

COPYRIGHT BOARD AND CONSTITUTIONAL INFIRMITIES: FAILURE OF THE COPYRIGHT (AMENDMENT) ACT, 2012 AND SUGGESTIONS FOR REFORMS

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Tribunalisation has been accorded constitutional legitimacy by the courts in India. It has evolved from serving as an alternate institutional mechanism, to one that is integrated within the judicial framework. However, even in their supplemental roles, tribunals have been used as a tool by the executive to undermine judicial independence. It is in the background of such unfettered transfer of judicial power to quasi-judicial bodies, and the Copyright (Amendment) Act, 2012 that the paper examines the constitutionality of two specific tribunals, namely, the Copyright Board and the Intellectual Property Appellate Board. The two bodies are vested with judicial powers to effectively discharge their functions. Their competence is however undermined by their lack of independent and transparent mechanisms. The Copyright (Amendment) Act, 2012, while claiming to enhance the competence of the Copyright Board, seems to have done little to iron out the constitutional infirmities. In fact, its silence on specifications of stringent qualification requirements for the members of the Board and the issue of their tenure only seeks to increase the infirmities. The issue is further compounded by the fact that the Amendment seeks to vest the Board with unbridled powers. In order to ensure effective adjudication, the systemic overhaul of these infirmity ridden institutions is imperative. The law should strive towards structuring a transparent and an independent institution, as opposed to one with unbridled powers but no mechanism to control such power.

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I. INTRODUCTION

The Copyright (Amendment) Act, 2012 ('Amendment') sought to alter § 11 of the Copyright Act, 1957 ('Copyright Act'), with the purported intent of streamlining the process of copyright adjudication and vesting such adjudicatory powers with a more competent and efficient Tribunal. Unfortunately, as argued in this paper, this Amendment pays mere lip service to the decision of the Supreme Court of India in *Union of India v. R. Gandhi* ('NCLT case').¹ This decision is a product of considerable power struggle between the executive and the judiciary with respect to the setting up of tribunals and vesting adjudicatory powers with such bodies. Needless to say, the salutary principles of independence of the judiciary and the separation of powers have guided the argument for those raising a clarion call against tribunalisation; while on the other hand, supporters of tribunalisation have relied less on conceptual, and more on practical arguments such as docket explosion and specialised administration of justice to justify the shift of adjudicatory power from courts to tribunals. In order to truly appreciate the merits of either of these viewpoints, it is imperative to study the background and constitutional history – since many of the previous decisions on these issues are a part of history in the light of the NCLT case. In this context, this paper assesses how the adjudication of copyright disputes, a relatively new entrant into this debate, can be constitutionally sustained, or challenged.

In this paper, I shall delve into the constitutional debates surrounding tribunalisation, primarily by mapping out the issues raised and addressed by the decisions of the Supreme Court in *Sampath Kumar v. Union of India*,² *L. Chandra Kumar v. Union of India*,³ *Union of India v. Delhi High Court Bar Association*,⁴ and indeed, the NCLT case. After exploring the contours and constitutional dimensions of tribunalisation, I shall move to the specificities of intellectual property rights adjudication, especially in the realm of copyright law. Here, I shall look into the historical basis, if any, for creating the Copyright Board, and much later, the Intellectual Property Appellate Board. I shall also address the constitutional infirmities associated with both these bodies, which resulted in a constitutional challenge before the Madras High Court. Finally, I shall examine the specific concerns raised by the Amendment and the manner in which this Amendment flies in the face of carefully evolved constitutional curbs on tribunalisation in both letter and spirit. This in turn necessitates a relook into the constitution, powers and jurisdiction of the Copyright Board.

¹ (2010) 11 SCC 1.

² (1987) 1 SCC 124.

³ (1997) 3 SCC 261.

⁴ (2002) 4 SCC 275.

II. TRIBUNALISATION AND OUR CONSTITUTIONAL SCHEME

A. CONSTITUTIONAL HISTORY AND EMERGING ISSUES OF TRIBUNALISATION

The constitutional scheme for regulation of courts and administration of justice has been detailed since the inception of the Constitution. Entry 77 of List I of Schedule VII, being the Union List, vests the exclusive legislative domain over the field of constitution, organization, jurisdiction and powers of the Supreme Court, with the Parliament. Entry 78 of the Union List covers constitution and organisation of the High Courts, while Entry 79 deals with the extension or exclusion of the jurisdiction of a High Court, to or from any Union Territory. More importantly, Entry 95 pertains to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in the Union List. Akin to this last provision, Entry 65 of List II, being the State List, vests exclusive law making power with the State legislatures in so far as the domain of jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in the State List, is concerned. Entry 46 of List III, being the Concurrent List, vests similar legislative powers with both the States and the Centre in so far as matters enumerated in this List are concerned. Entry 11A of List III, subsequently inserted by the Constitution (42nd Amendment) Act, 1976, provides for the administration of justice, the constitution and organization of all courts, except the Supreme Court and the High Courts.

Under this scheme, there is no place for, or even mention of Tribunals. Article 247 of the Constitution only permitted the creation of additional courts by the Parliament, for better administration of Parliamentary legislation. Despite this, tribunals were present and operational, and the extant legal disputes centred on themes such as the permissibility of a special leave appeal to the Supreme Court under Article 136 of the Constitution from an order passed by such quasi-judicial bodies.⁵ Perhaps due to the fact that the constitutional controversies in the first twenty five years of the Constitution concerned the right to property and other fundamental rights which were considered more vital to our existence as a democracy, issues such as tribunalisation were never seriously examined, and stood relegated to the status of third-generation constitutional debates. Even the 'separation of powers doctrine' was largely examined in the context of the relationship between the legislature and the

⁵ In *Associated Cement Companies Ltd. v. P.N.Sharma*, AIR 1965 SC 1595 (The Supreme Court has extensively discussed the earlier precedent, and held that a body would qualify as a 'tribunal' for the purpose of Article 136(1) of the Constitution so long as it was clothed with the State's inherent judicial power to deal with disputes between parties and determine them on the merits fairly and objectively).

executive,⁶ with decisions like *In re Delhi Laws Act*,⁷ *Ram Jawaya Kapur v. State of Punjab*,⁸ *U.N.R. Rao v. Indira Gandhi*,⁹ and *Samsher Singh v. State of Punjab*,¹⁰ providing intellectual fodder for academics and jurists. The brooding presence of Article 50, which in one short sentence made it part of the State's duty to "take steps to separate the judiciary from the executive in the public services of the State", made no sense whatsoever except in the limited manner that such directive principles are meant to be understood, that is, as mere guidelines without the force of legal or judicial sanctions in the event of non-compliance. The Supreme Court even went to the extent of observing that there was no rigid separation of powers in our Constitution, unlike the Australian Constitution, and hence, it would be constitutionally permissible to confer the state's judicial power on the hierarchy of courts established under the Constitution as well as on tribunals which were not 'courts'.¹¹ Little did the Court, when holding so, realise that a day shall soon come when this observation would require reconsideration in the light of unbridled interference with the institutional independence of the judiciary.

It is only when the political dispensation of the late 1960s and early 70s revealed its agenda for a committed bureaucracy and judiciary, and various judicial pronouncements started acquiring the hue of political and ideological concerns, that jurists started applying serious thought to the manner in which the executive engineered inroads into the administration of justice. Precisely at this juncture, as if to stroke this analysis and give it a new direction, the Parliament amended the Constitution by way of the Constitution (42nd Amendment) Act, 1976 ('42nd Amendment') that was also known as the 'mini Constitution'. The 42nd Amendment severely attacked the foundations of our Constitution and made us conscious of what till then had largely been a principle, namely, the doctrine of separation of powers.¹² Similar was the effect of the emergency that was imposed a year prior to this amendment. The challenge to the election of Indira Gandhi, the invalidation of Mrs. Gandhi's election by the Allahabad High Court,¹³ the immediate amendments to the Representation of the People Act, 1951 as well as the Constitution necessitating the seminal decision by the Supreme Court in *Indira Gandhi v. Raj Narain*,¹⁴ all contributed in large measures to the perception of grievous risks posed to the very fate of this doctrine. The guarantee that power shall not be vested with, or usurped by

⁶ For an excellent general discussion on the separation of powers doctrine in the Indian constitutional context, see MADHAV KHOSLA, *THE INDIAN CONSTITUTION* 1-43 (2012).

⁷ AIR 1951 SC 332.

⁸ AIR 1955 SC 549.

⁹ AIR 1971 SC 1002.

¹⁰ AIR 1974 SC 2192.

¹¹ *Associated Cement Companies Ltd. v. P.N.Sharma*, AIR 1965 SC 1595.

¹² See K K Venugopal, Senior Advocate, Separation of Powers-Drawing the Dividing Line at the 5th Durga Das Basu Memorial Lecture (March 18, 2012).

¹³ *Raj Narain v. Indira Nehru Gandhi*, AIR 1974 All 324.

¹⁴ AIR 1975 SC 2299.

any one individual or institution, suddenly appeared uncertain and weak. This, perhaps, fortified the flaccid foundations of the basic structure doctrine, first articulated in *Kesavananda Bharati v. State of Kerala*,¹⁵ and sealed the judicial recognition of its own independence and the separation of powers doctrine as part of the basic structure.

B. INSERTION OF ARTICLE 323-A AND 323-B

The political dispensation headed by Mrs. Gandhi retaliated strongly to the criticism from various quarters by imposing a national emergency under Article 352. In an era that witnessed maximum strains on the working of the judiciary, the executive hounded ‘non-compliant’ judges. Before the unceremonious supersession of Justice Shelat, Justice Hegde and Justice Grover to the high office of the Chief Justice of India had faded from public memory,¹⁶ the great Justice Khanna was similarly superseded for his powerful dissent in *A.D.M. Jabalpur v. Shivakant Shukla*.^{17,18} While these are the more startling cases, which revealed the sad reality that even Supreme Court judges were not beyond the *mala fide* interference by the executive, the attack on the higher judiciary was much deeper. As former Supreme Court judge, Justice Ruma Pal, points out, “sixteen High Court judges were transferred in 1976, ostensibly to promote national integration”.¹⁹ Other methods of censure, direct and indirect, were also used to make them ‘fall in line’.

It is in this milieu that the 42nd Amendment was passed. This amendment, introduced with the clear agenda to indiscriminately widen the powers of the executive, also sought to clip the wings of the sole institution that could realistically keep the executive action within bounds. This explains the presence of Article 323-A and Article 323-B, which proposed parallel institutions capable of replacing the judiciary. While reading the said Articles introduced by § 46 of the 42nd Amendment, the first thing that stands out is the inclusion of a separate chapter XIV-A, titled “Tribunals”, only for the purpose of inserting these two provisions.²⁰ Article 323-A specifically addressed the

¹⁵ AIR 1973 SC 1461.

¹⁶ Kuldip Nayar, *Justice Denied to Judge*, THE SUNDAY TIMES February 21, 2010.

¹⁷ AIR 1976 SC 1207.

¹⁸ *Justice Khanna was a Crusader for Civil Rights*, THE HINDU FEBRUARY 29, 2008.

¹⁹ Justice Ruma Pal, *5th V.M.Tarkunde Memorial Lecture: An Independent Judiciary*, available at http://theradicalhumanist.com/index.php?option=com_radical&controller=article&cid=431&Itemid=56 (Last visited on March 15, 2013).

²⁰ Constitution of India, 1950, Art.323(A):

- (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
- (2) A law made under clause (1) may:

legislative creation of administrative tribunals to hear service disputes between government employees. The history of this provision, mired in the Reports of various Committees, starting with the Shah Committee Report of 1969,²¹ has been mapped out by Justice Ranganath Misra, in the first important constitutional challenge to the Administrative Tribunals Act, 1985 in *Sampath Kumar v. Union of India* ('Sampath Kumar').²² Article 323-B vested the power with Parliament to create other tribunals, to adjudicate upon any of the eight matters stipulated therein. Benign as they appeared, these provisions authorised the Parliament to go to the extent of depriving the constitutional courts of the jurisdiction vested in them, and placing it in another body, wherein the appointment of members was left to an ordinary statute and not well-entrenched constitutional provisions and guarantees. Article 323-(A)(2)(d) and Article 323-(B)(3)(d) specifically authorised the Parliament to exclude the jurisdictions of

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- (a) [...]
- (d) Exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);
- Art.323 B: Tribunals for other matters
- (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws
- (2) The matters referred to in clause (1) are the following, namely:
- (a) levy, assessment, collection and enforcement of any tax;
 - (b) foreign exchange, import and export across customs frontiers;
 - (c) industrial and labour disputes;
 - (d) land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
 - (e) ceiling on urban property;
 - (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A;
 - (g) production, procurement, supply and distribution of foodstuffs (including edible oil-seeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
 - (h) offences against laws with respect to any of the matters specified in sub clause (a) to (g) and fees in respect of any of those matters;
- any matter incidental to any of the matters specified in sub clause (a) to (h)
- (3) A law made under clause (1) may—
- (a) provide for the establishment of a hierarchy of tribunals;
 - (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
 - (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
 - (d) exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals[...].

²¹ See Department Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice, Seventeenth Report On The Administrative Tribunals (Amendment) Bill, 2006, available at <http://164.100.47.5/book2/reports/personnel/17threport.htm> (Last visited on March 17, 2013) (States that the Shah Committee recommended the setting up of an independent tribunal to handle service matters pending before the High Courts and the Supreme Court).

²² (1987) 1 SCC 124.

all courts, except that of the Supreme Court under Article 136, with respect to the disputes or complaints that the Tribunals constituted under Article 323-A and Article 323-B could adjudicate upon. This ouster of jurisdiction along with the consequential undermining of judicial authority and independence, can only be truly appreciated when viewed alongside a parallel development in constitutional law, that is, the move by the judiciary to strengthen its domain by asserting greater authority over judicial appointments and transfers. In many ways, the executive was gearing up to present the judiciary with a *fait accompli*, by taking judicial powers away from this unified institution.

The wide-ranging implications of this devious attempt were not seen even at the time of Sampath Kumar, as evident from the fact that the principal arguments in this case centred around the ouster of judicial review rather than an overall undermining of judicial independence. As a compromise of sorts, the Supreme Court in Sampath Kumar, held that the writ jurisdiction of the High Court could be excluded with respect to the disputes placed within the jurisdiction of these Administrative Tribunals, which qualified as ‘alternative institutional mechanisms’.²³ However, since these Tribunals could substitute, and not merely supplement the jurisdiction of High Courts, which would result in a massive power transfer from these constitutional courts to the Tribunals, the Court also went on to observe that “the Tribunal should be a real substitute of the High Court, not only in form and demure but also in content and *de facto*”.²⁴ This observation, without any further embellishment, summarises the Supreme Court’s stance on tribunalisation from the very beginning. All attempts by the Court have been directed quite unsuccessfully, towards guaranteeing that tribunals function in an independent and efficient manner. In its final view, the Court held that as long as the Chairperson of the Tribunal was a retired High Court or Supreme Court Judge, and the Vice-Chairperson and other members were selected by a high profile committee headed by the Chief Justice of India, the Central Administrative Tribunal would be free from infirmities.²⁵ By doing so, the Court deviated from the realm of adjudication to that of policy-making or engineering policy. Instead, it would have been more desirable had the Court merely struck down the legislation on the ground of constitutional infirmity and left it open to the Parliament to devise a constitutionally compliant Tribunal. Perhaps, the large number of pending writ petitions in service matters before various High Courts had compelled the Court to take a more ‘practical’ view of the situation and sustain the constitutionality of Administrative Tribunals, but with appropriate safeguards to guarantee efficiency.

This judicial strategy clearly failed, as seen from the strong reasons that necessitated a challenge to Article 323-A and Article 323-B in

²³ *Id.*, ¶ 7.

²⁴ *Id.*, ¶ 18.

²⁵ *Id.*, ¶ 7.

L.Chandra Kumar v. Union of India ('Chandra Kumar').²⁶ Even here, the thrust of the constitutional challenge was on the ouster of the power of judicial review of the High Courts contained in Article 226 and that of the Supreme Court enshrined in Article 32. The earlier decision of the Supreme Court in *R.K. Jain v. Union of India*,²⁷ significantly triggered this challenge as the Court, in this case pertaining to the functioning of the Customs, Excise and Gold Control Appellate Tribunal established under Article 323B, held that the Tribunals created under Article 323A and Article 323B could not be considered as substitutes of the High Courts for the purpose of exercising jurisdiction under Article 226 and Article 227 of the Constitution. The fact that the Court here took into account the data pertaining to the working of these Tribunals for more than five years and expressed anguish with the state of affairs, weighed heavily in the mind of the seven judge bench in Chandra Kumar. The Bench also had the benefit of a well-reasoned and exhaustively researched decision of the Andhra Pradesh High Court in *Sakinala Harinath v. State of A.P.*,²⁸ ('Sakinala Harinath case') wherein an Indian Court had, for the first time, looked at foreign precedents from the United States, United Kingdom and Australia to understand the nature and concept of 'judicial power' and ultimately, proceeded to strike down Article 323A (2)(d) as unconstitutional.

The Supreme Court in Chandra Kumar, influenced strongly by the reasoning of the Andhra Pradesh High Court in the Sakinala Harinath case, concluded that the power of judicial review contained in Article 226 and Article 32 were part of the basic structure of the Constitution and could never be ousted through tribunalisation.²⁹ However, the Court provided leeway to the executive by holding that nothing in the Constitution proscribed the creation of tribunals that supplemented the High Courts without substituting them.³⁰ Thus, the Court paved way for the transition of tribunals from an 'alternative institutional mechanism' to one integrated within our judicial system, and subject to the power of judicial review by the High Courts under Article 226 of the Constitution. Interestingly, the Court also observed that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions was part of the basic structure, since a situation where the High Courts were divested of all

²⁶ (1997) 3 SCC 261.

²⁷ 1993 (65) ELT 305 (SC).

²⁸ 1993 (3) ALT 471 (This decision is a must-read for any serious student of constitutional law, as it delves into the silences in any Constitution and the vesting or apportionment of judicial power, absent any written provision. The Full Bench of the Andhra Pradesh High Court examined decisions from varied jurisdictions and Courts such as that of the Privy Council in *Don John Francis Douglas Liyanage v. The Queen*, 1967 (1) A.C. 259, and the U.S. Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, and held that in our constitutional scheme, though unwritten in specific terms, one can conclude that "it is axiomatic that they (Supreme Court and the High Court) are the *sole repositories* of the power of judicial review" in light of the nature of powers conferred upon them).

²⁹ (1997) 3 SCC 261, ¶ 100.

³⁰ *Id.*

other judicial functions “apart from that of constitutional interpretation” was to be avoided.³¹ This observation assumes significance due to the developments post Chandra Kumar, and particularly, in light of the creation of the National Company Law Tribunal. Finally, the Court rejected the contention that administrative members must be kept out of the fold of the Administrative Tribunals and reiterated the premise that specialist bodies must comprise of both, trained administrators and those with judicial experience.³² However, the executive has completely misused this premise, as seen from the attempt to appoint bureaucrats to the National Company Law Tribunal in the next section.

C. THE NCLT CASE AND ITS UNIQUE FACTUAL CONSIDERATIONS

While the Sampath Kumar and Chandra Kumar decisions concerned tribunals constituted under Article 323-A and exercising jurisdiction *constitutionally vested* in the High Courts in the first instance under Article 226, the National Company Law Tribunal (‘NCLT’) was mooted with the agenda of divesting the original company law jurisdiction *statutorily vested* till then with the High Courts. Automatically, the challenge to this Tribunal appeared to be weaker, since it did not seemingly tinker with the power of judicial review, which was held to be a part of the basic structure. For that matter, the move to place important powers such as the winding up of corporations and the approval of schemes of amalgamation, merger and de-merger of companies with a Tribunal did not appear to violate any provisions in the Constitution. However, this proposal could well signal the beginning of the end of the High Courts’ authority and varied jurisdiction, as understood and experienced by the citizen. In other words, the concern raised in Chandra Kumar to the effect that the High Courts could be divested of all other judicial functions *apart from that of constitutional interpretation*, started presenting itself as a distinct and tangible outcome, thus instigating the constitutional challenge to the Companies (Second Amendment) Act, 2002 before the Madras High Court. This Amendment inserted Chapters 1B and 1C of the Companies Act, 1956, which provided for the National Company Law Tribunal and the National Company Law Appellate Tribunal respectively.

The division bench of the Madras High Court, in a well-reasoned judgment in *R. Gandhi v. Union of India*,³³ struck down several provisions of the amendment pertaining to the qualification and appointment of members to the Tribunal as well as their conditions of service. The significance of this judgment, apart from it being upheld in entirety by the Supreme Court, lies in the fact that the High Court glossed over the constitutional silence, emphasized by

³¹ (1997) 3 SCC 261, ¶ 79.

³² (1997) 3 SCC 261, ¶ 96.

³³ (2004) 120 Comp. Cas. 510.

the Union of India, to generate a set of minimal standards which any adjudicatory body had to satisfy. These standards, as affirmed and further modified by the Constitution Bench of the Supreme Court in *Union of India v. R. Gandhi*³⁴ are as follows:³⁵

- (i) The Chairperson of the NCLT must be a retired judge of the higher judiciary;
- (ii) All tribunals need not have technical members. If the role of the tribunal has been traditionally performed by a Court, there is no necessity to have a technical member;
- (iii) The post of a judicial member can only be filled by advocates with a standing of ten years or more at the bar or district judges with experience of five years or more, and not with bureaucrats or those from the Indian Legal Service;
- (iv) The post of a technical member can only be filled with those who are of the rank of Secretary or Additional Secretary in the Indian Company Law Service or Indian Legal Service. The qualifications possessed by the other technical members have to bear strong nexus with the functions of the NCLT. Thus, a person with special knowledge or professional experience of fifteen years in science, technology, economics, banking, or industry cannot be considered for appointment as a technical member in the NCLT. However, persons having professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may be considered as persons with expertise in rehabilitation/revival of companies.
- (v) The Selection Committee for appointment of members to the NCLT must consist of the Chief Justice of India or his nominee, another senior judge of the Supreme Court, and two Secretaries from the Ministry of Company Affairs and the Ministry of Law and Justice respectively, with a casting vote enjoyed by the Chief Justice of India;
- (vi) The term of office of the members shall be seven or five years, and they shall be eligible for re-appointment for one more term;
- (vii) Any person appointed as a member should be prepared to totally disassociate himself from the executive. The lien period within which the member can reclaim his post in the Services shall not therefore exceed one year;

³⁴ (2010) 11 SCC 1.

³⁵ *Id.*, ¶ 56.

- (viii) Suspension of the President/Chairman or member of a tribunal can be only with the concurrence of the Chief Justice of India;
- (ix) The administrative support for all tribunals should be from the Ministry of Law and Justice. Neither the tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent ministries or concerned department.
- (x) Two-member benches of the tribunal should always have a judicial member. Whenever a larger or special bench is constituted, the number of technical members shall not exceed the judicial members.

While some of these directions were rendered in the specific context of the NCLT, the Supreme Court decision in the NCLT case also contains several important observations on judicial independence, thus giving us a body of general principles guiding the tribunalisation of justice. The most important element is the overall emphasis given by the Supreme Court on the criteria for, and manner of, appointment of members, the qualifications and conditions of service of such members, an evaluation of these criteria on the anvil of judicial independence and the specific functions carried out by the tribunal in question. Unfortunately, even the minimal standards laid down in the NCLT case are not satisfied by both, the Copyright Board and the Intellectual Property Appellate Board.

III. THE COPYRIGHT AND THE INTELLECTUAL PROPERTY APPELLATE BOARDS- UNEXPLORED DOMAINS OF TRIBUNALISATION

The Copyright Board was a part of the original enactment, i.e., the Copyright Act, 1957, and has been around since the year 1958, while the Intellectual Property Appellate Board ('IPAB') was created *vide* the Trade Marks Act, 1999. In 1957, when the Copyright Act came into force, there was minimal understanding and no clairvoyance, regarding the role which the Copyright Board would come to assume in the next fifty years. For this reason alone, law makers could be excused for framing minimalistic and totally ambiguous provisions with respect to the constitution and functioning of the Board. This was not, however, the case with the IPAB, as by the time this body was created, the decisions of the Court in Sampath Kumar and Chandra Kumar were part of our constitutional discourse on the separation of powers. Despite the same, the provisions in Chapter XI of the Trade Marks Act, 1999, which establish the IPAB, do not make any great progress when compared with § 11 and §12 of the Copyright Act, which govern the Copyright Board.

Another important distinction between the Copyright Board and the IPAB worth a mention here, though it may no longer be relevant post the NCLT case, is that the Copyright Board never took over any of the functions earlier carried on by the regular courts while the creation of the IPAB resulted in such transfer, as described below.

The IPAB hears appeals from the orders passed by the Registrar of Trade Marks as well as the Controller of Patents. Under the Trade Marks Act, 1958, all orders of the Registrar of Trade Marks could be appealed to a single judge of a High Court with the provision for a further appeal to a division bench of the same High Court. § 3 of this Act prescribed the jurisdiction rules for such appeals to the High Court. As per this provision, only High Courts with jurisdiction over the appropriate Trade Marks Registry could entertain appeals against the orders of that particular Registry. This meant that there were a total of five High Courts in the entire country which had jurisdiction to entertain appeals against the orders of the Registrars situated in the Trade Marks Registries located at Mumbai, Chennai, Kolkata, Delhi & Ahmedabad. These five High Courts were the Bombay High Court, the Madras High Court, the Calcutta High Court, the Delhi High Court and the Gujarat High Court. This jurisdiction was transferred to the IPAB.³⁶

Again, under the Trade Marks Act, 1958, there were two kinds of rectification petitions that could be filed in order to cancel marks that were already registered. The first kind of rectification petition, as per § 56 of this Act, could be filed at any point of time with either the Registrar of Trademarks or the High Court with the appropriate jurisdiction. Now, § 57 of the Trade Marks Act, 1999 divests the High Courts of this jurisdiction and places it with the IPAB. The second kind of rectification petition which is filed during the course of a pending trademark infringement proceeding (wherein the defendant pleads invalidity of the plaintiff's registered trademark as a defence, or where the defendant contends that his is also a registered trademark which in turn could be contended as invalid by the plaintiff), could be filed only with a single judge of the High Court and not with the Registrar of Trademarks as per § 107 of the Trade Marks Act, 1958. This provision also provided for a further appeal to a division bench of the same High Court. As per § 3 of this Act, only the five High Courts mentioned above had the jurisdiction to hear such rectification petitions filed during the course of a trademark infringement suit. Now, § 125 of the Trade Marks Act, 1999 vests this jurisdiction with the IPAB.

Similarly, the IPAB exercises jurisdiction over patent disputes that were being decided earlier by the High Courts. Thus, the IPAB hears appeals from orders passed by the Controller of Patents on issues such as, the granting or rejecting patent applications, allowing any post-grant opposition,

³⁶ § 91(1), Trade Marks Act, 1999.

mandating division of the patent application into two or more separate applications, mandating reference to any other patent in the claims as filed on the ground that the former patent may be potentially infringed by the claims in the fresh patent application, directing the patentee to compulsorily license the patent technology to an applicant after considering fulfilment of the statutory pre-conditions, directing the patentee to compulsorily license the patent technology to the customers of an applicant after considering fulfilment of the statutory pre-conditions and revoking a patent in respect of which a compulsory license has already been granted on the ground that the patent is still not being worked or being made available to the public at reasonably affordable prices.³⁷ The IPAB entertains appeals from orders passed by the Central Government as well, including an order of compulsory license in circumstances of national emergency, extreme urgency or for public non-commercial use.³⁸ The IPAB also hears revocation petitions to revoke already granted patents.³⁹

Prior to the Amendment, the jurisdiction of the Copyright Board primarily covered complaints with respect to the grant of compulsory licenses under § 31 of the Copyright Act. This grant is also subject to the fulfilment of vital statutory pre-conditions such as the copyrighted work being withheld from the public or offered by the owner on terms considered unreasonable by the complainant. Moreover, while fixing the royalty, the Board has to make a correct judicial determination of the materials placed before it pertaining to various relevant factors, including the industry conditions, the profitability and ability to pay, the fallout of prescribing a rate that is too low, the actual public interest involved in gaining access to the work under consideration etc. In fact, in *Phonographic Performance Ltd. v. Music Broadcast (P) Ltd.*,⁴⁰ the Bombay High Court reversed an interim order passed by the Copyright Board exercising its powers under § 31 of the Act, on the specific ground that the Board could not have arrived at any best judgment assessment while fixing the royalty. In the High Court's opinion, the Board being a quasi-judicial body had to confine itself to a determination of the royalty payable based entirely on the materials produced before it. From this pronouncement, it follows as a necessary corollary that the Board should be a body manned by persons with judicial expertise and experience. The same principle applies to the powers exercised by the Board under § 31-A, §32 and §32-A of the Act as well. The common factor in all these provisions is that they are concerned with the grant of a compulsory license under different situations. The jurisdiction of the Board to grant a license with respect to the work applied for, stands attracted in these cases if there exists a pre-condition. Hence, a judicial evaluation of the existence of a pre-condition by the Board becomes necessary. The Board also has the added responsibility of fixing the rate of royalty payable in all these situations

³⁷ Patent Act, 1970, § 117A.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 2004 (29) PTC 282.

which again requires application of judicial mind for balancing various relevant factors along with a proper consideration of the same. Similarly, for version recordings, the Copyright Board can, under § 52(1)(j) of the un-amended Act, fix the rates of royalty payable by the version recording company to the original owner of the track. Stipulations of the resale share right of the author in the original copies of a work when the work is sold for an amount exceeding Rs. 10,000/- can be fixed by the Copyright Board.⁴¹ According to § 6 of the Copyright Act, jurisdiction is vested in the Copyright Board to decide whether a work has been published or the date on which it has been published, in order to ascertain the term of the copyright in that work.⁴² The Board can also decide on questions of comparative durations of copyright such as whether the term of copyright for any work is shorter in any other country than that provided with respect to that work under the Indian Copyright Act, which is a pure question of comparative copyright law.⁴³ In line with the judicial character of the Board's powers and functions, it can under § 19-A, revoke an assignment upon receiving a complaint with respect to such assignment from an aggrieved party, after carrying out such inquiry as the Board considers necessary. Similarly, the Board can revoke a license under § 30-A.

This Board also hears appeals from certain orders passed by the Registrar of Copyrights. The Registrar is vested with the power to register the copyright in a work. This registration confers *prima facie* proof of the particulars entered in the register, such as the names or titles of the work and the

⁴¹ Copyright Act, §53A:

- (1) In the case of resale for a price exceeding ten thousand rupees, to the original copy of a painting, sculpture or drawing, or of the original manuscript of a literary or dramatic work or musical work, the author of such work if he was the first owner of rights under section 17 or his legal heirs shall, notwithstanding any assignment of copyright in such work, have a right to share in the resale price of such original copy or manuscript in accordance with the provisions of this section:

Provided that such right shall cease to exist on the expiration of the term of copyright in the work.

- (2) The share referred to in sub-section (1) shall be such as the Copyright Board may fix and the decision of the Copyright Board in this behalf shall be final:

Provided that the Copyright Board may fix different shares for different classes of work:

Provided further that in no case shall the share exceed ten percent, of the resale price.

- (3) If any dispute arises regarding the right conferred by this section, it shall be referred to the Copyright Board whose decision shall be final.

⁴² Copyright Act, 1957, §6: If any question arises—

- (a) whether a work has been published or as to the date on which a work was published for the purposes of Chapter V, or

- (b) whether the term of copyright for any work is shorter in any other country than that provided in respect of that work under this Act, shall be referred to the Copyright Board constituted under section 11 whose decision thereon shall be final:

Provided that if in the opinion of the Copyright Board, the issue of copies or communication to the public referred to in section 3 was of an insignificant nature, it shall not be deemed to be publication for the purposes of that section.

⁴³ *Id.*

names and addresses of the authors, publishers and owners of the copyright.⁴⁴ The decision as to whether a particular work must be registered or not would be taken by the Registrar after assessing the copyrightability of the work.⁴⁵ This is a function that involves a mixed question of law and fact. An appeal against a decision by the Registrar in this regard lies to the Copyright Board.⁴⁶ Based on a complaint filed under § 53 by the owner of the actual work, the Registrar can also stop the importation of infringing copies. The exercise of this authority requires determination of the question whether the imported copies actually infringe the copyright in the applicant's work, which again, is a mixed question of law and fact. The Copyright Board can also hear appeals against such orders passed by the Registrar.

The above stocktaking of the powers and functions carried out by both, the IPAB and the Copyright Board, (prior to the Amendment) makes it amply clear that both these bodies are placed with vital judicial power that ought to be normally exercised by the courts. It should naturally follow that these bodies are manned with members capable of carrying out these functions along with the necessary judicial independence to do so. Unfortunately, this is not the case as seen from a bare perusal of the provisions in Chapter XI of the Trade Marks Act as well as § 11 and §12 of the un-amended Copyright Act. The qualification criteria for the positions of Vice-Chairperson and judicial members of the IPAB make no reference to advocates who have at least ten years of practice. However, a member of the Indian Legal Service who has neither practiced before the High Court nor has any prior judicial experience, can qualify to become either a judicial member or the Vice-Chairperson of the IPAB⁴⁷ and subsequently the Chairperson of the IPAB after serving for two years as the Vice-Chairperson.⁴⁸ § 85(5) of the Trade Marks Act, 1999 states that the

⁴⁴ Copyright Act, 1957, §48 - Register of Copyrights to be prima facie evidence of particulars entered therein:

The Register of Copyrights shall be prima facie evidence of the particulars entered therein and documents purporting to be copies of any entries therein, or extracts therefrom certified by the Registrar of Copyrights and sealed with the seal of the Copyright Office shall be admissible in evidence in all courts without further proof or production of the original.

⁴⁵ Copyright Act, 1957, §45: "... (2) On receipt of an application in respect of any work under sub-section (1) the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights".

⁴⁶ Copyright Act, 1957, §72 - Appeals against orders of Registrar of Copyrights and Copyright Board:

(1) Any person aggrieved by any final decision or order of the Registrar of Copyrights may, within three months from the date of the order or decision, appeal to the Copyright Board.

⁴⁷ Trade Marks Act, 1999, § 85(2): A person shall not be qualified for appointment as the Vice-Chairman unless he—

- (a) has, for at least two years, held the office of a Judicial Member or a Technical Member; or
- (b) has been a member of the Indian Legal Service and has held a post in Grade I of that Service or any higher post for at least five years.

⁴⁸ Trade Marks Act, 1999, § 85(1): A person shall not be qualified for appointment as the Chairman unless he—

- (a) is, or has been a Judge of a High Court; or
- (b) has, for at least two years, held the office of a Vice-Chairman.

Chairperson, Vice-Chairperson and every other member of the Board shall be appointed by the President of India. § 85(6) adds that the Chairperson shall be appointed only after consultation with the Chief Justice of India. There is however no judicial oversight over the appointment of other members and as of now, it is not exactly clear as to who are the members of the Selection Committee appointing the Vice-Chairperson and other members of the IPAB. As per § 86 of the Trade Marks Act, 1999, members of the IPAB shall have only a five year term with no provision for an extension of the same. As per § 88 of the same Act, it is left to the Central Government to prescribe the salary, allowances and other terms and conditions of service of the IPAB members. The definition of 'Judicial Member' as per § 2(k) of the Trade Marks Act, 1999 includes the Chairperson and the Vice-Chairperson. This would mean that once a technical member qualifies to become a Vice-Chairperson, such Vice-Chairperson can sit as a judicial member with another technical member to function as a full-fledged bench of the IPAB. Therefore, two technical members can adjudicate complex trademark and patent law disputes, and have in fact done so in the past.⁴⁹

§ 11 and §12 of the un-amended Copyright Act have been even more ambiguous. The Copyright Board, prior to the Amendment, consisted of a Chairperson and fourteen other members, of which two were joint secretaries with different ministries in the Union, seven were law secretaries of different States, and five were directors of National Law Schools. This was a direct outcome of the ambiguity contained in § 11, as the only basic requirement prescribed was that the Chairman should be a person who is, or has been, a High Court judge, or someone qualified for appointment as a High Court judge. For the other members, no minimum qualifications were prescribed at all. The executive was conferred with wide and unfettered discretion while making appointments to the Copyright Board under § 11. There was no mention of any consultation procedure with the Chief Justice of India, judges of the Supreme Court and other judges from the higher judiciary before appointing the Chairperson or any other members. There was also no procedure prescribed in the Act for removal of the members. The only procedural limitation was tendering of a three months' notice in writing to the Central Government by the Chairman or any other member of the Copyright Board as per Rule 3(3) of the Copyright Rules, 1958, if they chose to resign from the office. No provision for removal of the Chairperson or a member on grounds of proven misconduct or incapacity has been made out, in contrast to many other statutes where a specialised tribunal is created for such purposes. Similarly, the terms and conditions of the post of the Chairperson and the members including their

⁴⁹ Ms. S. Usha who is the present Vice-Chairperson of the Tribunal was originally appointed as technical member for trademark matters and was subsequently elevated to the position of Vice-Chairperson. However after the retirement of the former Chairperson Mr. Z.S.Negi, Ms. S. Usha was sitting as the Judicial Member on benches along with Technical Members to hear and decide both, trade mark and patent cases.

salaries and allowances, were completely left to the discretion of the executive, *vide* § 11(2). The absence of any minimum threshold in the Act means that the Government can prescribe the length of the tenure of office as it deems fit, and prescribe whatever terms and conditions it considers appropriate. The Copyright Rules, 1958, which can be changed at the whim of the executive without any impediment, prescribes the minimum tenure of Board members as five years, with the possibility of re-appointment, and states that such salary or honorarium as the Government may deem fit, shall be payable to the Chairperson and the members.

It is only the most glaring defects with the IPAB and the Copyright Board that have been highlighted, as they render these tribunals to be in non-compliance with the constitutional requirements for a free and impartial judicial body as laid down in the NCLT case. Apart from these, there are several other legal inadequacies that require correction. The functioning of these bodies in practice has also left a lot to be desired, though an examination of these ground realities is outside the scope of this paper. The above inadequacies gave rise to the constitutional challenge against the IPAB and the Copyright Board by way of two separate writ petitions filed, and are currently pending before the Madras High Court.

The contentions raised by the petitioners in these writ petitions⁵⁰ are heavily built on the pronouncement of the Supreme Court in the NCLT case. The challenge to the Copyright Board focuses on the manner of appointment of members to the Board, the absence of any prescribed minimum qualifications for such members, and the massive presence of the bureaucracy, in the form of law secretaries of various states in the Board as it existed at the time of challenge. The key point, highlighted in this writ petition, is the total absence of any provisions in the Copyright Act, regarding the vital aspects of the manner of appointment, minimum qualification and composition of the Board, terms and conditions of tenure, and removal of members on the ground of proven misconduct or incapacity, which has resulted in unfettered discretion in the hands of the executive. The challenge to the IPAB emphasises on the possibility of technical members adjudicating without the presence of a judicial member, and the widely worded qualifications prescribed for the appointment of judicial members. Specifically, § 85(3)(a) of the Trade Marks Act, 1999 which allows for members of the Indian Legal Service (Grade I with three years' experience) to be appointed as judicial members has been contended as being *ultra vires* of Article 14 of the Constitution of India. This writ petition also challenges a couple of provisions as being in violation of the principle of judicial independence, namely, the present constitution of the Selection Committee for appointing members to the Board, the restriction on tenure of members to a period of five years with no provision for automatic re-appointment, the procedure

⁵⁰ W.P.No. 1212 of 2011 challenging the Copyright Board and W.P.No.1256 of 2011 challenging the IPAB.

contained in § 89(2) of the Trade Marks Act, 1999 for the removal of members, and the appointment of the Ministry of Commerce as the sponsoring Ministry for the IPAB.

Interestingly, it is after the filing of these writ petitions that the amendments to § 11 and 12, absent in the original draft bill of the Amendment, found their way into the final piece of legislation. It is now time to critically examine these amendments in the light of the constitutional principles relating to tribunalisation, and the infirmities suffered by the Board as highlighted above.

IV. THE COPYRIGHT (AMENDMENT) ACT, 2012 AND ITS VAGARIES

If one could summarise the ‘new’ framework proposed for the Board in one sentence, this is a classic case of a failed opportunity. No qualifications, except as earlier provided, have been prescribed, and even with the Amendment, the Act is silent as to whether a retired High Court judge should head the Board or not. The size of the Board has been reduced from fourteen members to three, including the Chairperson, indicating a positive step towards making the Board a permanent body, as opposed to an ad-hoc one. However, without any qualifications stipulated, the Government continues to enjoy virtually unlimited power which can be abused, to pack the Board with bureaucrats and persons lacking the basic competence to adjudicate. It is only recently that the Chairperson, Justice R.C.Chopra, had to pass an order that was strongly worded, which recorded the happenings at the Board.⁵¹ It emerged that the hearing for the day had to be adjourned as the quorum was not satisfied. Even more shockingly, the third member, being the Joint Secretary (Law) had informed the Registrar, Copyright Board, when he was called on the day of the hearing, that he was not in a position to attend the hearing.⁵² Needless to say, the dates were fixed well in advance, and this was not the first instance when the quorum requirement was unsatisfied. It is apprehended that such incidents will recur if suitable legal provisions are not found in the Copyright Act to tackle such problems. Unfortunately, the Board continues to function like a Government Department and there seems to be no political will to change the state of affairs.

There is not even a whisper in the Amendment with respect to the tenure of the members. The Supreme Court had made it clear in the NCLT case that tribunal members, who discharge duties of a judicial or *quasi*-judicial character, have to be given complete independence in their functioning which includes, no cause of concern over sudden termination. The drafters of this Amendment lived in blissful ignorance of the salutary pronouncement by the constitution bench. The fact that the newly introduced § 11(2) stipulates that

⁵¹ Order dated 15.11.2011 in Case No. 8/2006.

⁵² *Id.*

the salary and allowances of the members of the Board shall not be varied to their disadvantage after appointment, offers little respite. It is ironic that the inability to redress constitutional infirmities suffered prior to the Amendment comes along with a manifold increase in the powers of the Board, including the introduction of a statutory licensing regime and determination of royalty rates by the Board under this scheme.⁵³ Now, both broadcasters and content providers have to approach the Board for the royalty rates payable, as statutory licensing has done away with voluntary negotiations for all practical purposes. Despite the enormous responsibility that can be implied by the nature of this function, unbridled powers have been vested with the Board as a consequence of total silence on the guidelines for rate fixation. The newly introduced § 31D sub-section (3) only mandates that the rates of royalty for radio broadcasting shall be different from television broadcasting. It says nothing more on how the Board may go about fixing the rates for either of the modes of broadcasting.

The power given to the Board to remove any unreasonable element, anomaly or inconsistency in the tariff scheme fixed by a copyright society is also an exercise in ambiguous drafting, which will end up causing more mischief than that sought to be remedied. Similarly, § 31 which is the original compulsory licensing provision, has been retained with wider discretion vested in the Board to grant such a license, to not only the complainant but also to any person who, in the opinion of the Copyright Board, is qualified to communicate the work in question to the public. Again, no guidelines have been provided to determine who such persons are. § 31B, again a newly introduced provision, vests power with the Board to entertain an application for grant of a compulsory license to publish any copyrighted work for the benefit of differently abled persons. The role of the Board is quasi-judicial in character as it has to adjudicate between competing interests. Thus, in short, the present Amendment does nothing to improve the independence and transparency of the Board and yet, widens its powers without any guidelines to check the exercise of such powers.

The Copyright Rules ('Rules') were notified and came into force on March 14, 2013. These Rules aim to overhaul the regulatory framework supporting the Copyright Act, as is visible from the sheer increase in bulk from the now repealed Copyright Rules, 1958. Unfortunately, the thinking and ideology in power circles seems to be to continue populating the Copyright Board with bureaucrats and even worse, with 'technical' members who possess little or no professional expertise in performing an adjudicatory role. The Rules, specifically Rule 3, perpetrates mischief in more ways than one. Rule 3(2)(i) follows § 11(3) of the amended Act and reiterates that the Chairman of the Copyright Board shall be a person who is, or has been, a judge of a High Court or is qualified for appointment as a judge of a High Court. Needless to say, the second part of this provision is dangerous, as the constitutional requirement

⁵³ Draft Copyright Rules, 2012, § 3 amending §11 (2) of the Indian Copyright Act, 1957.

for appointment as a High Court judge is professional practice as an advocate for ten years. Thus, a person who has never adjudicated a dispute but only taken sides for a particular client or cause is given the onerous responsibility of Chairperson of the Board. As we have come to accept, being witness to the functioning of several quasi-judicial tribunals over the years, the Chairperson is the first among equals. His functions are not only restricted to the adjudication of the individual disputes at hand but also extends to the exercise of administrative control and providing precedential direction to the functioning of the Board. The Madras High Court, in the NCLT case held that the President of the National Company Law Tribunal ought to be a person who has *actually* held the office of judge of any High Court for a minimum period of five years. In the words of the High Court, “A wider vision, the ability to see things in context and in the proper perspective, the ability to innovate wherever necessary, and other similar qualities are almost as important as expertise in the subject”.⁵⁴ This view taken by the Madras High Court, except to the extent of the minimum qualification of five years, was accepted by the Union of India before the Supreme Court in the NCLT case. The last paragraph of the Supreme Court decision also makes it abundantly clear that Parts 1B and 1C, inserted by the Companies (Second Amendment) Act, 2002, can be made operational only by introducing the changes suggested by the High Court. The above view taken by the High Court applies with equal force even in the case of the Chairperson of the Copyright Board. The Rules, unfortunately, fail to rectify the constitutional defect in the parent statute and provide room to subvert the prescribed scheme, by permitting the appointment of any advocate with ten years standing as the Chairperson of the Board.

Rule 3(2)(ii) is again defective as it goes way beyond the ‘free play in the joints’ permitted by the judiciary when appointing technical members. This Rule permits four categories of persons to be appointed as members, namely (i) a person who is or has been a Member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years; (ii) a person who has, for at least ten years, held a civil judicial office; (iii) a person who is or has been a member of a tribunal or Civil Service not below the rank of a Joint Secretary to Government of India with experience of three years in the field of Copyright; or (iv) a person who has, for at least ten years, been an advocate with proven specialised experience in copyright law. Of these categories, the first one is highly problematic. While no doubt could perhaps be raised as regards the general competence and merit of those serving in the Indian Legal Service, the Supreme Court has clarified in the NCLT case that the technical members appointed to a tribunal performing adjudicatory function cannot be of a rank below Secretary or Additional Secretary.

⁵⁴ (2004) 120 Comp.Cas. 510 (Mad),¶ 79.

V. CONCLUSION: A CONTINUING CALL FOR REFORM

It is about time our lawmakers seriously commit to bring forth an independent Copyright Board for adjudication of complex legal disputes arising from the interpretation of copyright law. While the Amendment has now been passed with little scope for any consensus on further changes to the copyright law for the next decade or so, at the very least, the Rules could be modified to bring about vital safeguards in the functioning of the Board. *Firstly*, it must be clarified that the Chairperson of the Board shall only be a retired judge of the higher judiciary. *Secondly*, the Rules ought to make a distinction between a technical and a judicial member, and provide clearly that only those from the rank of Secretary or Additional Secretary with proven experience of five years or more in dealing with copyright law, or persons with special knowledge of economics or copyright law and experience in this regard for a minimum period of five continuous years, shall be appointed to the post of a technical member. *Thirdly*, the Rules should clearly restrict the right of lien for such technical members to a period of one year, and guarantee the Chairperson and the members a minimum tenure of five years. The members should also be considered eligible for re-appointment for an additional term of five years. *Fourthly*, the Rules should make clear the method of appointment of all members to the Board, and mandate that such appointment is done through the recommendation of a high-powered Committee headed by the Chief Justice of India, another senior Supreme Court Judge, Secretary in the Ministry of Human Resources Development, and Secretary in the Ministry of Law and Justice, with a casting vote enjoyed by the Chief Justice of India. *Finally*, the Rules should also make it clear that all administrative support to the Board shall be provided by the Ministry of Law and Justice and not any other Ministry.

I would also like to leave the readers with a little thought to ponder over. The IPAB, as we have seen above, hears cases arising from all other areas of intellectual property rights except copyright law. It seems redundant to have an IPAB to hear all these cases and a separate Copyright Board only to hear cases in copyright law. It is about time that the executive considered merging these two bodies under an umbrella tribunal known as the Intellectual Property Rights Adjudication Tribunal (IPRAT) and bringing in all the safeguards suggested above while appointing members to this Tribunal.

