



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



India

Singhania & Partners, Sonil Singhania/Nishi Shabana



1. Legislation and regulation

1.1 What are the main sources of copyright law?

The Copyright Act 1957 (the Act), supported by the Copyright Rules 1958 (the Rules), is the governing law for copyright protection in India. Substantial amendments were carried out to the Copyright Act in 2012. India follows a common law legal system, so relies on case law to interpret and set precedents in law. Hence, the judicial decisions contribute to the sources of copyright law in India. India is a member of the Berne Conventions and Universal Copyright Convention. The Government of India has also passed the International Copyright Order, 1999. According to this Order, any work first published in any country that is a member of any of the above conventions is granted the same treatment as if it was first published in India.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

Copyright subsists throughout India in the following classes of works:

- original literary, dramatic, musical and artistic works
- cinematograph films
- sound recordings.

These are the broad categories, and can be summarised as follows:

Literary works

The term 'literary works' encompasses all works that are in print or writing, irrespective of the quality or style of the work. Literary work refers not only to works of prose and poetry, but anything that would be under the ambit of 'literature'. However, there will be no copyright if the work is merely a collection of words, the collection of which involved no literary skill. In India, a computer program is treated as a literary work and is protected as such.

Dramatic works

A dramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, but does not include a cinematograph film.

Musical works

Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. A musical work need not be written to enjoy copyright protection.

Artistic works

Artistic work means a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture; and any other work of artistic craftsmanship. Any colour scheme, layout or arrangement of any alphabets or features qualifies as an artistic work.

Cinematograph films

Cinematograph film means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording; 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography, including video films.

Sound recordings

Sound recording means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. A phonogram and a CD-ROM are sound recordings.

2.2 What is required for works to qualify for copyright protection?

Any work which falls under any of the categories mentioned above can qualify for copyright protection. The work seeking to be copyrighted must be original; however, it is not necessary that the work should have some original thought or idea. The law is only concerned about the originality of the expression of thought.

2.3 What rights does copyright grant to the rights holder?

A copyright grants protection to the creator and his or her representatives for the works and prevents such works from being copied or reproduced without their consent.

The creator of a work can prohibit or authorise anyone to:

- reproduce the work in any form, such as print, sound, video, etc
- use the work for a public performance, such as a play or a musical work
- make copies/recordings of the work, such as via compact discs, cassettes, etc
- broadcast it in various forms
- translate the same into other languages.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes, the Copyright Act grants an author special rights which exist independently of the author's copyright, and subsist even after the assignment either wholly or partially of said copyright. The author has the right to:

- claim authorship of the work
- restrain or claim damages with respect to any distortion, mutilation, modification, or other act in relation to the said work if such distortion, mutilation, modification, or other act would be prejudicial to their honour or repute.

These special rights can also be exercised by the legal representatives of the author.

A recent amendment to copyright law states that the right against distortion is available to the author even after the expiry of the term of copyright. Previously, it was available only against distortion, mutilation etc done during the term of copyright of the work.

3. Ownership

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation:

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 60 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, it expires 60 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 60 years from the end of the calendar year in which the work was first published.
Category of work
Cinematograph films
Duration
Copyright shall subsist until 60 years from the beginning of the calendar year following the year in which the film is published.
Category of work
Sound recordings
Duration
Copyright shall subsist until 60 years from the beginning of the calendar year following the year in which the sound recording is published.

2.6 For how long do moral rights subsist in copyright works?

An author's moral right, which is a right against distortion, mutilation, or any modification to a copyrighted work is available even after the expiry of the term of copyright.

3.1 Who is the first owner of a copyright work?

Ordinarily, the author is first owner of the copyright in a work. However, concept of 'first owner' has further been elaborated under Indian copyright law and may be determined as follows:

In the case of a literary, dramatic or artistic work (which includes a photograph, painting or a portrait) created during the course of employment or under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the proprietor of such a publication shall, in the absence of a contract to the contrary, be the first owner of copyright. However, such ownership shall vest with the proprietor of the publication only for the limited purpose of publishing the work or a reproduction of the work in a publication and, for all other purposes, the copyright shall vest with the author of the work.

If a photograph, painting or portrait has not been made for the purposes of publication in a periodical but has been made for any other purpose, then in the absence of a contract to the contrary, the copyright in such work shall vest with the person at whose instance the work was created.

In the case of a cinematograph film, in the absence of a contract to the contrary, the copyright in the cinematograph film shall vest with the producer of the film (ie the person at whose instance the film was made for a value consideration).

In the case of a work made during the course of employment or under a contract of service or apprenticeship, the employer shall, in the absence of a contract to the contrary, be the first owner of copyright. In the case of a government work, the copyright in the work shall vest with the Government, in the absence of a contract to the contrary.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

As per the Act, work of joint authorship means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors. Equal rights are enjoyed by each author and each can assign their work independently. However, consent of each author is required for licensing or use of the copyright work. The duration of copyright for a work of joint authorship is calculated with respect to the author that dies last.

4. Infringement

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Under Indian law, registration is not a prerequisite for acquiring a copyright in a work. A copyright in a work is an inherent right and is acquired by the author as soon as the work is created by him/her.

However, the Act does provide a procedure for copyright registration. Though such registration does not confer any special rights or privileges to the copyright owner, the Certificate of Registration of Copyright and the entries made on the Register serve as *prima facie* evidence in a court of law when a dispute relating to ownership of copyright arises. Thus, registration only raises a presumption that the person in the Register is the actual author, owner or rights holder. In infringement suits and criminal proceedings, when time is of the essence to obtain urgent orders, registration is of tremendous help. A copyright notice is not necessary under Indian law to claim protection; however, such display may be useful in evidencing the ownership of the copyright and date of creation of the work.

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright shall be valid only when it is in writing, signed by the assignor or by his/her duly authorised agent.

3.5 Can moral rights be transferred, assigned or licensed?

No, moral rights cannot be transferred or assigned.

A copyright is infringed if a person without an appropriate permission or licence does anything that the owner of the copyright has an exclusive right to do. There are two classes of infringement: primary infringement and secondary infringement.

4.1 What acts constitute primary infringement of copyright?

Primary infringement occurs where a person performs any of the following acts without the consent of the rights holder.

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing a copyright work in public
- communicating the work to the public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

4.2 What acts constitute secondary infringement of copyright?

Secondary infringement occurs where a person, with knowledge or reasonable grounds for such knowledge, carries out any of the following actions in relation to infringing copies of the work:

- makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire
- distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright
- by way of trade exhibits in public
- imports into India.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

Under the Act, there are certain circumstances which constitute 'fair dealing', which is not considered an infringement. The lists of non-infringing acts are summed up below:

Use
Parody
Conditions
There must be no intention to compete with the copyright holder, and the motive for use of copyrighted matter must not be improper.

Use
Private use, including research
Conditions
Applicable only to literary, dramatic, musical or artistic works.
Use
Criticism or review
Conditions
–
Use
Reporting of current events, through newspaper, magazine or similar periodical, photographs or film
Conditions
Exception – the publication of a compilation of addresses or speeches delivered in public is not fair dealing.
Use
Reproduction of any work for the purpose of judicial proceedings or a report of judicial proceedings, or in any work produced by any house of any Legislature, exclusively for the use of the members of that Legislature
Conditions
–
Use
The making of copies or adaptation of a computer program in order to utilise the computer program for the purposes for which it was supplied; or to make back-up copies purely as a temporary protection against loss, destruction or damage
Conditions
Must be the lawful possessor of a copy of such computer program.
Use
Any act done to achieve inter-operability of an independently created computer program with other programs by a lawful possessor of a computer program
Conditions
Only applicable if such information is not otherwise readily available.
Use
The making of copies or adaptation of the computer program from a personally legally obtained copy for non-commercial personal use

Conditions
–
Use
The reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force
Conditions
–
Use
The reading or recitation in public of any reasonable extract from a published literary or dramatic work
Conditions
–
Use
The publication in a collection, mainly composed of non-copyright matter, <i>bona fide</i> intended for the use of educational institutions, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions
Conditions
Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.
Use
Reproduction of a literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction; or as part of the questions to be answered in an examination; or in answers to such questions
Conditions
–
Use
The performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording
Conditions
The audience must be limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.

Use
The making of sound recordings in respect of any literary, dramatic or musical work, if sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work, or the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him
Conditions
–
Use
The causing of a recording to be heard in public by utilising it, in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or as part of the activities of a club or similar organisation which is not established or conducted for profit; or as part of the activities of a club, society or other organisation which is not established or conducted for profit
Conditions
–
Use
The performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution
Conditions
–
Use
The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction
Conditions
–

Use
The publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public
Conditions
–
Use
The reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access
Conditions
Provided that where the identity of the author of any such work (or, in the case of a work of joint authorship, of any of the authors) is known to the library, museum or other institution, the provisions of this clause shall apply only if such reproduction is made at a time more than 60 years from the date of the death of the author (or, in the case of a work of joint authorship, from the death of the author whose identity is known; if the identity of more authors than one is known, from the death of such of those authors who dies last)
Use
The storing of a work in any medium by electronic means by a non-commercial public library for preservation, if the library already possesses a non-digital copy of the work
Conditions
–
Use
The making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India
Conditions
–

Use
The reproduction or publication of any matter which has been published in any Official Gazette except an Act of a Legislature, or any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter, or the report of any committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government, or any judgment or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court
Conditions
–
Use
The production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder
Conditions
Provided that no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public. Also provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government
Use
The making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture
Conditions
–
Use
The making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under section 2(c)(iii) of the Act, if such work is permanently situated in a public place or any premises to which the public has access

Conditions
–
Use
The inclusion in a cinematograph film of any artistic work permanently situated in a public place or any premises to which the public has access; or any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film
Conditions
–
Use
The use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work
Conditions
–
Use
The performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any <i>bona fide</i> religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority
Conditions
Religious ceremony including a marriage procession and other social festivities associated with a marriage
Use
The adaptation, reproduction, issue of copies, or communication to the public of any work in any accessible format by any person to facilitate persons with disabilities to access the works; or any organisation working for the benefit of persons with disabilities in the case that the normal format prevents the enjoyment of such work by such persons
Conditions
The copies of the works in such accessible format are made available on a non-profit basis and only to recover the cost of production, and the organisation shall ensure that the copies are used only by persons with disabilities, and take reasonable steps to prevent their entry into ordinary channels of business

5. Remedies

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

Under the Act, hypertext linking does not *per se* constitute copyright infringement; however, reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public could amount to copyright violation. But in the case of hyperlinking, the linking site is not reproducing any work. The reproduction, if any, takes place at the end of the user who visits the linked page via the link. Technically, the linking site is only informing people about the presence of the work and giving the address of the site where the work is present. It is at the user's discretion to access the work by clicking the link. But, nevertheless, the linking site is definitely aiding in the distribution of the work.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right of action.

5.1 What remedies are available against a copyright infringer?

The Act provides the following remedies for copyright infringement:

- civil
- criminal
- administrative.

However, it is only the first two remedies, civil and criminal, which are of any real practical importance. Under civil remedies, one may file for interlocutory injunction, pecuniary remedies, *Anton Piller* orders, *Mareva* injunction and accounts rendition, delivery of infringing copies and damages for conversion. Under criminal remedies, one may file for imprisonment and fine, seizure of infringing copies and delivery of them to the owner. Under administrative remedies, one may file for moving the Registrar to ban the import of infringing copies and delivery of the confiscated infringing copies to the owner.

5.2 Are there any specific remedies for online copyright infringement?

A court can direct that infringing websites be blocked by internet service providers (ISPs) either as part of a John Doe order or a website-blocking order [*RK Productions v BSNL* (2012) 5 LW 626]. The Copyright Act says that any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Act, with the intention of infringing such rights, shall be punishable.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

The Act prescribes that the intentional infringement or abetment of an infringement of the copyright in a work would be considered as criminal act. Criminal remedies for copyright infringement include:

- punishment through imprisonment which may not be less than six months but which may extend to three years
- fines which shall not be less than Rs.50,000 and which may extend to Rs.200,000
- search and seizure of the infringing goods including plates, which are defined as including blocks, moulds, transfers, negatives, duplicating equipment or any other device used or intended to be used for printing or reproducing copies of the work
- delivery of infringing copies or plates to the owner of the copyright.

6. Enforcement

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit for bringing a copyright infringement claim is three years from the cause of action.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

Under the Act, the plaintiff can seek recovery under all three remedies, namely (a) account of profits (b) compensatory damages and (c) conversion damages, which are assessed on the basis of value of the article converted.

6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Every suit or civil proceeding in respect of the infringement of copyright can be instituted before a District Court or above. The monetary/pecuniary threshold divides the court on a vertical basis. For example, in Delhi Courts, matters amounting to INR 10 million lie before the District Courts, and those above INR 10 million lie before the High Courts. However, the amount of pecuniary jurisdiction is different for all High Courts and this limit is decided by respective High Court Rules. In many states, the High Court has no pecuniary distinction. All civil suits go before District Courts, and only appeals before the High Court.

6.2 Are there any other ways in which you can enforce copyright?

Copyright Board

The Copyright Board is a body constituted by the Central Government to discharge certain judicial functions under the Act. The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of licences in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. It does not deal with copyright infringement cases or with criminal piracy of copyright works.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright? What do they do?

In India, the Copyright Office is the government body responsible for promoting and enforcing copyright. The Office is under the control of the Registrar of Copyrights who acts under the direction of the Central Government. Specifically, the Copyright Office is under the aegis of the Department of Industrial Policy and Promotion (DIPP).

7. Copyright reform

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

In India, there are some registered copyright societies which undertake the management and protection of copyright in works of authors and other owners of such works.

Some of these are:

Agency
The Indian Performing Right Society Limited (IPRS)
Who it represents
Musical works
Agency
Phonographic Performance Limited (PPL)
Who it represents
Sound recording
Agency
Indian Reprographic Rights Organization (IRRO)
Who it represents
Reprographic (photo copying) works
Agency
Indian Singers' Rights Association (ISRA)
Who it represents
Performers' (Singers') Rights

6.5 Are copyright levies payable? By whom, and in what circumstances?

The Indian Copyright Act does not prescribe any copyright levies.

7.1 What do you consider to be the top recent copyright development?

Delhi University photocopying case

The ongoing litigation between a group of leading publishers and a small photocopying shop attached to Delhi University in a 'fair dealing' debate has come to a conclusion. The judgment was passed in favour of the photocopier, underlining the principle that the utilisation of the copyrighted work would be fair use and justified if the same is used for the purpose of education. It would have no concern with the extent of the material used, both qualitative and quantitative, and the law is only concerned with whether the inclusion of the copyrighted material was justified by the purpose of the course pack and that the same is required during the course of instruction.

7.2 What do you consider will be the top copyright developments in the next year?

The Government of India has transferred copyright from the ambit of the Human Resource Development Ministry (HRD) to the Department of Industrial Policy and Promotion (DIPP). This is a strong step taken by the Government in the direction of strengthening the IP protection regime in the country and consolidating all IP-related functions under one body, to reduce possible conflicts owing to differing jurisdictions and to ensure uniformity in decision making at national and international levels.

Continuous developments in the copyright regime, such as facilitating e-filing of copyright applications, shifting of departments, availability of a list of pending applications and significant efforts taken by the judiciary to bring about a landmark change in IP jurisprudence, indicate that copyright law in India is strengthening.

© RPC, or the relevant contributors, 2018

*The information contained in this publication is a general guide and is not a substitute for specific legal advice.
No responsibility is accepted for any errors or omissions.*