

Copyright: An Indian perspective

Jagdish Sagar

My unexpected participation in the TRIPS negotiations, as my country's sole negotiator on copyright, remains one of the unforgettable experiences of a 38-year civil service career. I shall try to put this across to the reader as I remember it, which means no specific dates; I shall also avoid names since I remember fewer of them than I do faces.

In India, the upper echelons of the civil service are notoriously "generalist". Thus, in the late 1980s and early 1990s, after extremely varied experience in other fields, and in vastly different parts of India, I found myself in the Ministry of Human Resources Development, Department of Education, in charge of the Book Promotion Division.

The Book Promotion Division was responsible for copyright – an arrangement that already reflected an antiquated notion of what copyright is about. And I was the only senior person anywhere in the Government of India who was expected to know the law of copyright; the Registrar and Deputy Registrars of Copyright – middle-ranking officers – were, like me, birds of passage. WIPO exposed me to some training and I learned much from interactions with the leading copyright industry associations in publishing, music and software. It was fascinating, but I did not expect that what I was learning would be of any great practical importance, to me or anyone else, in the foreseeable future. The Book Promotion Division was a backwater – but would not be so for long.

Now, before I proceed with my own experience of the TRIPS negotiations, some background is necessary. The Uruguay Round of multilateral trade negotiations had been much in the news. The media, and public opinion as expressed by some very vocal persons, supported the Indian Government's position that IP had no place in multilateral trade agreements. That was, of course, a battle already lost. Nevertheless, most of the people one met seemed firmly of the view that IP was an imposition of the developed countries to keep us down: we needed free access

to information to catch up with them.¹ One sometimes heard such concerns voiced quite emotively in terms of national sovereignty.

India had always been subject to the Berne Convention for the Protection of Literary and Artistic Works under the “colonial clause” and the (British) Government of India had acceded to the 1928 Rome Act of the Convention as a contracting party. This had continued without remark, and a body of judicial interpretation had been built up over the years² when the Joint Parliamentary Committee, convened to study the Copyright Bill, 1956, recommended that the term of copyright be reduced from 50 (the Berne minimum) to 25 years. Fortunately, the government overruled this idea and pushed through a Berne-compliant version of the Bill, which became the Copyright Act, 1957.

But the mindset that the parliamentary committee gave expression to has never gone away. India was in the forefront of those countries which, refusing to accede to the 1967 Stockholm Act of the Berne Convention, compelled the adoption of the 1971 Paris Act adding an Appendix to the Convention to allow developing countries to issue compulsory licences in certain cases. This was supposed to be necessary for our educational system, but India did not bother to amend its own law to provide for such compulsory licences until 1984; thereafter, it never even issued a single compulsory licence to avail itself of this hard-won right and, in the late 1990s, actually allowed this special right that we enjoyed to lapse by failing to renew its ten-year declaration under Article I of the Appendix. Few noticed, nobody complained. Here again was a very clear case of our ideological position having no relationship at all with any actual national interest; not for the last time.

In my area of copyright law, there was (and is) a real issue about our place in the world. With our productivity in film, music, software (already coming up in those days) and even print media, we have a strong interest, vocally expressed by the stakeholders involved, in strong copyright protection. We had (and still have) the world’s largest film industry, which is closely tied to a very large music industry; our software industry held out great promise at the time, which has since been realized. Whatever the politics of our relationship with other developing countries in regard to other and broader issues, we did not then, and certainly do not now, have common interests with many of them in the sphere of copyright. At the same time, there is an influential section of opinion in India which, on the strength of ideological prejudices (though these are widely prevalent and have very little to do with any overtly political considerations), favours a much more relaxed copyright regime.

To return to the story, one day I received a telephone call from someone in the Commerce Ministry telling me I was required for the TRIPS negotiations in Geneva. Eventually, I would make over a dozen trips to Geneva, honing my very limited skills in the French language, getting very familiar with the geography of that town and (on a couple of days when copyright was not on the agenda) sneaking out of Geneva for a few excursions. Normally, for a civil servant to be deputed abroad, there is a certain amount of processing and approval-taking, but now the Commerce Ministry handled all that, bought my tickets, booked my hotel room and paid me my per diem. I retained the diplomatic passport that was issued on a short-term basis for such purposes and I would quite often find myself at the airport at a day's notice.

Looking back, the sequence of events is impossible to recover but the memories are vivid. This was unlike most international conferences that I had attended: it was more businesslike, with not much in the way of carefully worded speeches read from prepared texts; rather, it was much more face-to-face, in both seating and style. We were a proud Indian team of two: I handled copyright and neighbouring rights and Jayashree Watal (who consequently did much more of the talking and spent more time in Geneva) handled almost everything else. We both knew enough of our areas to be sufficiently confident, and were not really daunted by the size of some of the delegations, but it was no advantage to face much larger teams, particularly from the developed countries – there were never fewer than half a dozen Americans in the room at any given time.

The first time round, true to our general brief on the TRIPS negotiations at the time, I was non-committal about the main innovations that were on the table, which would require us to amend our copyright law. These were the introduction of rental rights for films, software and sound recordings, and performers' rights. By the next session, and from then on, I felt confident enough to take an independent line in consultation with the Indian stakeholders concerned. Of course, I did not do so without in-house approval where amendments to our law might be necessitated, but I found such approval to be readily forthcoming.

I cannot, at this remove in time, recount the negotiations sequentially, but will do so by topic, and will carry the story forward to subsequent outcomes.

Computer programs

By the time of the TRIPS negotiations, we had a burgeoning software industry. We had no issues about protecting computer programs as literary works, which

had already been done by amendment of our Act in 1984, though the definition of a computer program was (if adequate) not really satisfactory; nor do I remember much controversy about this internationally, though, at the time, a few countries did contemplate having *sui generis* protection for computer programs. To comply with the treaty as it was taking shape, we would also have to further expand the definition of literary works to include electronic databases, but that posed no problem for our government. It does, however, bear mention that this protection in India remains strictly limited to copyright protection as specified in Article 10(2) of the TRIPS Agreement, that is, to the extent that the database constitutes an intellectual creation by virtue of the selection or arrangement of its contents. Nor does copyright subsist in data *per se*, which Article 10(2) seems to envisage as a possibility. To this date, there is no database right, as in the European Union, even distantly on the horizon. (It is another matter that the courts have sometimes applied copyright in databases quite liberally.)

Rental rights

The whole concept of rental rights was novel in India and, for want of understanding, I was conservative and non-committal about it the first time the topic was discussed. However, on my coming home and interacting with our film, music and software industries, its importance became obvious. Those were the days of videocassettes for audiovisual works and, besides, in India, audiocassettes were the most common form of recorded music on the market – in the early 1990s, compact discs (CDs) were more expensive and the repertoire available on them was limited, and vinyl was disappearing. Videocassettes and audiocassettes were much easier to reproduce than anything known hitherto, and seemed very liberating to those (and there were many) who did not set much store by the law of copyright.

There were many rental shops for videocassettes and small “video parlours” were not rare: these were mini-theatres, sometimes, but not always, clandestine, where the contents of videocassettes were projected onto screens, giving a small audience an actual (and infringing) theatrical experience. The film industry, which still depended mainly on theatrical exhibition, was getting hurt. Video parlours were, of course, obviously infringing, but public opinion was not particularly friendly to copyright and the police had other priorities. However, it was the much larger business of hiring out videocassettes that posed the most serious problem: it was changing the way of consuming film, keeping audiences away from the cinema theatres, and the film industry was getting nothing out of this new mode of distribution. The film industry was helpless, not only because of the scale of the

problem but, more fundamentally, because of lacunae in copyright laws that had been enacted for a different era. In India, the hiring out of a copy of a videocassette was not *per se* an infringing act: to establish infringement it was necessary to establish both that the copy being rented out was an infringing copy, and that the person who produced the copy had no authorization to do so. The industry itself could be faulted for not anticipating this situation by making video available at reasonable prices before the problem had assumed such serious proportions, but now, clearly, something had to be done.

The idea of rental rights, when put to representatives of the film industry – who, in those days, unlike now, were not very IP-savvy – was welcomed. It was as novel to them as it had been to me. The music industry in India, then, as now, was rather sophisticated about how it went about protecting its rights: it had the advantage of much greater international exposure, since the larger Indian record labels had traditionally been subsidiaries of multinationals. They knew about rental rights and, of course, supported them. The same was true of the software business which, though homegrown, served international markets and understood IP.

For us, the only real sticking point in the negotiations on rental rights was the United States' insistence on exempting itself from the obligation to introduce rental rights in its own law, on the grounds that it needed rental rights abroad (where infringement was rife) but not at home (where the American delegation said it was not). This was called the "impairment test". The American delegation explained to us that, if they were to introduce rental rights at home, it would upset the comfortable relationship that already existed in their country between the video rental business and the film industry; hence, they felt they could impose on the rest of the world what they felt they did not need themselves. This was a grossly unequal provision but, after discussion with the Commerce Ministry, we accepted that we needed rental rights in our own country anyway. Therefore, and because the Government of India had to choose its battles, we decided, reluctantly, to go along with it. Now, over two decades later, we do hear complaints of Indian films being widely pirated in the United States: that, certainly, is "impairment".

Following the TRIPS Agreement, in India we enacted provisions on rental rights that were actually TRIPS-plus. Because of the difficulty of defining "commercial" (which can mean different things in different contexts in our judicial precedents), we improved on the requirements of the TRIPS Agreement by dropping that qualifier and conferring exclusive rental rights. Further, we included sale or offer for sale of a copy in the exclusive rights of the copyright owner – in effect, abolishing the exhaustion rule for these classes of work.

This has since been modified; the word “commercial” has been inserted, and “commercial rental” does not include rental, lease or lending for non-profit purposes by non-profit libraries or non-profit educational institutions.

Performers’ rights

Performers’ rights serendipitously offered a solution to a peculiarly Indian problem. South Asia is possibly the only civilization with a classical music that is as sophisticated as that of the West – indeed, unlike in South-East Asian countries, for example, there are few takers for Western classical music in India. But our classical music does not fit the traditional copyright paradigm, in which the work is distinct from the performance. In India, the classical musician is both a composer and a performer: he or she improvises, within a strict and difficult discipline that it takes a lifetime to acquire, on any one of a range of traditional, well-identified themes. Every performance is a composition, a once-and-for-all creation that gives a distinct identity to every recorded performance by the same maestro. However, our law at the time defined a musical work in terms of notation, in blind adherence to the language of the earlier law enacted during the British Raj. This was actually an irrelevant, alien concept for our music. In 1977, the Supreme Court, in passing, suggested that the government should consider giving performers a right, but the government did not respond, I believe for want of understanding. India never acceded to the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), but now the new compulsion to amend our Act to introduce performers’ rights was put to good use. We not only introduced performers’ rights into our Act, but simultaneously amended the definition of a “musical work” to drop the requirement of notation. As a result, the Indian classical musician now has, so to speak, two strings to his or her bow: a performance, once fixed, is now protected both as a performance and as a musical work.

The neighbouring rights of phonogram producers posed no problem: like other common law countries, we already protected phonograms as copyrighted works, and our protection of phonograms was already TRIPS-plus. The rights of broadcasting organizations, again, were no problem. Nor did any of the other innovations, including the extension of the three-step test to all rights, pose any problem for us.

The first thing to do, once the TRIPS Agreement was signed, was to push through the necessary amendments to the Copyright Act. This proved surprisingly easy – our Minister, the late Arjun Singh, was a literate and cultivated person who had

no difficulty understanding the questions involved and, once he had been briefed, actively pushed the process. This turned into an exercise to review the whole Act, and we ended up modifying about a quarter of the text, not only to meet the requirements of the TRIPS Agreement but to address numerous other issues. We updated the provisions on collective administration, strengthened criminal remedies for infringement, updated a number of definitions, completely revamped the section spelling out exclusive rights and updated the provisions on limitations and exceptions.

But the most important thing that we did in the amendments was to introduce a right of making available the copyrighted work, as a form of communication to the public – in this, we were way ahead of much of the world. It seems odd, looking back, that the Internet never figured in the TRIPS negotiations: at least, I do not remember any mention of it and the treaty itself took no account of it. But, soon after the TRIPS Agreement, 1995 was being called the “year of the Internet”. India has yet to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT) but, with just this one TRIPS-plus amendment in place, our courts have been able to enforce copyright on the Internet. In recent years, courts have: ordered Internet service providers to block infringing websites; ordered them to block any uploading of the plaintiff’s copyrighted works, and, for the purpose, required them to block infringing web addresses – in effect, a “John Doe” order; and restrained social networking sites from allowing the plaintiff’s content to be uploaded.

I was able to see our Bill to amend the Copyright Act introduced in Parliament and into the committee stage. Then, as my term in the Ministry of Human Resources Development ended, I moved on to other, very different work. But, until I retired in February 2004, the Ministry kept me on one committee after another and I found myself returning to its conference rooms from wherever I was and whatever I was doing. I was involved in developing our position during the negotiations leading up to the 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, which accepted the WCT and WPPT, and in the formulation of draft legislation to comply with the requirements of these two treaties.

It is a matter of regret, I feel, that legislation to make our law compliant with the WCT and WPPT was not introduced until 2010 and not enacted until 2012, and that India has still to accede to either of these treaties. Nor do I believe our amended legislation is wholly compliant, particularly in regard to technological measures. The main focus of the amendments was not on the WCT and WPPT

but, rather, more on provisions intended to help authors in the entertainment business – itself a laudable object – which, unfortunately, were so drafted as to create confusion and ambiguity: professionally, I am currently involved in constitutional challenges to some of these amendments. The old populism has come back and there seems currently to be much more enthusiasm for the treaties on limitations and exceptions. The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled was, of course, laudable, but the Indian position on educational and library exceptions seems weighted too far against the rights of copyright owners, to the point, arguably, of not appearing to be TRIPS compliant in regard particularly to the three-step test: at times, I have felt that there is insufficient appreciation of the fact that the TRIPS Agreement imposes inescapable obligations which cannot be derogated from in any possible WIPO treaty. One longs for the more pragmatic and businesslike approach that I believe India managed to retain during the general negotiations that culminated in the establishment of the WTO, not least those leading to the TRIPS Agreement.

There is, for me personally, a happy epilogue. I acquired the reputation of a person who knew a thing or two about copyright, with the result that I am able, over a decade after I retired, to be rewardingly and gainfully employed as a practising copyright lawyer. The TRIPS negotiations did that for me.

Endnotes

- 1 Trademarks did not particularly figure in this kind of discussion. My own remarks here apply mainly to copyright; the issues regarding patents were different and are dealt with by Jayashree Watal (chapter 16).
- 2 India is, of course, a common law jurisdiction, and its statutory law on copyright has much in common with that of other Commonwealth countries.