LEGAL DEVELOPMENTS

NEPAL’S NEW LAW ON COPYRIGHT: SOME REFLECTIONS

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1. Development of Copyright Law

Nepal enacted its first copyright law in 1965. The law, however, was never applied, mainly because of its technical defects, the most important among which are the lack of litigation rules for copyright infringements and the confusion about the authority of the Registrar in relation to Section 17 which provides for civil remedies and penal actions for the infringement of copyright.

Since the law has never come into use, these technical flaws have gone largely undetected through the passage of the first amendment to the Copyright Act 32 years later. The amendment, which was introduced in response to the dramatic upswing of the audio and audiovisual market towards the mid-nineties, made no substantial change other than a few alterations on matters of immediate concern relating to scope of protected works and penal sanctions. More particularly, computer programs and research works, were added to the list of coverage, and fines for infringement of copyright, hitherto negligible, were increased manifold.

In practice, however, copyright infringement cases, though occasionally heard in academic debate, were rarely filed and were likely to be dismissed by the authorities.¹ Reference to these cases amply illustrates why, despite the existence of a copyright law

¹ After the amendments of 1997 had come into force, Music Nepal (P.) Ltd. filed a case for copyright infringement with the Registrar at the Nepal National Library. Notwithstanding the defendant’s being caught red-handed by the police, the Registrar refused to take action, on the grounds of having no authority to punish the culprits. The plaintiff’s petition for the grant of a writ of mandamus to the Supreme Court was dismissed. Likewise, in Foundation Books, New Delhi v Registrar, the Supreme Court upheld a decision by the Appellate Court that the Registrar was not entrusted with the power to order sanctions under the relevant Section 17 of the Copyright Act.
for over three decades, Nepalese authors and other right owners were not in the position to assert their rights.

To date, Nepal has stayed outside any of the traditional conventions on intellectual property rights. There are no intellectual property laws governing plant breeders’ rights, integrated circuit layout design and geographical indications nor any laws to regulate unfair competition. However, Nepal’s recent accession to WTO\(^2\) in September, 2003 has made obligatory the enacting of legislation in conformity with the provisions of the TRIPS Agreement, which embody, to a large extent, the fundamental principles and provisions of the existing international intellectual property conventions.

2. **New Copyright Act, 2002**

In August 2002, Nepal enacted a new copyright legislation which replaced the 1965 law. The new law is structurally well organised, besides being more extensive and up-to-date than the former Act. It contains more detailed provisions concerning enforcement, which is, to a considerable extent, in conformity with the minimum requirements of the TRIPS Agreement. The new Act is divided into seven chapters which contain 43 articles. It extends protection, for the first time, to the rights of performers, phonogram producers and broadcasting organisations.

2.1. **Rights of the Authors**

2.1.1. **Economic Rights**

Chapters 1 and 2 of the new Act are entirely devoted to substantial matters, such as the definition and the rights of the authors. Article 7 lists a number of economic rights granted to the authors.\(^3\) The Act emphasises that the exclusive rights are not exclusive of any limitations, and therefore they do not confer to the right owners an absolute power to control the use of, and access to, their works. This is made clear in Article 7, which, in the very beginning of the sentence refers to Chapter 4, i.e. to the chapter restricting the exercise of rights and providing for limitations and exceptions in certain cases provided therein.

Article 7 reads as follows: “Subject to Chapter 4, the author or the copyright owner shall have the exclusive right to do the following acts...”. As a matter of fact, there has been no need to employ such restrictive wording in the article which is devoted entirely to the economic rights, for Chapter 4 would have *ipso facto* made it clear. Obviously, this wording has been used in order to stress the public policy considerations of the law.

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\(^2\) The WTO’s Ministerial Conference held in Cancun, Mexico, approved Nepal’s membership to WTO by consensus on 11 September 2003. Nepal had applied to join the WTO in May 1989.

\(^3\) These rights include: (a) right to reproduce a work, (b) right to translate a work, (c) right to amend or modify a work, (d) right to adapt, including any transformation, of a work, (e) right to transfer or let for hire the right in respect of audio visual works, works embodying sound, computer programs, databases or musical works in the form of scores, (g) right to import a reproduction of a work, (h) right to make a public exhibition of the original or a copy thereof, (i) right to perform a work, (j) right to broadcast a work, and (k) right to make a public communication of a work.
2.1.2. Moral Rights

The new Nepalese law embodies features reflecting the two great legal traditions in the field of copyright: the common law tradition and the civil law tradition. As long as it makes no distinction between copyright and related rights, it is closer to common law. But when it comes to moral rights, it turns to the civil law tradition of continental Europe. It addresses moral rights from a dualist point-of-view, and hence considers them rights as distinct from, and independent of, economic rights.

Article 8 of the new Act explicitly recognises three distinct moral rights: right to paternity, right to integrity, and right to modify works. However, the core characteristics of moral rights – perpetuity, inalienability and imprescriptibility – are not fully respected and preserved in Nepalese copyright law.

For example, Article 14, in line with Article 6bis of the Paris Act (1971) of the Berne Convention, delimits the term of protection of moral rights as equal to that of economic rights, i.e. life plus a post mortem period of 50 years. In the case of performers, to whom Article 9 (3) grants the right to identify as such or claim their name in relation to the performance and the right to prohibit any distortion, or any other alteration, of their performance to the detriment of their reputation and popularity, these moral rights run, parallel to other rights, for 50 years from the date of fixation in a sound recording or from performance.

When the law restricts the protection of moral rights to a specific period, immediately a question arises as to what would happen to the integrity of works once they enter the sphere of public domain. The law does not state that the author’s heirs or the State should take the responsibility for protecting the integrity of works that fall in the public domain. Under these circumstances, logically comes the question whether anyone should be free to use and manipulate a work or a performance, the way he or she chooses? This is one of the issues to be possibly addressed in a future amendment of the Nepalese copyright law.

Another distinct aspect about moral rights under the Nepalese Copyright Act is that they are transferable by the author’s last will and testament. Article 8 (2) sets the limit to non-transferability of moral rights to the period covering the author’s life-time, thereby allowing the author to transfer it by his last will and testament to any natural or legal person whom he has appointed as the person to exercise his moral rights after his death. As laid down in Article 24 (2), such transfer, shall be executed in written contract, subject to the condition that the transferee shall not change the name of the author with regard to his works. Failing such transfer by the author, after his death his moral rights shall be deemed to pass to his heirs.

But the law does not anticipate the fate of these rights in the event where the author has not transferred these rights, nor does he leave any heirs. It is to be noted that by virtue of this transferability provision, the publishers may be induced to exert pressure on

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4 The Act recognizes only three types of related rights: the rights of performers, phonogram producers, and broadcasting organisations.
6 The first sentence of Article 8 (1) reads that moral rights are independent of authors’ economic rights.
authors, so that these rights could be transferred to them and thus, enhance their control on the exploitation of works.

2.2. Scope of the Application of the Law

Under the new law, copyright protection is available to authors whose works were first published in Nepal, and authors whose works were first published in another country and within the next 30 days published in Nepal, irrespective of the author’s nationality, domicile or residence. This is set out in Article 13 (1:b), which deals with the scope of application. These provisions which limit protection to be granted to works of foreign authors are, however, likely to be amended very soon, for Nepal has made commitment to adopt the TRIPS Agreement by 2006.

The Act protects the works of authors domiciled in Nepal. However, it does not deal with the works of co-authors where one of the authors is a foreign national. Protection is accorded to audiovisual works produced by a producer whose head office is located in Nepal, or who is domiciled in Nepal. Likewise, architectural designs of buildings constructed in Nepal, or any artistic works used in the building, or any other structure constructed in Nepal, are protected by the Act.

As prescribed by the Berne Convention, the protection is automatic without requiring compliance with any formalities. However, authors wishing to register their works are provided with an option for registration under Article 5 (1). The registration may serve as a valuable evidence for establishing ownership in case of dispute regarding the date of creation.

2.3. Protected Works

Any work of original and intellectual creation in a literary, scientific or artistic domain is eligible for protection according to the definition of ‘work’ as provided in Article 2 (1). The list of works illustrates the broad scope of coverage for a wide variety of works.

The definition above clearly sets forth two basic eligibility requirements for a work to qualify for copyright protection. First, it must be original and second, it must belong to

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7 Article 2 (1) defines works as being “works of original and intellectual creation in literary, scientific, artistic and other domain, including the following works:....”
8 Article 2 (1) cites by way of illustration the following works as being works that fit into the definition:
- books, pamphlets, articles, research papers;
- dramatic or dramatico-musical works, pantomimes and similar works prepared for performing in the stage;
- works of musical compositions with or without words;
- works of audio visual;
- works of architectural design;
- works of drawings, paintings, sculptures, engravings, lithography, and other works of art;
- photographic works;
- works of applied art;
- illustrations, maps, plans, three-dimensional works relative to geography, topography and scientific articles; and
- computer programs.
a literary, artistic or scientific domain. But nowhere does the law clarify, or provide any clue for, the amount of originality needed for a work to constitute an intellectual creation. This is left entirely to the rational interpretation by the courts on a case-by-case basis. In the absence of any case law in Nepal, and the implementation of the new law still pending, it is yet to be seen how the courts would interpret the originality requirement in different categories of works.

2.4. Unprotected Works

Article 4 enumerates items that are excluded from protection. They include ideas, news, methods of operation, concepts, principles, court decisions, decisions of administrative agencies, folk songs, folk stories, proverbs and statistics of general information. Apart from these exceptions, copyright is available for any literary, scientific or artistic works of original and intellectual creation.

2.5. Ownership of Copyright

As a matter of rule, the initial ownership of copyright is vested in the author of a work. Article 2 (b) defines the author in relation to a work as being the person who created it. Exceptionally, however, the meaning of author varies with the situation under which a work is created. Article 6 (2) envisages five such cases where copyright belongs to a person or legal entity other than the actual creator: (a) in the case of a joint work prepared under the direction or control of a person or legal entity, the person or legal entity under whose direction or control the work is prepared; (b) in the case of a commissioned work, the person or institution that have commissioned the work; (c) in the case of an anonymous work, the publisher until such time as the identity of the author is revealed and substantiated; (d) in the case of audiovisual works, its producer unless otherwise stipulated in a contract, and (e) in the case of a work of joint authorship, the co-authors. In the latter case, if such work is divided into chapters where individual contributions can be distinguished and used separately, each individual author will have copyright in his or her respective contribution.

2.6. Transfer

Chapter 5, which concerns the transfer of copyright, is very brief. It contains only one article (Article 24). According to it the copyright owner can transfer or license his or her economic rights in whole or in part, with or without specifying any condition. The article, however, maintains that such transfer must be executed in a written contract, but it does not contain any provision specifying the modes of transfer.

2.7. Terms of Protection

As regards the duration of protection, the Nepalese law, like the laws of Germany and the Nordic countries, makes no distinction between moral and economic rights, and extends the same period of protection to both categories of rights. Protection is generally available for life plus a post mortem period of 50 years. However, this period of protection varies with the nature of the respective work as follows: (a) in the case of

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9 See Lipszyc, Delia, “Copyright and Neighbouring Rights”, Paris, UNESCO, 1999, p. 265: “It is considered in Germany and the Nordic countries that when the author’s rights expire in the economic field, the normal right ceases to belong to the private sphere; from then onwards it is a question of safeguarding the cultural heritage in the public interest”.

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work of joint authorship, 50 years from the death of the last surviving author; (b) in the case of works prepared under the direction or control of a person or legal entity, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first; (c) in the case of anonymous or pseudonymous works, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first; (d) in the case of works of applied art and photographic works, 25 years from the date of their creation; and (e) in the case of a work published after the death of its author, 50 years from the date of its publication.

2.8. Limitations and Exceptions

Articles 16 through 23, under Chapter 4, deal extensively with limitations and exemptions from copyright protection. Unlike the Anglo-American system, where statutory limitations and exemptions are further supplemented by the so-called “fair use” or “fair dealing” doctrine, the Nepalese Copyright law, like those following the continental legal tradition, has simply opted for providing a number of statutory exemptions allowing the users to make short excerpts or reproductions from published copyright materials for specific purposes, without authorisation of the copyright owners. These exemptions basically relate to uses such as research and teaching, quotations, private use and reproduction of single copies for library and archival use. The extent of such free uses is, however, mostly subject to the condition that they do not undermine the copyright owner’s economic rights to exploit his works.

2.8.1. Private Use

The reproduction of “some part” of a published work for private use is allowed under Article 16 (1). However, reproductions consisting of a “substantial amount” of the work are subject to the condition that they do not prejudice the economic rights of the author or copyright owner. Article 16 (2), for example, forbids the reproduction of the architectural design of a constructed building or other designs related to construction, or the reproduction of a substantial portion of a book, or the reproduction of musical works in the form of music scores, or the reproduction, in whole or of a substantial part, of a database by way of digital transcription, in a manner that would prejudice the economic rights of the author or the copyright owner.

It remains, however, unclear whether this restriction is intended to mean the second and third step of the three-step test as provided in Article 9 (2) of the Berne Convention, which reads: “... provided that such reproduction does not conflict with a normal exploitation of the work and does not unnecessarily prejudice the legitimate interest of copyright owners.

10 Article 9 (2) of the Berne Convention is often referred to as the “three-step test” where, according to Ficsor (The Law of Copyright and the Internet, Oxford, 2002, pp. 284-287, 516), the first step requires that an exception or limitation should be a special case involving specific use. It should be precisely defined and must be justifiable by some clear public policy considerations. The second step requires that an exception or limitation must not conflict with a normal exploitation of works. This means that any free uses, or exceptions or limitations, must not enter into economic competition with the exercise of the rights of reproduction by the right owners. And the third test requires that an exception or limitation must not unnecessarily prejudice the legitimate interest of copyright owners, i.e. that such prejudice must not conflict with any normal exploitation of the work and it must be reasonable to the extent that it can be justified by well-founded public policy consideration.
the author”.\textsuperscript{11} The absence of any expression reflecting the third step of the test indicates that compliance with the second step will be sufficient to avoid infringement of copyright. If this is so, the conditions set for the free use of copyrighted material under Nepalese law are less stringent than the Berne prescription.

Also worth noting is the language used in Article 16 (1) - ‘some part’, and that used in Article 16 (2) - ‘substantial portion’ of a book. Only Article 16 (2) contains the condition that the reproduction of protected subject matter should not undermine the economic rights of the author or copyright owner. A comparison of these two provisions points to the fact that the Nepalese law makes no distinction of ‘some part’ or ‘substantial portion’ based on a criterion other than the quantity of borrowing. According to this distinction, it can be safely presumed that any borrowing, whatever may be its quality, will not be deemed an infringement of copyright if it is a short excerpt in proportion to the length of the original text.

This is perhaps the reason why no restriction of any kind is implied in Article 16 (1) as it is in the case of ‘substantial’ borrowing or reproduction in Article 16 (2). The law therefore appears to have taken it for granted that only ‘substantial’ portions of borrowing may undermine the economic rights of the copyright owner, hence the insertion of the restrictive condition in Article 16 (2).

If quantity or volume is the sole criterion governing the free use of a work, the question which then arises is how much of the length in relation to the original will constitute ‘some’ or ‘substantial’ portion, of which the law contains no explanation. According to the language of Article 16 (2), it appears that even the substantial amount of borrowing or reproduction will not constitute an infringement of copyright as long as it does not undermine the economic rights of the author or copyright owner.

It is, however, accepted that, for copyright purposes, substantiability is not to be determined by the mere quantity, or volume, of the borrowing. What must be equally taken into account is the quality of the borrowing. In some cases, the extraction of a few lines may constitute an infringement while in other cases even a bulk may be held fair use. Since the notion of ‘quality’ is governed by a number of factors, the idea underlying ‘substantiability’ is in a way similar to the US doctrine of ‘fair use’, where the use made of a work in any particular case is determined by a set of factors or criteria prescribed by the law.\textsuperscript{12}

\textsuperscript{11} A similar restriction is provided for in Article 16 (2) of the WIPO Performances and Phonograms Treaty, 1996 (WPPT). Article 16 (2) of the WPPT reads: “Contracting Parties shall confine any limitations of or exceptions to rights provided for in this treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.”

\textsuperscript{12} The following are the four criteria or factors to be considered for determining a fair use of copyright under section 107 of the US Copyright Act:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purpose;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.
These criteria, however, are not free from criticism. In the Nepalese context, these issues are bound to come up in the course of time as cases start emerging with the implementation of the new Act.

2.8.2. Teaching and Illustration

The Act contains an exception for the use of works in teaching, subject to the condition that such uses do not undermine the economic rights of the author or copyright owner. The permitted uses, as laid down by Article 18 (1), extend to the reproduction of short excerpts from any published work, by way of illustration, writing (publication) or audiovisual recording. The exception also includes reproduction, transmission, and display of some portions of works, for the purposes of instruction in a classroom.

There is, moreover, an exception in favour of quotations from published works under Article 17. But where such uses are made, the title of the work and its author must be indicated.

2.8.3. Library and Archival Use

Public libraries and archives which supply materials to individuals for research and private studies without any profit motive can, under Article 19, reproduce a single copy of any work in their possession that has been lost or damaged, or where such work cannot be acquired.

2.8.4. Reproduction for Information Purposes

Article 20 of the Nepalese law deals extensively with the exception provided for the reproduction, the broadcasting, and the communication to the public of a work, for the purposes of information. These exceptions are subject to the condition that the title of the work and its author are acknowledged. Article 20 (a) permits the reproduction by newspapers and periodicals, as well as the broadcasting, or the communication to the public, of articles published in newspapers or periodicals on political or religious topics, and of broadcast works of the same nature. This provision has been directly adopted from Article 10bis (1) of the Berne Convention. The law maintains that such reproduction, broadcasting, or communication to the public, should not prejudice the economic rights of the author or copyright owner.

The free reproduction, broadcasting or communication to the public is allowed under Article 20 (b) for the purpose of reporting current events or illustrating an event. Likewise, Article 20 (c) permits the reproduction, broadcasting or communication to the public, for the purpose of reporting current events of some portion of the news items or judicial proceedings published in any newspaper or a regular periodical.

However, according to Article 20 (2), the reproduction, broadcasting and communication to the public, provided for by Article 20, will not be allowed when the author has expressly reserved to himself such reproduction, broadcasting and communication to the public.

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13 See, Leon E. Seltzer, “Exemptions and Fair Use in Copyright”, Cambridge, Massachusetts: Harvard University Press, 1978, pp. 18-23. Seltzer points out that there is “no slightest guidance (in the Act) in the ordering of priorities in the application of the four ‘factors to be considered”.
2.8.5. Public Exhibition

Article 23 contains a provision according to which anyone is free to make a public exhibition of the original or a copy of a work, without the authorisation of the author or copyright owner. Such exhibition must take place without use of cinematography, television, slides, screens, or any other mechanical devices.

2.8.6. Reproduction of Computer Programs

Article 21 permits the free reproduction of a single copy of a computer program in the case where such reproduction is necessary in order to utilise the program or for the purpose of a back-up copy, or in the case where a lawfully acquired computer program has been lost or destroyed or rendered unusable.

2.9. Infringement of Copyright

Article 25 of the Nepalese Copyright law defines the acts that constitute infringement of copyright. According to Article 25 (1:a), the reproduction, with or without economic gain, of works or phonograms for sales and distribution or for any other purpose, their public communication or renting them, without the authorisation from the copyright owner, or, if licensed, in violation of the terms and conditions thereof, will represent infringement of copyright.

Under Article 25 (1:e) of the Act, the importation, production or rental of equipment and devices designed or produced for the purpose of circumventing a technological measure used to protect the unauthorised reproduction of protected works, will be an infringement of copyright. Similarly, the production, or the importation of equipment that enables or facilitates the viewing of encrypted broadcast programs constitute an infringement under Article 25 (1:f).

Article 26 prohibits the importation, for commercial use, of copies of protected works and phonograms made in another country, which, if made in Nepal, would have been infringing copies. There is, however, an exception under Article 23, which allows the importation of single copies for private use without the authorisation of the copyright holder.

The use of the term ‘commercial use’ in Article 26 in relation to the restriction of the importation of unauthorised copies is in so far imprecise as it could be taken to mean that importation of unauthorised copies for any purpose other than commercial use will be permissible, and hence it would not constitute an infringement of copyright.

Yet, since there is no definition of ‘commercial use’ in the Act, it can equally be argued the other way. The importation of multiple unauthorised copies, irrespective of any use or purpose, may be considered as being commercial as long as such importation will impair the local market and reduce potential demand for the respective work. The loss of sales resulting from such importation will take away the bulk of the profit from the legitimate holder of copyright, and hence such importation may be held as infringement of copyright.

Furthermore, if Article 26 is interpreted in conjunction with Article 22, which allows the importation of a single copy for the private use of the importer, there is no need to
mention ‘commercial use’. In this context, the term does not serve any function. Instead, Article 26 may safely use such terms as ‘irrespective of any use or purpose’, or ‘whatever may be the use’, or ‘commercial or any other use’.

Related to the importation of unauthorised copies are the issues involving parallel imports and the exhaustion of rights, which, unfortunately, are not addressed in the law. For example, it is unclear whether the right owner’s authorisation will be needed for the importation in Nepal of a product or a work which have been produced in another country by him, or with his authorisation. Article 26 in this respect appears to suggest that the importation of any such copies which, had they been made in Nepal, would have constituted an infringement, would be deemed unauthorised. It is obviously the non-authorised reproduction which would have constituted an infringement if the copies were made in Nepal. It thus follows that any copies produced, or put into circulation, by or with the authorisation of the right owner, are legitimate copies, and can be lawfully imported without the right owner’s consent.

Assuming this to be a correct interpretation of Article 26, it could be concluded that the right owners will have no right to prevent the parallel imports of their copies or products from another country where they are lawfully produced or placed in the market, with their consent. This, in essence, implies further the exhaustion of rights, where the copyright owner may not exercise his rights over the further distribution or resale of the copies of his works once they are put on the market by his consent.

2.10. Remedies for Infringement

Articles 27 to 29 and Article 36 provide for civil remedies and penal sanctions. Civil remedies include injunctions (Article 36) and recovery of damages from the defendant (Article 27:2). Under the penal sanctions, the law prescribes a minimum fine of Rs. 10,000 (approximately US$ 130) up to Rs. 100,000 (approximately US$ 1300) or 6 months imprisonment or both for a first offence. The punishment is doubled for a second or further infringement, and carries confiscation of all infringing material. and equipment used for its reproduction.

2.11. Enforcement

The law invests police officials with the power to search and seize infringing copies. This is provided for in Article 32 (1), which states that a right holder who suspects that his work has been, or is likely to be, reproduced in violation of Article 25 may file a complaint before a police official for the investigation of the offence. Upon receipt of the complaint, the police official shall take necessary measures to prevent infringing copies from being sold or distributed and, if necessary, may even search and seize the infringing copies.

Article 32 (2) further provides that materials and equipment used to reproduce infringing copies may also be seized. It remains unclear whether the issuance of a warrant is needed, before proceeding to search and seizure of infringing copies. It is most likely, however, that such warrants may not be needed, as delay in most cases would result in the removal or destruction of evidence. The law stipulates that seized

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14 Article 25 exclusively deals with the acts constituting an infringement of copyright.
15 See Article 50 (2) of the TRIPS Agreement where it is stated that “the judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any
articles should be destroyed if the court has ordered their confiscation. Under the new Act, the police official who investigates copyright cases should hold the rank of inspector.

Article 37 contains measures to prevent the importation of unauthorised copies. According to its provision, the customs official will have the right to suspend the release of the imported unauthorised copies for a period of 10 to 20 working days. Under Article 31 (1), a copyright holder who suspects that unauthorised copies are about to be imported in contravention of Article 26 may request in writing the customs authorities to suspend the imports of such copies. The customs official, if he finds the request reasonable after having made the necessary enquiries, may suspend the release of these copies, for a period, not exceeding 20 working days, Article 30 (2).

The punishment prescribed by Article 28 for unauthorised importation of infringing copyright material includes the confiscation of imported copies, a fine up to Rs. 100,000 (approximately US $ 1300) and the recovery of damages to the copyright owner.

The Nepalese law, regretfully, does not contain any provision to prevent the possible misuse of these measures to abuse legitimate trade. The TRIPS Agreement contains such provision.  

2.12. Collecting Societies

The law has abolished compulsory licenses and provides for the setting up of autonomous collecting societies, one for the administration of rights in each category of works. This has no precedent in Nepalese copyright law. The law invests the Registrar, with the power to oversee and control the activities of each collecting society. It is submitted that the task of setting up collecting societies, an essential component of copyright enforcement, may be extremely difficult for Nepal. The receipts from the commercial exploitation of protected works are likely to be very low, given the size of the copyright market and the scale of use of copyright materials. As the experience of most countries demonstrates, for a new collecting society, the initial period is usually challenging and arduous, with administrative expenses running much higher. At times, income may even be negative. On top of these expenses come the costs which a collecting society, during the start-up years, may have to incur for numerous litigation cases, since most users in the beginning are generally reluctant to pay for the use of protected works, thus obliging the collecting society to instigate legal proceeding delays is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.”

Article 26 forbids the importation into Nepal for commercial purpose copies of copyright works made in other country which, if made in Nepal, would infringe copyright in the work.

Article 53 of the TRIPS Agreement requires that “the competent authority shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.” Further, Article 56 of the Agreement provides: “Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.” Moreover, by Articles 53 and 56 of the TRIPS Agreement the applicant for customs actions may be required to “lodge security, and if no wrongdoing is found, must be liable to compensate the owners of the goods for any injury caused.”; cf. World Trade Organisation (WTO), “Guide to the Uruguay Round Agreements”. The Hague, The Netherlands, Kluwer Law International, 1999, p. 219.
against them.\(^{18}\) It is for this practical reason that the establishment of copyright collecting societies may not be initially viable in the Nepalese context unless they are adequately supported by government funding. Nevertheless, copyright being an essentially private right, the responsibility to administer such rights should be ultimately left to private bodies, with appropriate regulations governing their proper operation. This generally is the practice in countries with market economies.

3. Conclusion

It is regrettable that, despite the two years period spent on drafting and finalising the law, some of its provisions are still inadequate, while others require textual clarity. Just as an example, the law does not contain any provision governing infringement of moral rights. Moreover, despite the declared objective in its preamble,\(^{19}\) the Act takes no account of some of the critical issues arising from the new developments, such as the digital technology, which has a significant impact on copyright.

A close and critical reading of the text reveals several instances of lapses and defects, which exist, to a great extent, simply because copyright has never been applied previously in Nepal. The new Act will be perhaps the first Nepalese law on copyright to see a trial before the court. With its increasing use and exposure to cases involving a variety of issues and circumstances, the law will gradually mature and will become eventually more refined and polished, more consistent and reliable. Until such usage of law, the \textit{lex scripta} will remain largely incomplete, and defects and deficiencies will simply pass undetected till the need arises to respond to disputes or litigation, or that what is happening in ‘the market place’.

The law, no matter how well drafted and conceived, is unlikely to sustain its credibility unless adequate mechanisms ensuring its proper enforcement are put in place. The success of this law will much depend on the ability of the judges to give rational and creative interpretation of its provisions, and its proper enforcement by the court and the administrative authorities. Regrettably, Nepalese judges and advocates do not possess adequate knowledge of intellectual property law, for they have never had occasion to confront issues involving intellectual property rights. Given this situation, together with other problems such as lack of copyright awareness as well as difficult and unaffordable access to copyrighted works, it is apparent that Nepal has still a long way to go before it is able to develop and establish a sound copyright regime. The voyage has just begun!


\(^{19}\) The preamble to the new Act states that the objective for the legislation of the new Act is to update the existing provisions on copyright.