Government-Owned Copyright in Standards

Wither Public Interest?

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It is well-established that owners of copyright are entitled to certain exclusive rights with respect to usage of works created and owned by them. However, the entitlement is not without a counteractive force in the form of fair use or fair-dealing exceptions and the application of other copyright doctrines that limit exclusivity. In the present case, the debate surrounds the copyrightability of works owned by the Government. Should Government work, (standards formulated by Bureau of Indian Standards (BIS) in this particular case) by default, be made available in the public domain or as copyright owners, Government and Government bodies can exercise their right to charge a monetary sum for granting access to works created by them? Alternatively, is there a middle ground to arrive at a balance between public interest and rights of Government as copyright owner?

Since copyright is a statutory right given to the owners of copyrightable works, on the face of it, it would seem absolutely fair that BIS, a Government body, should claim copyright over standards prepared and published by it. Moreover, charging a fee for use of these standards hardly seems atrocious considering the rights provided to owners under Section 14 of Copyright Act, 1957.

Section 2 (k) read with Section 17 (d) of the Act makes BIS the owner of these standards. So, reserving the right to communicate these standards to public, granting renewable licenses for their use, and prohibiting any unauthorized publication or communication to the public would be well within their rights. One may find virtues with open standards, especially when they were developed by the Government. But there is no fundamental error in Government owning copyrights over its work provided that there is an incentive question to be resolved. The fact that the Parliament in its wisdom thought so is a good starting point to further the inquiry in the context of copyright over standards.

The Contention Surrounding Copyright in Standards

The dispute emerges from the fact that many of these standards relate to public health & safety. Accordingly, charges stipulated for their use seem not only exorbitant but add to the regulatory burden for market players. Purchase price for a hard copy of the entire volume of Production and General Engineering Standards is INR 4,25,560 for Indian residents. For residents outside India, the price increases tenfold to INR 42,55,600. Processing charges, packing charges, and postal charges further augment the price which, in all reasonableness, can be termed steep.

One side of the coin avers that as the owner of literary works in these standards, BIS can make them available to the public at a price they deem fit. The flip side however, also gives rise to the following question:

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However, it is not clear why the actual implementation of such purely functional standards by any end user would infringe the copyright in work if the user did not engage in literal copying. Proviso to

Section 11 of the BIS Act, 2016 allows making a copy of a Standard by an individual for personal use. This, combined with the sheer difficulty in enforcing copyright claims against end users of standards who actually implement them, may be the reason why such end users have not been sued by the BIS for copyright infringement after public domain activist Carl Malamud made them available online on his website in the year 2013.

The present discord surrounding standards and their eligibility for copyright protection goes back to the year 2015 when Carl Malamud filed a PIL against the Union of India and BIS; praying for issue of writs of mandamus and prohibition against the respondent.

Do Standards hold the Force of Law?

There is no legal basis to support the claim that the standards formulated by BIS are equivalent to law. The constitution of BIS under a parliamentary Act does not accord the status of law to standards formulated by it.

The BIS Act states the purpose of BIS as

BIS product certifications, in most cases, are voluntary in nature and do not hold the status of a legal mandate. In view of public health and safety, certain items have been brought under the mandatory certification scheme where manufacturers of items notified under quality control orders under different statutes need a mandatory product certification from BIS. Foreign manufacturers are also mandatorily required to obtain product certification licenses from BIS.

Except these two cases, product certification scheme is entirely voluntary in nature and serves the purpose of enhancing product value by ascribing conformity of a product with technical specifications or any other criterion determining product quality. This position is further affirmed by a reading of Section 16 of the BIS Act which empowers the Central Government to direct compulsory use of a Standard Mark in case of goods or articles which are of concern to human, plant and animal health & safety, national security, or prevention of unfair trade practices. These items are accordingly brought under the mandatory certification scheme as pointed above.

Section 9 (1) (g) of the BIS Act empowers the Bureau to publish and sell its standards. As per Rule 15 (2) of BIS Rules, 2017 [Rule 7 (1) (b) of BIS Rules, 1987], it is only mandatory to notify the establishment, revision, amendment, or withdrawal of Standards in the Official Gazette; which means that it is the establishment, revision, amendment, or withdrawal of a Standard which will have to be notified in the Official Gazette and not the entire Standard itself. Notification in the Official Gazette serves to notify the public about establishment, revision, amendment, or withdrawal of a Standard. Mandatory publication of the complete standard in the Official Gazette would defeat the very purpose behind the aforementioned Section 9 (1) (g) as the work will be available for unrestricted viewing and usage under the fair dealing exception.

Rule 31 also makes it mandatory to publish a Standard Mark in the Official Gazette and not a Standard; the difference between the two being easily discernible from their respective definitions in the BIS Act. Publishing the entire standard is not mandatory under the BIS Act or Rules. So, the mere act of selling the standards for monetary consideration cannot be termed arbitrary or unconstitutional.

Standard formulating bodies worldwide, like ISO/IEC, Standards New Zealand, and ABS rely on selling and licensing of standards to sustain themselves. BIS, the body in question, explicitly states that certification operations account for 90 percent of its revenue.

Further, with respect to the cost-revenue issue, in **293 F.3d 791 (5th Cir. 2002)]**, the dissenting judges made the observation below.

The observation is self-explanatory. Stripping an organization of its major revenue source to fulfill a demand for granting free access to all standards is simply unjust if there are costs involved to develop standards without the Government using scarce tax resources to create these regulatory standards.

Can all Standards be measured with the same yardstick?

The BIS defines the benefits of standards as "

Some, but not all purported benefits concern public welfare. In this context, it would be fundamentally flawed to use a blanket yardstick of public interest and welfare to argue in favour of free public access to all standards.

Fair Dealing and Copyright

A careful reading of relevant provisions of the BIS Act and Rules and Rule 7 (1) (b) of the 1987 Rules in particular, as it has been relied on in the PIL for making a case for mandatory publication of Standards in the Official Gazette would reveal that it is which is to be mandatorily notified in the Official Gazette and not Yet, for the sake of argument, if we assume that the Standards indeed hold the force of law and thus unauthorized reproduction, publication, and communication to public of these standards is within the circumference of the fair dealing exception in Section 52 (1) (q); even then the argument would lose its ground.

The exception in the above section which expressly states that reproduction or publication of any matter published in the official gazette is not infringement also lays down in clear terms that this fair dealing exception does not apply to an Act of legislature. Even when reproducing an Act of legislature has been termed as fair dealing, there is an added stipulation that such reproduction can be made subject to the condition of reproduction or publication together with original material. Verbatim reproduction of such Act of legislature is nowhere authorized in the Act.

The dissenting judges, including the Chief Justice in **293 F.3d 791 (5th Cir. 2002)]** aptly observed that

Concerning fair use, it was further observed that,

The same observation can be made in the present situation involving BIS. It is safe to state that fair use exceptions do not authorize a person to hamper the revenue source of the organization whose material they are publishing on the internet for free access.

In the end, the final question emerges.

The answer to both the questions is a yes, albeit with some qualifications. BIS is a Government body which, as per the Copyright Act is the first owner in works commissioned by it. The fairness and equity of the copyright claim aside, the legality of it cannot be brought into question. Works created by the BIS cannot be termed non-copyrightable subject matter only because of the nature of work. It would be like compelling a medical professional to not reserve any rights in a medical book authored by them just because the subject matter therein concerns public health.

As established above, standards do not hold the force equivalent to that of a law. Accordingly, irrespective of their nature, they do not warrant full disclosure in public domain and it is perfectly acceptable, and legal for BIS to assert copyright over works created and/or published under its direction or control.

However, it is also an indubitable fact that usage of some standards will definitely be covered by the fair use exception envisaged by Section 52 of the Act, the teaching exception under Section 52 (1) (h) being one of them. The National Building Code, for example, as has also been observed in the PIL, is used for academic purposes by engineering students. Charging a student an arduous sum for academically useful material could be indeed viewed as unjust and unfair.

Further, copyright claim over other standards of vital importance such as food & agriculture standards, medical equipment & hospital planning, water resources etc. can be brought under scanner citing issues of public health, safety, and security.

On the other hand, some standards, such as the ones concerning textiles, banking, and financial services, while important, do not concern public health, safety, or security. Copyright over such standards may not be challenged on the grounds of broader public interest when one views regulatory costs of procuring such standards leading to a market failure. But in all such cases, the regulatory burden to comply is the same for all market players and entails no price discrimination against specific players.

Is there a solution?

A plausible solution would be to craft some specific exceptions to the copyright ownership of BIS. Being a Government body, public welfare should be the primary pointer on its agenda. Standards with compulsory academic usage or pivotal impact on health, safety, and security of general public should either be made available free of cost or at reasonable prices. A license of rights regime akin to statutory licensing may be the way forward if there is a cost/incentive question to be resolved.

Determining the reasonableness of royalty/licensing fee is a matter to be adjudicated by the copyright board (the appellate board after the 2017 amendment), and the judiciary. The benchmark for ascertaining the impact of a particular standard on public health, safety, and security is another matter in the adjudicatory domain of the judiciary.

For the remaining standards, the BIS should be free to determine the price, in accordance with its own rules and its rights as a copyright owner. Classification of standards into copyright protected and public domain categories would be a suitable method of striking a balance between public interest and rights of the copyright owner and bringing the entire debate to a logical conclusion. In fact, such a model of two sided markets where some standards developed by BIS for public safety etc. (which are mandatory in nature) is forfeited in the public domain on a royalty free basis, and others where it could charge a price where such standards are voluntary, is the surest way towards successful creation and commercialization of Government-owned standards.

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