EXPLORING THE INTERSECTION: INFORMATION TECHNOLOGY LAW AND TECHNOLOGY PROTECTION MEASURES UNDER THE COPYRIGHT (AMENDMENT) ACT, 2012

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I. INTRODUCTION

Digitization was a universal phenomenon which impacted India in the end of the twentieth century. The change in economic policy leading to the opening of the economy in the early 90s resulted in the increased availability of computers, especially to the domestic consumers. The situation received a further thrust with the availability of Internet and its rampant use. The accessibility of digital technology, with its various advantages especially quality, allowed more and more works to be converted into this format and creation of newer works in digital format.

The more the works started to be created in this format, the more became their unauthorized use. This led to the creation of technological measures (TMs) which are capable of preventing these unauthorized uses either by preventing access to these works or by preventing certain activities. These technologies are commonly known as access control TMsand copy control TMs, respectively. But these technological measures employed by authors (owners of the work) were not welcomed by consumers of goods and services in the digital market. This conflict led to the creation of technology capable of circumventing the TMs applied by authors for the protection of their works which nevertheless resulted in the unauthorized use of the works.

Consequently, authors lobbied to get protection for these technological measures that were being employed to protect copyrighted work leading to such provisions being incorporated in the WIPO Copyright Treaty[1](WCT) as well as WIPO Performances and Phonogram Treaty[2](WPPT) at the international level. Based on these provisions, many States, particularly, the United States[3], Australia[4] and England[5], enacted national legislations to protect

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[1] Article 11 - Obligations concerning technological measures.
[2] Article 18 - Obligations concerning technological measures.
[3] The Digital Millennium Copyright Act, 1998.
[4] The Digital Agenda Act, 2000.
[5] The Copyright, Designs and Patent Act, 1988.

technological measures applied by copyright owners to safeguard their works. The recognition of such rights created various problems in all these countries, the major being that common people were not in a position to enjoy the rights conferred to them as limitations and exceptions to copyright. It was under these circumstances that India introduced a provision for protecting technological measures via the Copyright (Amendment) Act in 2012.

RESEARCH OBJECTIVES

1. To carve out the loopholes present in the Copyright Act, 1957 in relation to Technology Protection Measures.
2. To discuss the impact of cyber piracy on the entertainment and media industry and how the new amended Act tries to mitigate this problem.
3. To discuss the extent to which Information Technology Act could help penalizing the act of circumvention of protection measures or facilitating circumvention w.r.t to copyright.
4. To suggest certain recommendation in Copyright (Amendment) Act, 2012 for protection of anti-circumvention measures.

RESEARCH METHODOLOGY

Nature of research work: This project "Technology protection measures under Copyright (Amendment) Act, 2012" is a 'Doctrinal' work. Doctrinal research includes studying books and established literature and not actually going to the field and doing empirical research.

Source of research work: The sources of this project are both primary (bare acts, statutes, etc) and secondary sources (books given by different authors, journals, internet, etc).

II. INDIAN SCENARIO – E&M INDUFSTRY

India has one among the largest media consuming and content creating industry and for the same reason, the segment that took most advantage of this wave of digitization is the entertainment and media (E&M) industry. This led to the mammoth growth of this sector outpacing the growth in gross domestic product (GDP). While annual average growth in nominal GDP was 14.48 per cent over the period 2004-08, the E&M industry grew by 16.6

percent over the same period.[6] In 2008, the E&M industry recorded a growth of 10.3 per cent, over the previous year. The value of the industry in 2008 was estimated to be Rs. 51,300 crore and was projected to be Rs. 1, 15,700 crore by 2012 as per the FICCI - PricewaterhouseCoopers 2008 Reporton the Indian Entertainment and Media Industry. This industry consists of various segments like television, print media, filmed entertainment, radio, music, Internet advertisement, sports entertainment, animation, gaming, etc., but the sector that has benefited most is filmed entertainment.

Even when the terminology used is E&M industry, it can be seen that the best advantage has been to the film entertainment sector, mainly Bollywood, since in terms of production it is the biggest, producing more than 1000 films a year with a ticket sale of around Rs 800 billion.The revenues of the Indian film industry have grown 360 per cent in the period 1998 - 2005, and 58 per cent in the period 2001-2005.[7]

This huge market is not the playground of any single large player, but is owned by multiple competitors, mostly individuals. It is only after film production was conferred with an industry status; did corporations start to enter this arena leading to the establishment of production houses.[8] The popularization of Indian culture across the globe established a market for Indian entertainment industry elsewhere too. Realising the potential of this sector, multinational production centres of the west started investing here, the notable among them being Sony, Universal and Fox Corporation. This led to huge foreign direct investment (FDI), with the year 2006 registering the maximum inflow.

The point that has to be noted is that digitization of the works is one of the prime causes that led to this boom and was followed by the inevitable outcome of digitization, namely, unauthorized copying of the work, commonly termed as 'piracy'. Technology has developed to such an extent that copying of a work has been made quite easy, consequently hindering further growth of the industry. A study by Ernst & Young, India showed that an amount to the tune of Rs 16 000 crores is lost each year due to piracy. The Motion Pictures Association of America

[6] Indian entertainment and media outlook 2009, PricewaterhouseCoopers, p. 6, 62, http://www.pwc.com/en_in/in/assets/pdfs/pwc-indian-entertainment-and-media-outlook-2009.pdf
[7] Lorenzen Mark & Täube Florian Arun, Breakout from Bollywood? The roles of social networks and regulation in the evolution of Indian film industry, Journal of International Management, 14 (2008) 286.
[8] Roy Chowdhury Ayan, The future of copyright in India, Journal of Intellectual Property Law and Practice, 3 (2) (2008) 102-114.

reported a loss of USD186 million during 2004-05 in India.[9] This forced the owners of such work to resort to technological processes for the protection of their works against piracy when they made their work available in India. Simultaneously, producers of certain works in India also resorted to the use of technological measures to protect their works against piracy.

But technology has always found its answer in the same language by producing technologies capable of negating the earlier ones, thereby forcing the owners of technological measures to seek to legal safeguards for their protective technology. This made the major right holders, domestic and international, lobby for the introduction of such legal provisions, irrespective of the fact that India is under no international obligation to provide for such protection.

III. COPYRIGHT ACT, 1957

The Indian Copyright Act, 1957 as amended in 1994, contained certain provisions which can be interpreted to include protection of anti-circumventing technology. The Act defined the term, 'plate' to include certain devices that aid or intend to aid the reproduction of works. The section used the term 'other devices' after specifying certain other technologies that are used for the purpose of reproducing existing works. Hence the term 'other devices' warranted the same kind of interpretation and was meant to include any kind of device or process which had the potential of aiding reproduction or duplication of the work.

The question which arises is whether circumventing technology can come within the purview of plates. To answer this, examples of some circumventing technologies are considered. De-CSS is one such technology meant to circumvent a protective technology called content scrambling system (CSS) which constitutes a two-part interlocking system between the digital video disc (DVD) and the DVD player. Only if both these systems are authorized and complementary, will certainly acts like copying take place. It is evident that the intention of the technology is to prevent unauthorized reproduction. When one looks into the definition of plates it can be seen that all the devices included therein are the ones capable of producing copies relating to different media in which they apply.

The same is the case in use of De-CSS in relation to the work protected by CSS. Hence it can be concluded that De-CSS is a 'plate' coming within the definition of Section 2(t) of the

[9] Sensarkar Nilanjana, The potential impact of digital rights management on the Indian entertainment industry, Journal of Intellectual Property Law and Practice, 6 (1) (2007) 47.

Copyright Act. Applying this to all copy protection technologies, it can be said that such technologies squarely come within the ambit of the definition of plates. But on applying the above interpretation to the class of technologies called access control technologies, it can be seen that the analogy does not fit in. The purpose of using such, technologies, a typical example being 'region codes', is to prevent unauthorized access to the work and not to make copies. Hence, such technologies do not fall within the purview of plates. Thus, while copy control technologies fall within the definition of plates, access control technologies do not.

The section includes within its ambit such devices 'used or intended to be used for printing or reproducing copies of any work'. It can be seen that through this, the ambit of the device has been restricted to that kind of technology which will aid in the violation of the reproduction right. Although the nature of right, the violation of which is prohibited is specified, namely, the reproduction right; and in that aspect the application of the provision is narrowed, it can be seen that the use of the term 'intended to be used' creates much space for the application of the provision. There is thus, no need for actual violation of the right; even a potential violation is capable of attracting the provision. This leads to a situation where any technology capable of reproducing or printing illegal copies can come within the ambit of the term 'plate' even if it has never been put to such use. On applying the same in the digital context, it can be seen that, due to the nature of the technology, every activity involves a reproduction, either temporary or permanent. If the term reproduction includes the transient copying that takes place in the digital context, then all kinds of activities will come within the purview of this section as long as they are done with the aid of such devices. In the case of devices that create a permanent copy, they will come squarely within the ambit of plates for the reason that whenever a person is using a technology for the purpose of fulfilling his need he actually reproduces or intends reproduction.

The above stated anomaly involving inclusion of virtually all kinds of technologies is clarified by the provision imposing liability for the possession of plates which is provided under Sections 65 and 66 of the Copyright Act, 1957. Liability is attracted only when plates are made or kept in possession for the purpose of making infringing copies of the work. The term 'infringing copy' as per Section 2(m) of the Act means a copy made through reproduction in contravention of the provisions thereof. In short, an infringing copy is a copy which is the consequence of a reproduction prohibited by the Copyright Act. Consequently, copies made on reproduction for the activities permitted under the Act will not fall under the category of

infringing copies. Thus, there is a clear link between the violation of the reproduction right and infringement of copyright and as long as the result is not an infringing copy, the possession or manufacture of plates will not invite any liability. Applying this to the digital context, although the technology will require reproduction, as long as such reproduction is not for the purpose of creating infringing copies, liability will not be attracted.

Another point to be noted is the actors that will be covered under these provisions. The liability under the section accrues when a person 'knowingly' makes or has in his possession such device for the purpose of infringing copyright. The term 'knowingly' has twofold implications. First, in order to attach liability, it has to be proved that the person had knowledge that the device is being used for the purpose of infringing somebody else's copyright. Secondly, liability is attached not only to the person who has such a device in possession for the purpose of actual infringement but also to such persons who manufacture the devices knowing that they will be used for the purpose of infringing copyright. This shows that the making or the possession of such device must be with a reasonable apprehension that the result will be infringement of copyright of some other person. If the technology is capable of activities which might result on infringement or non–infringement based on the action of the person using such technology, liability does not attach to the manufacturer, if he can prove that he had provided such device for the purpose of conducting non–infringing activities. When this is applied in the digital context to circumvention technology, it can be seen that the same technology can be capable of facilitating both - infringing and non-infringing activities. In such cases, the manufacturer or user of such devices can be held liable unfairly, affecting situations in which the technology is used for non–infringing activities.

Moreover, the nature of the liability also needs to be looked into. The liability attached includes confiscation of the plates and giving it to the copyright owner apart from the imposition of criminal liability which includes imprisonment and also imposition of fine without any prescribed upper limit. Thus if one applies these liability provisions to circumventing technology, based on the above stated argument that circumventing technology will come within the purview of plates, it is clear that any person who knowingly possesses or manufactures any technology that will help in the circumvention of any copy protection technology for the purpose of infringing copyright of any other person, will face criminal prosecution since there is a reproduction and the person causing such actual reproduction or

facilitating such reproduction has reasonable knowledge to comprehend that the technology can very well be used for the purpose of creating infringing copies, irrespective of the fact that it is due to the inherent property of the technology.

If the above suggested interpretation is attached to the term 'plate' and consequential liability is attached, it can be seen that this will give rise to a scenario where lawful exercise of the rights guaranteed under the Copyright Act would become unattainable. The Copyright Act, 1957 permitted the use of works by third parties so as to ensure that such third parties can meaningfully enjoy their personal and social life. This enjoyment would be prejudicially affected by equating plates and circumventing technology. This is one of the reasons which led other countries to enact a separate set of principles to deal with circumvention technology, though they have similar provisions[10] in their copyright legislations dealing with plates and other devices. This clearly shows the desire of the law to facilitate access to information for the purpose of enrichment of society.

The lack of provisions such as one relating to 'plates' in the Indian Copyright Act in other jurisdictions, aims to accommodate the new technology meaningfully, in the sense that right of the owners of the work as well as the public who ought to enjoy and attain benefits of the work are both taken care of in a beneficial manner. Often administrative authorities act first and only at a later point of time will a competent court decide as to whether such technology falls within the purview of the term 'plate'.

Considering that technology is in such a state of flux, the application of this provision therefore, can lead to uncertainties and complexities. Thus, expanding the boundaries of existing law so as to accommodate the latest technology, which itself has not been standardized nor for that matter completely evolved, will create a situation of further uncertainties leading to social disruption. This realization appears to have paved way for the enactment of a new provision dealing exclusively with technological measures and its circumvention.

IV. CURRENT LAW AND RELEVANT PROVISIONS

Due to pressure from various quarters, domestic and international, the Government of India introduced several amendments in the Copyright Act via the Copyright (Amendment) Act,

[10] Section 503 US Copyright Code includes confiscation of plates, moulds, tapes, negatives, etc. This is a provision very similar to Section 66 of the Indian Copyright Act, 1957.

2012; one such amendment is the introduction of a provision related to protection of technological measures. The amendment inserted a new provision (Section 65A) specifically dealing with protection of technological measures along with certain specified exceptions to the same. The remaining portion of this article deals with an analysis of this provision.

Subject Matter of the Provision

The provision attaches liability to every person who 'circumvents an effective technological measure'. However, it is noteworthy that neither the term 'circumvention' nor the terms 'technological measure' or 'effective technological measures' have been defined in the Act. The corresponding provisions in the WCT4 and the WPPT5 also left these definitions open ended so that different Member States could interpret these terms keeping in view their domestic needs. For instance, the US law, namely, the Digital Millennium Copyright Act, 1988 (DMCA) in Section 1201(a)(3)(B) and its Australian counterpart, the Digital Agenda Act, 1968 (DAA) in Section 10 (1), have defined the term 'effective technological measure' in relation to infringement activity, specifically access control. The Section 1201(a)(3)(A) of DMCA also defines the meaning of circumvention. The European Union (EU) has defined 'technological measures' in relation to activities restricted and unauthorized by right holders while 'effective' has been defined in relation to technologies such as encryption, scrambling, etc.[11]

The absence of definitions for terms like 'technological measure' in the Indian amendment, creates a gap because it is not clear as to whether the provision relates to access control measures or copy control measures or both. Furthermore, it being preceded by the term 'effective' necessarily implies that all technological measures are not effective. This further implies that circumvention of non–effective technological measures does not attract liability under this provision and if infringement is caused, liability can be attached only to infringement and not circumvention. But the proposed provision does not lay down any guideline as to how to differentiate between an effective technological measure and a non– effective technological measure. If the purpose of a definition is to give clarity as to what will be the activities that will be covered by the provision, the proposed amendment has failed in this aspect. Consequently it has also not done much to simplify possible problems relating to the interpretation of the term 'plate' under Section 2(t) of the Copyright Act, 1957 which was earlier in existence.

[11] EU Directive, 2001 Article 6, Para 3.

From the drafting of the provision it seems that the legislature has left it entirely to the domain of the judiciary to decide as to what will comprise an effective technological measure and what will constitute circumvention. This is a policy decision that should have taken into account various facts like identification of all effective technologies that have minimum adverse effect on the legitimate interest of the public, recognition of all technologies that serve the need of the owners of copyrighted works protected by technology, etc. Further, the application of the provision essentially lies in the meanings attributed to these words and leaving them to the judiciary does not seem to be a commendable approach.

Activities Covered

The requirement of WCT and WPPT is to provide protection against the act of actual circumvention. A close look at the laws of different countries reveals that the laws of most countries have gone beyond this international mandate and have afforded extended protection even to preparatory activities like manufacture, import, sale, etc., of the devices and services used for the purpose of circumventing a technological measure.

The new Indian provision uses the term 'who circumvents' indicating that the activity covered is that of circumvention. Unlike the US provision, since circumvention remains undefined, the authors shall consider the dictionary definition of circumvention which means to evade, elude, etc. Thus, the activity intended to be covered is the avoidance or bypassing of an effective technological measure. Moreover, the words in the provision imply that there must be an actual circumvention of an effective TM. This means that liability is imposed on the person who does the act of circumvention. This takes out from the purview of the provision, any person who facilitates, by making available the circumventing technology or otherwise, the act of circumvention, although it is possible to impose liability on such persons as abettors of infringement if it can be proved that they had the reasonable belief that the work is being circumvented for the purpose of infringing someone's copyright. This is in contrast with the provisions of the DMCA, DAA and EU Directive, all of which impose liability on the person who in one way or the other assists in the circumvention of a technological measure. The advantage of the Indian provision when compared to the others arises in those situations in which a person might need to circumvent a technological measure for the legitimate exercise of his right but might not be having the technical know – how to do the same which might require him to take the assistance of a third party, through the rendering of a device or process.

While the other laws prohibit such third-party activities and make them liable under respective provisions consequently affecting the right of another person to satisfy his/her legitimate needs, the Indian law provides a scenario in which such person can effectively exercise his right with the help of third parties as there is no prohibition to such activities of assistance or preparation of circumvention. In this regard, the new Indian provision seems more balanced.

Moreover, the act of circumvention attracts liability only when there is an 'intention of infringing rights'. Intention means a purpose or desire to bring about a contemplated result or foresight that certain consequences will result from the conduct of the person.[12] This means that the activity of a person is covered only if he does such act with the desire to make an infringing copy. Under the DMCA there is no direct link between circumvention and infringement, leading to a situation where remedy can be granted under the copyright regime even in absence of copyright infringement. Hence, legislatively providing a condition that circumvention should have a link with copyright infringement will ensure that the provision is not used to counter market competition. In this aspect too, the Indian provision seems better in comparison.

When this new provision that imposes liability in relation to plates is compared with the older provision, it can be seen that the language used in relation to plates is 'knowingly makes or has in his possession'. Here the mental element attributed is knowledge which is the awareness of the consequence of an act. In situations where 'knowledge' can be established, a person is held responsible even if he did not desire a particular outcome as long as it can be established that he had reasonable knowledge that the outcome might have been the consequence of such act. In such situations, the law is stricter to the extent that absence of intention can also attract liability.

The reason for the difference in approach in dealing with liability in case of circumvention of a technological measure and plates could be that in every case of technological circumvention, the person circumventing has the knowledge that his act can end in infringement although he may not desire such a result. Consequently, if knowledge had been one of the required mental elements in case of circumvention of technological measures, then every such circumvention would end up in attracting liability. This is probably the reason why the legislature defined

[12] Glanville Williams, Text Book of Criminal Law, 2nd ed. (Universal Law Publishing Co Pvt Ltd, New Delhi), 1999, p. 27, 74 – 75.

different principles of liability for these two. This indirectly shows that the legislature does not hold the view that circumvention technology will come within the purview of plates.

But the point to be noted is that these provisions might be read together. This combined reading of the provisions can create two fold problems. Firstly, if the rationale of providing the requirement of 'intention' to attract liability for circumvention was with a view to identify situations in which circumvention occurs but infringement does not, then the provision requiring only 'knowledge' will be in direct conflict since the same set of facts will be covered under two provisions requiring different mental elements. Secondly, the activity that is covered under the anti – circumvention provision is only the actual act of circumvention. If the provision dealing with plates is also attracted then persons who manufacture technology which facilitates circumvention will also be liable. The activity of manufacturing such devices has been consciously kept outside the purview of the circumvention provision with the intention of achieving a social goal. Hence attracting the provision in relation to plates will only facilitate the inclusion of a set of activity which has been intentionally excluded.

Actors Targeted

As the activity contemplated under the provision is only actual circumvention, the only actor targeted is the person who actually circumvents an effective technological measure applied to protect the work. The proposed provision has specifically excluded activities such as manufacture or otherwise dealing with technology that will facilitate circumvention. Thus, it can be seen that all preparatory activities are excluded and consequently all persons who make such preparation. This is keeping in view the dual nature of the technology in the sense that the technology that would facilitate circumvention for the purposes permitted by the section itself is the one that can be used for infringement. As a result, if manufacture and otherwise dealing in the technology are prohibited, this will not only inhibit infringement but also those activities which the copyright regime aims to encourage. It is in order to prevent such a situation, manufacturers and other persons have been kept beyond the ambit of liability.

Rights Protected

The WCT and WPPT mandate is that States need to safeguard only those technologies which have been used to protect rights conferred by the respective convention and under the Berne mandate. It further restricts those acts which are not authorized by the author or restricted by

the law. The Indian provision says that it can be 'applied for the purpose of protecting any of the rights conferred by this Act'. This provides that any technological measure applied for the protection of any and all rights provided under the Act will be covered. The first category of rights protected under the Act is the economic right (Section 14). Various rights are guaranteed under the title of economic right: the major being the right of reproduction which comprises of making available of physical copies of the work and the right of communication of the work which comprises of making the work available otherwise than by issuing physical copies. It is this right of communication of the work to the public that is most significant in the online digital context.

The earlier Copyright Act, 1957, under the right of communication to public, did cover the Internet scenario in a limited way. To bring further clarity, the Amendment Act of 2012 suggested modification in the definition of communication to public [Section 2(ff) of the Copyright Act, 1957] so as to include the online context. This has been done by specifying that the right includes making the work available at such place and time individually chosen by the person accessing such work. This means that the author of the work has the right to make the work available to the public at large or to a particular category of the public. This in turn confers on the author a right to grant or deny access to a particular work, in relation to the whole world or any specified group.

When the provision dealing with imposing liability for circumvention of technological measures comes into force, the right of regulating access to the work will also devolve on the author of the work. This means that the copyright regime thereon has the duty to protect this right also. This implies that a technological measure that is intended to protect access will also be covered within the proposed provision for the reason that access right is a protected right. This also means that circumvention of an access control technological measure will also attract liability, though the same has not been particularly laid down.

The next set of rights guaranteed under the 1957 Act is moral right provided in Section 57. These rights protect the work from being distorted, mutilated, etc. The protection of these rights implies that technological measures that are employed for the safeguard of integrity of works also get protection. Apart from these rights, the 1957 Act also confers certain specific rights on performers known as 'performers right' (Section 38) and on broadcasting organizations known as 'broadcast reproduction right'(Section 37), both being economic in nature. Contrary to the

nature of the rights under Section 14, these rights are negative rights. This raises the question as to whether circumvention of any technological measure meant to protect these kinds of rights attracts liability. To clarify this position and impose liability on situations of circumvention of technological measure protection, the Amendment Act, 2012 seeks to amend the existing Section 39A so as to include a direct link to the provision imposing circumvention liability, i.e. the Section 65A. When it is said that the above stated rights are protected, it is meant that only situations involving violation of these rights resulting in the infringement of copyright is envisaged. And only circumvention in such situations will attract liability.

Thus, it can be seen that the infringement of rights is directly linked to circumvention. A perusal into the legislation of other countries shows that this clarity, i.e. direct relation with infringement of copyright, is missing. Both the DMCA and the Australian statute impose liability on a person for the circumvention of technological measure meant to protect copyrighted work. The laws there do not mandate that such circumvention must lead to copyright infringement. This has caused much difficulty since persons who had circumvented the protection technology had been held liable even in cases of mere circumvention not leading to any kind of loss to the owner of the protected copyrighted work. In EU, however, direct link between the act of circumvention and resulting infringement is obligatory. It can be see that the new Indian provision has also followed the same line, underlining the fact that the purpose of copyright law is to protect what is due to the author of an original work.

Remedy

The only remedy provided under the proposed amendment is of criminal nature. Any person against whom violation of this provision is proved shall serves prison term of maximum two years and is also liable to pay a fine for which no limits have been fixed. This could be because the type of works could be totally different and the amount of loss that could potentially be caused to the owner of the work is also likely to vary in magnitude. Here again the striking similarity in comparison to the provision (Section 65) imposing liability for knowingly making or possessing plates is evident, since it also provides for criminal liability comprising of imprisonment extending to a maximum term of two years along with fine. This similarity probably stems from the similarity in the nature of the activity and its consequence, though the mental element attributed to is different.

Express Exceptions

Like other statutes that impose liability for circumvention of technological measures have provided for specific statutory exception, so also the new Indian statute has provided for certain specific situations in which circumvention is permissible. The Section 65 specifically says that it does not prohibit any person from 'doing anything referred to therein for a purpose not expressly prohibited by this Act'. Accordingly, the section refers to the activity of actual circumvention, thus specifically permitting circumvention. The permission given for circumvention under the provision is not absolute and must be for a purpose 'not expressly prohibited by this Act'. From the framework of the Copyright Act, it is evident that the activities that are expressly prohibited by the Act are only those resulting in infringement activities. These activities are specifically mentioned in Section 51 of the Copyright Act, 1957. The majority of such activities are exercising rights of the owner of the work without a licence and otherwise dealing in the copyrighted work without the authority of law or causing economic loss to the owner of such work which includes importing infringing copies of the work.

At the same time, the Act provides that the doing of certain activities will not be considered as infringement by the law, as provided in Section 52. The major of these activities include – reproduction for fair use in literary, dramatic, musical and artistic work, but not computer programs; for private use including research, criticism and review; for purpose of reporting current events, for legislative and judicial proceedings; for educational and instructional purposes; for libraries; communication of the work through reading and recitation in public of reasonable extracts; by amateur clubs; religious institutions; etc. Specific exception has been provided in the use of computer programs for the making of backup copies, copies for the purpose of utilization of the program for which it is provided, etc. For any of these above stated purposes an effective technological measure can be circumvented.

Under the older Act, the principle of fair dealing can be exercised only in relation to literary, musical, dramatic and artistic works and not in respect of cinematograph films and sound recordings. Hence circumventing a technological measure which protects a cinematograph film under the principle of fair dealing is not maintainable and will attract liability for anti – circumvention and infringement. But the Amendment Act, 2012 seeks to amend the existing Section 52(1) (a) and includes within its purview, cinematograph films.

Apart from this, the Act has certain other sections conferring certain rights on performers and broadcasting organizations while at the same time prohibiting certain activities. One can infer from this that circumvention of an effective technological measure for the purpose of doing any of these activities will also attract liability. This position has been clarified by the Amendment Act, 2012 by specifically linking these rights to the anti –circumvention provision.

An examination of other statutes, including the WIPO Treaties, which deal with exceptions to circumvention liability, shows that activities permitted by the author are also excluded. This means that circumvention of a technological measure under a licence from the owner of the work is permissible, irrespective of the whether the act shall result in infringement of copyright. From a bare reading of the current Indian provision, it can be seen that this freedom is not conferred on the author of the work. But as stated earlier, this will be included since this is an activity that has not been expressly prohibited by the Act.

Section 65A of the Copyright Act also provides an exception dealing with encryption research. Such an exception has also been provided under the DMCA as well as the Australian law. The provision is however, included as two independent activities, one being the circumvention of the technology and the second being infringement of copyright. But, for the purpose of conducting study in relation to encryption, decryption and related technology, it is necessary to break the technology. This will attract liability, both civil and criminal in nature. To avoid this situation and for the purpose of advancement in the field of encryption an express exception is necessary.

What has to be noted is that though infringement of copyright and infringement of technology are different and distinct, the purpose of copyright law is only to look into the cases of copyright infringement and infringement of technology needs to be considered only if it results in infringement of copyright. The Indian provision tows this line. Circumvention per se has not been made an illegal activity. Hence, there is no need to provide for a specific permission to break the technology for the purpose of encryption research for the reason that circumvention without any resulting infringement is not within the ambit of the proposed provision and therefore, providing for such an exception has no significance.

Facilitating Circumvention

A unique provision can be seen in the current Indian Copyright Act with reference to liability of a person who facilitates the creation of technology to circumvent in Section 65A. While most jurisdictions impose liability on persons facilitating circumvention, the Indian provision expressly provides that a third party can help a person to circumvent a technological measure provided such circumvention is not to do any activity prohibited by the Act. In order to facilitate such circumvention and with a view to monitor the same, the section obligates that a record be kept of the person seeking such circumvention and also the reason for it. The inclusion of this provision is with the realization that it is not within the capacity of every person to have the technical knowhow to circumvent a technological measure applied to a work so as to satisfy his personal legitimate needs. In most cases of circumvention, there is a requisite for a certain degree of professional expertise and the section ensures that this professional expertise is made available to the common man.

But there could be a huge problem in the implementation of this section. In a country as vast as India, it is not easy to identify and isolate persons who have this technical knowhow. A wide variety of persons ranging from a computer geek, who could be a minor totally unaware of the consequences of his action, to a professional hacker might have technical knowledge of this nature. Another point of significance is that the section makes maintenance of records mandatory in situations facilitating circumvention but does not impose any sanction in case of non – maintenance. Nevertheless, in certain situations it might be possible to treat them as abettors of infringement provided that they had reasonable knowledge that such circumvention is for the purpose of carrying out infringing activities.

Also, there is no mechanism provided under the section for inspection of records or such other activities and appears to be entirely in the custody of the person who is facilitating circumvention, who is free not to make any entry or alter entries whenever he feels that his interest might be affected in any manner. Thus, there is no guarantee that the records are genuine and moreover, such records come of some use only in case of disputes and even when presented in the court, this record may not have much evidentiary value.

If the purpose of including this provision is to track down persons who after taking advantage of this provision indulge in infringement, it fails again since once a protective technological

measure is circumvented in relation to one particular work, the same mechanism can be used to circumvent the same protective technological measure employed to protect any other work. Besides, there is no guarantee that the circumvention technology will remain with the person who sought such facilitation of circumvention. For example, if the circumventing technology is a software which was given to the person seeking circumvention for a legitimate purpose, there is every chance that such software can be taken from him by any other person and used for infringing some other person's copyright. In such cases, even if the record was properly maintained, the entries in the record will not serve much purpose in tracking the person who has infringed copyright.

Another scenario which the provision does not contemplate is the posting of a circumventing technology on the Internet so that it can be accessed and used by any person, irrespective of whether the use into which he puts that technology is permitted or prohibited. As the provision does not prohibit persons from making available technology that will facilitate circumvention of a protective technological measure, any person can make such circumventing technology available through any means. Although in such situations, the persons making available the circumvention technology can still be considered as an abettor, it is not clear to what extent such anargument would be successful. And as the proviso do not impose any liability on persons who do not maintain proper records, if the person making the technology available through Internet has provided for some mechanism seeking requisite information from persons accessing such technology, the mandate of the proviso will be satisfied although ineffective in relation to the needs for which it was enacted.

V. RECOMMENDATIONS

1. Express definition of Effective Technological Measures should be provided.

Infirmity - The absence of definitions for terms like 'technological measure' in the Indian amendment, creates a gap because it is not clear as to whether the provision relates to access control measures or copy control measures or both. Furthermore, it being preceded by the term 'effective' necessarily implies that all technological measures are not effective.

Article 6(3) of Information Society Directive of European Legislation defines -

Technological measures – Technological protection measures is defined as any technology, device or component that in its normal operation is designed to prevent acts in respect of works or other subject matter, which are not authorized by the right holder.

Effective technological measures - where the use of the copyright work or other subject matter is controlled by the right holder through application of an access control or protection process such as encryption.

Solution

There is a need to expressive definition of technological measures in the amended section 65A of Copyright (Amendment) Act, 2012, (As provided in the Technological Protection Measures and the Copyright Amendment Act 2006, Australia). Technological protection measures is a broad term that covers many different types of technologies used to control access to copyright content, or to prevent users from copying protected content. Content that is protected by a copy protection technology could include movies, games, software, CDs or digital music files, or even content stored in a protected area on a website (eg, where you have to pay money or enter a password to access the content).

Types of protection measures - Access control and Copy control technological measures.

Access control technologiesare technological protection measures which are used by copyright owners to control access to their content.

Some examples of access control technologies could be:

- Password control systems (eg, a 'members only' password which limits access to special content on a website to authorized members).
- Payment systems (eg, where you have to pay a fee to access certain content on a website). for example, the Choice website has some freely available publications and some publications that are restricted to people who have paid to access them.
- Time access controls (eg, a technology that manages how long you can access copyright content).
- Encryption measures applied to tapes or disks that only allow access to copyright content (eg, the film or music stored on the disk) to authorized players.

Copy control technologies technological protections measures applied to copyright content which prevent, inhibit or restrict the doing of a copyright act with that content (eg, making a copy of a protected film, emailing it or putting it online).

Some examples of copy control technologies could be:

- Software lock which prevents you from making a copy of a computer program.
- Encryption measures stored on the disk containing a movie or CD which prevent you from copying the movie or songs on the disk
- Technology that 'locks' documents to prevent them from being copied (eg, the function that 'locks' a PDF document to stop you from making a copy)
- Technology that makes an unauthorized copy of a film unwatchable (eg, some copy protection technologies add elements to the signal produced by a DVD/VHS player which make any recording of the film unwatchable).

Solution by implementing the technological measures.

An electronic database could be placed somewhere on the Internet or computer Bulletin Board for a user to copy a small sample of the database and if a user deems it suitable the user pays the full fee to copy the entire database. The user may also be registered to receive further upgrades on payment of a fee. This may solve the problem of unauthorized use as well as give fair returns to producers of data.

2. Wide range of exceptions to Circumvention of technological measures should be avoided.

Infirmity - Section 65A (2) (a) provides that circumvention of effective technological measure will not attract liability if it is done for the purpose not expressly prohibited by this Act. Section 52(1) exceptions are clearly stated as not being infringements of the rights granted under the Copyright Act.

Solution

Given the fact that circumvention is itself an unlawful activity and an unlawful activity done for a lawful purpose cannot be taken as a defence to infringement.

Instead of adding exceptions to circumventing activities the copyright law should provide for corresponding duties on the copyright holder facilitate access to works protected by technological measures to beneficiaries. Thus, copyright holders who employ TPMs (Technological Protection Measures) should be required to:

- Tell their customers how they can be contacted if the customer wishes to circumvent the TPM for a legitimate purpose.
- Upon being contacted, aid their customer in making use of their rights / the exceptions and limitations in copyright law.

The exception to Section 65A(1) should only be restricted to encryption research, lawful investigation, security testing of a computer system or network with the authorization of its owner, protection of privacy and measures necessary for protection of national security.

3. Intention not at all required for imposing liability

Infirmity - The act of circumvention attracts liability only when there is an 'intention of infringing rights. Intention means a purpose or desire to bring about a contemplated result or foresight that certain consequences will result from the conduct of the person. This means that the activity of a person is covered only if he does such act with the desire to make an infringing copy. The act of circumvention itself being an unlawful activity which relates to tampering of source code or even hacking of online database for unauthorized access should be penalized. Moreover Section 65 of the Information Technology Act, 2000 makes this act punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both. Therefore, there is a need to separate the two act of circumvention and infringing act and separate liability should be imposed at least in the digital database context.

Under the Digital Millennium Copyright Act, United States there is no direct link between circumvention and infringement, leading to a situation where remedy can be granted under the copyright regime even in absence of copyright infringement.

VI. CONCLUSION

Considering in detail the proposed provision in relation to anti – circumvention measures, one infers that unlike the provisions that have been incorporated in the developed countries, which have the potential of fostering the growth of industries at the cost of public, the approach followed by India seems quite different. In fact, the non-linking of circumvention to infringement of copyright in the legislations of the developed countries, has created a major problem in the form of perpetual copyright, i.e. certain works in the public domain and works in which the term of copyright has expired continue to have a different kind of protection; liability in case of circumvention using a technological measure to gain. As far as India is concerned, the direct linking of copyright infringement with circumvention will enable overcoming the problem of perpetual copyrights.

Unlike the provisions of the other statutes, by providing an exception to perform any act not forbidden by law, the Indian provision has ensured that all the stipulations that permit public use of a protected work for various legitimate purposes recognized by the Copyright Act is well protected. Though an access right has also been recognized through the introduction of the amendment, the drafting of the exception in the manner above stated will ensure the work is available to the public since access control technological measures can also be circumvented. The existing law permits fair use and other provisions only in literary, musical, dramatic and artistic works. But the amendment which provides for protection of technological measures also calls for the extension of the provision to include cinematograph films and sound recordings as a category of work.

The recognition of these works coupled with the fact that these works are now available in the digital format gives an enormous boost to the entertainment industry. Currently, the rate of work transmitted through on-demand services, live streaming, downloading etc., and is very low, only around3 per cent of the total transaction in the industry on a yearly basis. But with the availability of higher broadband width, the contribution of this sector is expected to grow to a higher level. A careful look at the American cases that have ended up in conviction under the DMCA, reveal that a majority of them have been for the circumvention or manufacture of devices capable of stealing satellite signals, illegal modification of video game consoles,14 decryption of direct to home satellite service, etc. These are exactly the kind of technologies and services coming to India. At this juncture when such technology is being made available,

the implementation of a provision with this ambit coupled with the further exception will act as a huge impediment from the view of the entertainment industry.

However, as far as the public is concerned, the proposed amendment will not bring much change to the existing system and no negative impact will be felt by the consumer. In fact, the inclusion of more types of works within the ambit of limitations and exceptions to copyright will make the life of the public more comfortable creating more and more turbulences in the industry as such. Thus, it can be concluded that to the extent the American and Australian provisions are pro-author, the Indian provision is pro-public.

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