ANTI-CIRCUMVENTION LAW OF COPYRIGHT IN INDIA

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INTRODUCTION

The Indian Copyright Law is codified in the form of ‘The Copyright Act, 1957’. The Act being more than 60 years old has certainly gone through few make overs and amendments to keep it in sync with the changing legal scenario in the country as well as the World.

However, the changes brought by ‘The Copyright (Amendment) Act, 2012’ are significant ones due to several reasons, which we shall see in the later parts. The Amendment Act has introduced two new provisions in the form of Section 65A and 65B. The provisions provide with Anti-circumvention provisions in the form and along with Digital Rights Management provisions. Whether the changing Digital Environment can be held as a reason for the amendment like other countries is still debatable, because, if this is the actual reason, then it might be said that it has come a little too late.

However, the objective of harmonizing the Indian Copyright provisions with the provisions of the WIPO Copyright Treaty and WIPO Performers and phonograms Treaty (WPPT), sounds much more plausible. Even though, India is not a signatory of any of the WIPO Internet Treaties, the legislature has definitely realized the need for the Indian copyright to be in harmony with the International provisions to ensure proper Copyright protection to the right holders in the cyberspace, as well as to protect several other economic interests and considerations. Majorly, the changes are said to be targeted against the ever rising menace of Piracy, particularly the Indian Film Industry.

Irrespective of the real motive behind such delayed change in the policy, the changes have been welcomed by the legal community, even though few voices were raised questioning the need for the changes. However, how complete these provisions are and how much profound effect they have on the Indian Copyright Law, is yet to be seen. This project is concerned with the Laws in India regarding Anti-Circumvention of technological protection measures.
THE PROBABLE TRIGGER - PIRACY

Adding to the argument that even though not being the signatory to the WCT or WPPT, India had no obligation to introduce these provisions, the ever increasing menace of ‘Digital Piracy’ may be one answer we can arrive at. Even though digital Piracy is not a new concept in India, the administration has been fighting the menace of digital piracy for a long time. However, interesting thing to note here is that, till recent past, the ‘physical’ form of piracy has dominated the markets, i.e. the offline piracy which consists of small shops and vendors selling pirated products like CDs and DVDs of movies, music and games. But, the increase in access to internet coverage in different parts of the country as well as rise of Mobile piracy due to higher capabilities of present generation smartphones has caused concerns in department of Internet Piracy.

To support the above argument, let’s take a look at the IIPA 2014 statistics. According to IIPA, within 2016, India will be the second largest Internet market in the world and world’s leading English language market, with an estimated 330-370 million Internet users. Mobile penetration stands at around 70% with an increasing number of mobile (smart phone and tablet) users (estimated at around 22 million) having 3G Internet access. Moreover, the Indian Government’s National Broadband Policy, the Indian cyberspace is set to go only in one direction and that is up.

Also, the recent times have seen the emergence of peer-to-peer software tools and pirating sites and the ease of using them without fear of detection have added to the ever increasing span of piracy. A recent study which tracked the maximum downloads on the peer-to-peer network for media content placed India in the top ten piracy countries in the world. Nowadays finding a movie online on the date of its release is a common scene.

Now let’s support the above observation with some facts; In India, the music industry estimates a total loss of $431 million in 2012 (the largest percentage of that attributable to mobile device piracy, then physical piracy, Internet piracy, public performance piracy, and radio/TV broadcast piracy) and upwards of 90% music piracy online, while the software industry reported a 63% rate of PC software piracy in 2011 with a commercial value of unlicensed software estimated to be over US$2.9 billion.

Now, to say that the Indian Copyright Industry being the only victim of this piracy onslaught, will be an understatement. The above stats clearly show the rising status of India in the cyberspace as far as occupying space and content is concerned. The rising interest of foreign production houses, majorly part of Hollywood, in India cannot be overlooked. The biggest production housed like Sony, Marvels, Warner Brother etc. have realised the great potential Indian Media Industry holds. The interest in the Indian market can be realized from the fact that nowadays movies which are contended to do good in India are released on priority basis, even a week or two early then they get released in US itself.

Apart from above factors, there is no doubt that the diplomatic pressure put by US on India might be one of the major driving forces behind the changes brought by the Indian Government. The US government has been known internationally as the bully kid trying to enforce its own system of working on every other party. The increasing partnerships between India and US, the large sector earning of US from its Copyright resources, the loses caused due to piracy in India, all these factors may be summed up to be understood as the driving force behind the Copyright Act amendments.

Section 65A states as follows:
“(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person from,-

a. doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

b. doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

c. conducting any lawful investigation; or

d. doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; or

e. operator; or

f. doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

g. Taking measures necessary in the interest of national security.”

TECHNOLOGICAL PROTECTION MEASURES

The new Section 65A provides with the provisions for prohibiting circumvention of technological protection measures applied on copyrighted works. It states that; “any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine”.

The provision uses the term “effective” as a prefix to the technological protection measures. This approach can be compared to the one taken by the WCT, DMCA and EUCD. However, WCT and DMCA do not define the term ‘effective’; only EUCD has gone a step further to define the term. ‘It provides that a technological protection measure will be deemed as effective where ‘the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

However, the Indian provision leaves the element of ambiguity in the first provision itself, for the Judiciary to come up with required interpretations. However, there are no precedents available to this time as far as Indian Judiciary is concerned. Therefore, there is lot of ambiguity regarding the phrase ‘effective’, in regard to Indian Legislation.

Now, another highlighting feature of the above provision is that, it prohibits an act of circumvention of technological protection measures, only when such act is done with the intention of infringing any copyright. In some manner, this limits the scope of the provision if we compare it with the similar counterparts in EUCD or DMCA or Australian Law. In other words, it prohibits an act of circumvention only if intended towards copyright infringement, but lawfully circumventing a technological measure for using it under ‘Fair use’, is not prohibited.
This provision on the first glance may look good, as it keeps the space for ‘Fair Dealing’. However, it will encourage more and more content owners to apply such access and control technological protection measures, thereby increasing the trouble for legitimate users by increasing their transaction costs. Even above that, not most of the users are expert in encryption decryption techniques and will find that technical expertise missing to circumvent such measures even to enjoy their right of fair dealing. And in turn they will have to rely on third parties for such assistance. And then there comes the complications of liability and stringent procedure to be followed in case of ‘third party facilitation’, which will be discussed later below.

The word ‘Intention’ used in the provision passes the burden of proof on the content owner to prove that there was an intention to infringe the copyright, because mere act of circumvention of any technological protection measure will not amount to any kind of offence.

Also, the provision provides for only ‘criminal’ liability, i.e. two years of imprisonment. It does not provide for any ‘civil liability’, which somehow goes against the interest of the content owner, as civil liability would ultimately result in damages, which will compensate the content owner in one way or another. Also, most of other legislations i.e. DMCA and EUCD provide with criminal liability only in case of subsequent offence, thereby giving the culprit a chance as well as reducing the costs to the society.

EXCEPTIONS

Just like its counterparts, Indian Copyright Act provides with certain exceptions which will not amount to liability if any effective technological protection measure is circumvented.

1. The first of such exception provides that a user can take help of a third party to circumvent any technological protection measure for a purpose not expressly prohibited by the Act. This provision refers to the third party software tools and device which can be used for purposes which are not expressly prohibited by the Copyright Act. The provision also provides that these third parties have to keep a complete record of the person using their product/service to circumvent such TPM including the purpose of such act.

The above provision strikes a good chord where it includes both “Device/product/technology” and “service” within the purview of the term “facilitation” by third party.

However, there are two difficulties in the implementation of the above provision;

a) As there are lot of “open source” Software tools available on the internet which can be used for circumventing TPMS (both for restricted and unrestricted circumventions), most of them are free and their downloads limit is unaccountable for, there is no way such record can be maintained by such ‘facilitating third party’ which is required by the provision. Therefore rendering this provision somewhat redundant.

b) On the other hand, the question of liability of these ‘Third Parties’ facilitating such circumvention arises. As there are lots of software tools which though are intended for lawful and legitimate purposes, but have the tendency to be used for the purpose of restricted acts.
2. **Encryption Research** – Though this provision provides that such research must be done on a lawfully obtained encrypted copy, it fails to determine the scope and meaning of the term ‘Encryption’.

3. **Conducting any Lawful Investigation**

4. **Testing Security of Computer System** – Though it states that any such act for this purpose must be done with the authorisation of the owner, but the terminology “doing anything” somewhat leaves quite broad ambiguous scope.

5. **Identification or Surveillance** - Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user.

6. **National Security**

   **Fair Use** - Also, as has already been discussed, the mere act of “Circumvention of effective Technological Protection Measures” in itself is not an offence under the Indian Copyright Act, 1957. Therefore, all the exceptions provided under Section 52(1) i.e. the acts which do not constitute Copyright Infringement, will not give rise to any liability under Sect. 65A in case of Circumvention of any TPM.

   All the provisions provided under Section 52 fall under ‘fail dealing’ category. Few of them relevant to digital content are:
   - Any work for private/personal use like research, criticism, review, reporting current events and affairs, lecture delivered in public. Provided that electronic medium of these including a computer program should not be the infringing copy itself.
   - Transient and incidental storage of a work in electronic transmission is included under fair dealing.
   - Reproduction of a work for judicial purposes, for educational purposes.
   - Storing of work by Non-commercial public library.
   - Special provisions for persons with disability, separating such transmissions from the general ones.

**DRAWBACKS OF INDIAN ANTI-CIRCUMVENTION PROVISIONS**

The Indian Copyright Amendment Act, 2012 even though seems like revolutionary and a step in the right direction by the legislature, it is not free of any shortcomings. As a matter of fact, the provisions pose more number of concerns and challenges then it tries to solve and provide for. There are several shortcomings in the Indian provisions, which are discussed below:

   a) The first and foremost shortcoming which can be recognized in the Indian provisions is the lack of details. The provisions look like as if they were formulated hurry and the importance of details and clarity was somehow overlooked.

   b) One major shortcoming lies in the fact, that Section 65A does not define the term “technological measure”. This is by far the most elemental part of the provision and not defining the term itself creates a lot of ambiguity and uncertainty, as to what might and what might not constitute a ‘technological measure’.

   c) Secondly, the prefix “effective” used before technological measure, just piles up the ambiguity even more.

   d) The anti-circumvention provision does not provide for the “knowledge element” for doing an act of circumvention of technological measures. The EUCD and the Australian Copyright Act provide particularly the knowledge element. The absence of the knowledge requirement leaves the scope of the act much broader and person unaware of such
circumvention innocently done on his part without intention to infringe the copyright may find himself in some legal trouble. Even the DMCA has been criticised for skipping on that element.

e) One of the biggest drawbacks in Section 65A is the absence of provisions to deal with the “trafficking of the circumvention devices”. The Indian Copyright Act, is completely silent on the prohibition and liability of such third parties which manufacture, import, offer to public or provide such technology, product or device which causes circumvention of technological protection measures.

The EUCD, DMCA and the Australian Copyright Act specially provide for such provision to keep a check on such third parties which manufacture and provide with such circumvention devices, thereby playing a major role in such prohibited act.

f) There is no provision for “Civil Liability”, the Act provides only with criminal liability. Even though it works as a strong deterrent, but it somehow takes away that benefit of monetary compensation which could have been available to the content owners if there was civil liability. Also, providing for criminal liability for a personal use on the first instance without commercial intent may be a little more then what the society requires.

g) The Act does not prohibit the act of circumvention of technological protection measures ‘per se’, but liability arises only when such act is done with “intention” to cause copyright infringement. This creates a responsibility on the content owner to prove that there was intention to infringe copyright behind the act of circumvention, and this will be not a practical proposition to prove. Therefore, it leaves a large scope of misuse of the provision and the culprits escaping liability.

h) The Act is also silent about the definition of the term “circumvention”. The word in English Oxford dictionary means ‘to find a way around’. However, a proper definition within the act will close any gaps for ambiguity and make the job of the Courts easy, just like definition provided under DMCA.

i) The Act fails to distinguish between “access control” and “copy control” technological protection measures. Leaving a huge gap of ambiguity. However, the literal interpretation of the Section 65A (1) of the Act, provides that the legislature intended to include both access and copy control measures.

j) Even though the Indian Legislation has tried to follow the International norm while providing for exceptions and Fair use provisions, a lot is left to be desired. First of all, all the exceptions provided in Section 65A are poorly drafted and lack lot of substantial details, which makes them incompetent and incomplete. One major exception missed out by the Indian Legislature is the exception for “Interoperability”, which has been dealt by other National Legislatures in quite detail.

CONCLUSION & SUGGESTIONS

The evolution of copyright has been closely linked to technological development. Just as the concept of ‘crime’ has existed since the inception of the concept of ‘society’, in the similar way, the right of ‘copyright’ has been followed by the concept of ‘infringement’ of the right, since its inception. However, the Technological advancement since the advent of Internet, aka Cyberspace, has changed the dynamics of the relationship between Copyright and its infringement in a fundamental way. The extrinsic nature of the cyberspace has altered the vital concepts of copyright as a subject matter.
The ease, with which the internet facilitated the infringement of copyright, had many scholars wondering whether the ‘Copyright’ as a right will cease to exist someday. The difficulty in protecting the copyrights in works has proved to be a great concern, especially considering the share of copyright in the national as well as international economies. However, a united effort at the international level has stood up against the digital annihilation of copyright. And out of that effort there have been some remarkable efforts from individual Nations to try and formulate Laws which strike a balance between the advancement of technologies and the integrity of Copyright.

The individual right holders have indeed taken the initiative on themselves and applied the Technological protection measures to protect their rights. The individual Governments have also come forward to shield such efforts in forms of legislations. However, one thing needs to be understood is that, the rights of the content owners do not in any manner superimpose the rights of the users and the general public. There needs to be a balance between the both. To achieve this task, it is important to target such anti-circumvention provisions at the more technologically sound people, who have the expertise and potential to circumvent such technological protection measures. Also, the provisions need more sharpness towards Manufacturers and distributors of such circumvention devices. This is important because, the majority of ordinary users do not possess such technical expertise to circumvent most of the technological protection measures. The strict implementation of such protection measures ultimately causes inconvenience to the majority of ordinary users and the real culprits get away somehow.

The Indian Copyright Law had been adamant to the technological changes all around the globe, and yes it was indeed getting plundered by the evils of Piracy. However, the recent changes in the law discussed above have indeed provided the legislature with a new outlook and perspective. Even though several scholars and activists have argued that India at this stage does not need any such legislation, keeping eyes closed towards the copyright violations on the cyberspace and not making efforts to remove such disparity will not do any good.

Therefore, in the light of the above argument, the effort of the Indian Legislature towards introducing new provisions complying with the international standards and keeping Indian law in sync with the technological advancements is definitely appreciable. The losses suffered by the Indian economy due to acts of piracy is all time high and this effort seems to be directed towards fixing that only.

However, important thing to be kept in mind is the fact that, the purpose of Anti-circumvention is not only to put digital locks on protected work, but also to ensure that the rights of the general public and users in respect of fair dealing are not curtailed. The laws should not be formulated in a manner which can have negative impacts on access of knowledge. The government will have to find a middle ground where the needs of the copyright lobbying industries (such as Bollywood & Hollywood) are indeed met, but not at the price of freedom of information and knowledge and access to works and content within the purview of fair use. There is no doubt that the Indian Law on the subject matter of Anti-Circumvention Law of Copyright on cyberspace in its infancy stage is not even close to be called complete, however this is a start and a positive one, holding a promising future for the changes yet to come.
With this positive thought I would like to end the project with certain suggestions which can be applied by the legislature to get the best results from their implementation:

- The first and the foremost requirement is for the legislature to come up with new provisions, maybe after conducting a large scale study to find out the right mix of provisions required. Undertaking a detailed study with an aim to deal with the drawbacks of current system, as mentioned earlier can be a first thing to do.
- The offence of circumvention of technological measures should come under ‘civil liability’. Only on subsequent or repetitive instance should criminal liability arise. This will help compensate the content owner, as well as increase the level of participation of the parties which will help in resolution of cases much quickly. Also the incapacity of the Indian criminal system is no surprise to anyone.
- There should be a specialised agency to deal with such class of cases. This will help in speedy resolution as it will also take burden of already burdened Indian Judiciary.
- There is also the need for trained and well-equipped police force to detect such cases and take the necessary steps in enforcing these provisions and preventing further circumvention acts.
- The copyright holders should be made responsible and answerable for the technological measures implemented on their works by them. For instance, providing unlock codes to users in the ambit of fair use.
- The issue of third party liability in case of circumvention of technological protection measures where they provide with such means to circumvention needs to be tackled not just at National, but also International Level.
- Since there is unconditional prohibition on any kind of facilitation in circumvention by third party, except on authorisation by content owner, the presence of a large number of tools and devices available on the internet without check are a persistent violation of provisions in the face of the Act. As, it is not feasible to block access to every such tool online, there is a need to revise and bring in new provisions in this subject matter.
- The traditional rules of copyright do not apply to technological protection measures, for instance the time period of a copyright is 50-70 years according to International standards. However, the technological protection measures can exist as long as the work exists. Therefore, this area of the subject matter needs to be addressed.
- Last but not the least, the ubiquitous nature of Internet necessitates the consideration of multinational enforcement, which will to some degree require the harmonization of domestic laws concerning enforcement measures and facilitate the cross-border protection of copyright in the digital age.

REFERENCE

1. Entered into force on March 6, 2002
2. Entered into force on May 20, 2002
3. WIPO Article 11- Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.
4. International Intellectual Property Alliance. The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers.


6. Supra


9. The recent release of the movie “Furious 7” has witnessed one of the biggest openings in India for any English movie; however, India topped the piracy charts, as this movie was pirated 5,78,000 times in India till 20th April, just 2 weeks after its release. Editorial, “fast-furious-downloads-India-tops-piracy” Economics Times, April 20, 2015.

10. For instance, ‘Avengers: Age of Ultron’ releasing on 24th April in India as compared to 1st May in US

11. Indian Copyright Act, 1957, s. 65A(1)


13. European Union Copyright Directive

14. European Union Copyright Directive, art. 6.3

15. Indian Copyright Act, 1957, s.65A(1)


17. Jerry JieHua, “Toward a More Balanced Approach: Rethinking and Readjusting Copyright System in Digital Network Era”, Springer 2014, at 82

18. Indian Copyright Act, 1957, s. 65A(2)(a)

19. Supra

20. DMCA, EUCD, Copyright Act, 1968

21. Indian Copyright Act, 1957, s. 65A(2)(a)

22. Indian Copyright Rules 2013, Chapter XVII, s. 80 provides with the procedure of maintaining records. It provides the records to contain the following details:

a) Name, postal address, photograph, email address and telephone number of the person asking for assistance.

b) The reasons and purpose for circumvention of technological protection measures

c) An undertaking in writing that such person is entitled to circumvent such technological measures in respect of the particular copyrighted content.

d) Record may be maintained online for 3 years.

e) These records can be produced in the court as evidence.
23. For instance simple ‘Screen Recorder’ software created for legitimate purposes – like creating educational tutorials, but can be easily used for recording such videos which are protected by TPMs, thereby causing copyright infringement.

24. Indian Copyright Act, 1957, s. 65A(2)(b)
25. Indian Copyright Act, 1957, s. 65A(2)(c)
26. Indian Copyright Act, 1957, s. 65A(2)(d)
27. Indian Copyright Act, 1957, s. 65A(2)(f)
28. Indian Copyright Act, 1957, s. 65A(2)(g)
29. Added by Copyright Amendment Act, 2012
30. Indian Copyright Act, 1957, s. 52(1)(i)(a)
31. Supra s. 52(1)(ii)(c)
32. Supra s. 52(1)(ii)(d)
33. Supra s. 52(1)(ii)(d)
34. Supra s. 52(1)(iii)(n)
35. Supra s. 52(1)(vi)(ii)
36. Indian Copyright Act, 1957, s. 65A(1)
37. European Union Copyright Directive, art. 6.1
38. Copyright Act, 1968, s. 116AN(1)(c)
39. European Union Copyright Directive, art. 6.2
40. Title 17 U.S.C. s. 1201(1)(a)(2)
41. Copyright Act, 1968, s. 116AO
42. Indian Copyright Act, 1957, s. 65A(1)
43. Title 17 U.S.C. s. 1201(a)(3)(A)
44. Australia - Copyright Act, 1968, s.132 APC(3), s. 116AN(3)DMCA - Title 17 U.S.C. s. 1201(f)