

INADEQUATE PROTECTION AGAINST PIRACY: COPYRIGHT AMENDMENTS INADEQUATE

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I. Introduction

As technology advances at a dizzying pace, so does the need for protection of copyrights in cyberspace. Internet users can utilize unauthorized copies of copyrighted works; and digital technology enabled piracy of novels, photographs and movies has caused substantial economic loss. At this juncture, Technological Protection Measures (TPM) which can safeguard proprietary works from digital piracy is a welcome and much needed development.

TPM promotes the authorized use of digital content; the most widely used methods are password and cryptography. TPM can be broadly classified into two categories on the basis of the functions performed: those measures which control or restrict access to a work are referred to as Access Control Technology and those which restrict the uses of the work are called Copy Control Technology. In most instances, these measures are capable of providing extensive security to the copyright works in which they are installed.

Ironically, technology is not simply biased towards authors who seek to protect their copyrights; the same technology also enables unauthorized users to frame technical solutions which can counter TPM. These circumvention devices or technologies which are initially created for personal use later hit the internet markets at cheap prices and even as free open source software. These technologies are capable of circumventing the virtual defense that is created by the TPM and enable unauthorized use of the works. It is not possible to combat these circumvention devices with technological measures.

Therefore, the system must devise laws to protect copyright issues. The World Intellectual Property Organization (WIPO) has formulated two

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crucial treaties¹ which mandate its member countries to extend adequate legal protection for effective TPM, in its national copyright legislations. Several countries, such as the US, Japan, Australia and Germany have adhered to this mandate.

II. The Copyright Amendment Act, 2012

The Copyright Amendment Act, 2012 was passed by the Lok Sabha in May 2012. The amendments introduced Section 65A in the Copyright Act, 1957. 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. It also enlists certain exceptional situations when circumvention of TPM would not amount to an offence.

Nevertheless, the provisions in the Copyright Act do not address the menace of circumvention of TPM in a comprehensive manner. Before drawing any conclusions about the effectiveness of the new Indian statute, let us examine the provisions existing in some other countries. USA protects TPM under Section 1201, Title 17 of the United States Code (US Code). The US law prohibits both the circumvention of effective TPM and the trafficking in circumvention devices. Trafficking in circumvention technology implies manufacture, sale, import or rental of such technology. In order to ensure that the law does not hinder the progress of technology, it is specifically provided that trafficking in only that technology which is primarily designed for circumvention of devices or that technology which has very limited commercial purposes other than circumventing TPM can be restricted. Both these attributes of circumvention technologies have been consolidated by two judicial precedents.

III. Primary Design Theory

The primary design theory was discussed in *Sony Corp. Of America v Universal City Studios Inc*². Universal City Studios, Inc., sued Sony for contributory copyright infringement based on the manufacture and

1 The treaties are: 1) WIPO Copyright Treaty, 2) WIPO Performances and Phonograms Treaty

2 464 U.S. 417 (1984)

distribution of VCRs which enabled the users to tape copyrighted material and, thus, make copies of those works. The Supreme Court, basing its decision on the substantial non-infringing uses of VCRs, held that home time-shifting by users was fair use and, thus, not copyright infringement. The Supreme Court held that Sony was not liable for contributory copyright infringement for the distribution of VCRs because the technology was capable of substantial non-infringing uses. In *Sony Computer Entertainment America Inc. v. Game masters*³, , the Defendant sold various "game enhancers" which allowed users to modify the rules of Sony's PlayStation games, such as by making the game harder or easier, or by giving a game character infinite lives or unlimited ammunition.

The devices also allowed users to play games designed exclusively for use in Japanese and European PlayStation versions. In granting Sony's application for a preliminary injunction, the Northern District of California held that the "game enhancers" appeared to be devices whose primary function was to circumvent "a technological measure (or a protection afforded by a technological measure) that effectively controls access to a system protected by a registered copyright...." .

Very similar protection has been ensured under the German and Australian copyright laws. Section 95a of the German Copyright Act prohibits the circumvention of any technological measure without the rights holder's authorization. It also provides protection against trafficking in circumvention technologies. The Copyright Act, 1968 of Australia extends protection against circumvention only for Access Control Technology. The statute brings in a real distinction between Access Control and Copy Control Technologies. It further prohibits trafficking in any kind of circumvention technology.

It is evident that there should be two components for every legal statute protecting TPM from circumventions. The statute should explicitly prohibit any kind of circumvention activities and the statute should also prevent trafficking in circumvention technologies that has been primarily designed for such circumvention and has got negligible commercial purposes apart from circumventing TPM.

3 87 F. Supp. 2d 976 (N.D. Ca. 1999)

In the Indian statute the second component is not present. Section 65A does not prohibit trafficking in circumvention technologies. This stands out as a serious lacuna. The addition of a clause prohibiting trafficking in circumvention devices would discourage perpetrators who deal in manufacture and transfer of such technology. As the rate of manufacture and transfer of such technology slides, the frequency of circumvention activities will also decline. Thus prohibition of trafficking allows the enforcement agencies to nip the circumvention activities in the bud.

Moreover, the entities that manufacture and transfer such technology raise illegal income and are equally liable for initiating such circumventions. To be more precise, they abet the offence of circumvention of TPM. While preventing trafficking of circumvention technology, caution must be exercised so as not to extend a blanket prohibition to the circumvention devices. The provision should not target general purpose devices whose incidental use results in circumvention. That would create stagnation in the development of technology and push unnecessary restrictions on access to knowledge. It would be much wiser to adopt the *primary design theory* or the *limited commercial purpose theory* as enunciated in the US copyright law, with suitable adaptations. However, complete evolution of these doctrines is possible only through judicial precedents. Once the legislature introduces such a provision, the judiciary can interpret the concepts of primary design or limited commercial purpose on a case by case basis.

Even the Parliamentary Standing Committee on Human Resources which scrutinized the amendments felt that the provision is inadequate when it stated in its report that a constant watch would have to be kept on the impact of this provision and corrective measures taken as and when required⁴. The legislature should take cue from the developed nations and further amend the copyright law to incorporate prohibition of trafficking. It would further allow the judiciary to evolve the law based on practical situations, keeping in mind the larger public interest of facilitating access to the public. A clause preventing trafficking in circumvention devices enables the copyright regime of India to adapt to the challenges presented by the digital media environment.

4 227th Report of the Parliamentary Standing Committee on Human Resources Development