

DIGITAL RIGHTS MANAGEMENT: A PANDORA'S BOX TRYING TO WIPE OFF THE RIGHTS OF CONSUMERS

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“For too long, copyright and patent enforcement has been framed as an issue of ‘intellectual property rights’, with the implication that they have a similar status to human rights. Butthe misuses of intellectual property rights are actually hampering freedom of expression, education, and participation in cultural life - and governments are beginning to agree with us. We want to re-frame Intellectual Property enforcement as an issue of consumer protection.”

Jeremy Malcolm¹

I. Introduction

“Imagine young Chris Disk sitting at home, one afternoon, listening to the radio when he hears that his favorite band, The Screaming Monkey Bandits, released a new CD. Upon hearing this, he runs up to his mom and asks her for money to go and buy the new CD. She proceeds to explain to Chris the importance of money and that he needs to work for the money. Chris then spends the next two weeks working hard...Finally, Chris has made enough money to buy the CD and he rushes off and buys the new Screaming Monkey Bandits CD. He races home, pops the CD into his computer setup with speakers, hits play, and then KABLAM! The computer makes a loud noise, starts smoking and won't work. Chris begins to cry. After saving up more money to pay

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1 Jeremy Malcolm, CI Project Coordinator for IP and Communications; See Plan to amend UN Consumer Protection Guidelines to safeguard access to education and culture, September 2010, available at <http://www.consumersinternational.org/news-and-media/press-releases/2010/09/plan-to-amend-un-consumer-protection-guidelines-to-safeguard-access-to-education-and-culture>.

*a computer repairman to extricate the CD from the computer drive and repair his computer, Chris returns to the store to get his money back. At this point the retailer explains that this CD has a new copyright protection "format" that cannot be played in a computer. Unfortunately..the new Screaming Monkey Bandits CD was not marked to warn Chris that he could not play it in his computer..."*²

In the above scenario, Chris was left with nothing other than a damaged computer. This story is more than just a hypothetical incident; it led to class action lawsuit in California against five major record labels for distributing defective and unstable audio-discs containing no-copy technology.³

Before proceeding further, it is pertinent to highlight the changing digital status quo. In the pre-digital era, people's ability to do various things to or with content was limited. However, the networked digital age allows doing anything to digital content, instantaneously, and at virtually no cost. While this is indeed a great opportunity for new content business models, but it threatens the livelihood of content creators by making rampant piracy possible.⁴ Thus, there was felt a need for a technology that will enable to secure content, management, distribution and promotion of Digital Content on the cyberspace.

Such progressive technology has been termed as Digital Rights Management ('**DRM**') and Technological Protection Measure ('**TPM**').⁵ DRM is a broad term that refers to any technologies and tools which have been specifically developed for managing digital rights or

2 Kevin C. Earle, *No-Copy Technology and the Copyright Act: Has the Music Industry been Allowed to Go too Far in Diminishing the Consumers Personal User Rights in the Digital World?*, 2 J. Marshall Rev. Intell. Prop. L. 337-338 (2002-2003).

3 *See Id.*

4 Stephen Manes, *Full Disclosure: Copyright Law—Ignore it at your own Peril*, PC World, July 2003, available at http://www.pcworld.com/article/111657/full_disclosure_copyright_lawignore_at_your_own_peril.html, aid,111657,00.asp.

5 "In the context of 'digital rights management', the term 'digital' can refer to various aspects: (1) automated management (by digital means) of (2) rights which are specified by digital means with regard to the use of (3) digitally stored content. These aspects are typically – but not necessarily – all present in a single technical measure for a given platform", Lucie Guibault and Natali Helberger, *Consumer protection and Copyright Law*, ECLG/035/05, p. 9.

information.⁶ In this Article, '**Digital Content**' means any text, graphics, images, audio, video, software, etc., necessarily in digital format. DRM aims to protect ownership / copyright of Digital Content by allowing only an authorized recipient to do certain permitted act with the content.

For better explanation, some of the instances of DRM are- *a movie production company embeds software on its Digital Versatile Disc('DVD') that limits the number of copies a user can make form that DVD; an e-book server restricts access to, copying of and printing of material based on constraints set by the copyright holder of the Digital Content, etc.*

Digital Content Owners ('**Content Owner**') consider DRM as a tool to secure their interest in the digital world. Other important reasons to choose DRM are as follows: *First* and much reported in the media, DRM aims at making illegal copying harder and more costly.⁷ In simple words, DRM aims to increase the cost of piracy. *Second*, often overlooked, but of equal importance, DRM intends to reduce costs of obtaining Digital Content legally.⁸ Thus, DRM encourages the Digital Content Users / Consumers ('**User**') to obtain the Digital Content legally.

Though on the face of it DRM appears to create a win-win situation for both the side, but in reality it largely helps the Content Owners. Different approaches may be adopted by the User to address this issue. Recourse can be taken to the law(s) dealing with the Copyright; and/ or the law(s) dealing with the Competition; and/ or the law(s) dealing with the Consumer Protection. This article primarily aims on the first recourse available in India and in light of that seeks to address the concern of Indian User so as to provide them with the benefit of technological innovations without abusive restrictions.

This Article exposes the extent to which Content Owners aims to restrict the User's rights by enforcing DRM / TPM. To balance this inequity, the analytical research investigates the application of Copyright law of various jurisdictions, which somewhere promotes, and somewhere

6 Nicola Lucchi, *Countering the Unfair play of DRM Technologies*, 16 Tex. Intell. Prop. L.J. 93 (2007-2008). [hereinafter Nicola]

7 *Five Giants in Technology Unite to Deter File Sharing*, N.Y. TIMES, Jan. 5, 2004, at C1.

8 Viktor Mayer Schönberger, *Beyond Copyright Managing Information Rights with DRM*, 84 Denv. U. L. Rev 181-182 (2006-2007).

restricts the curtailment of User's rights though DRM / TPM. Furthermore, this article also highlights the recent Amendment to the Copyright Act, 1957, with special reference to the introduction of anti-circumvention provision in India.

The *first* part of the Article, after a brief definition of the term DRM and TPM, deals with the functioning of this system. The *second* part discusses the reasons by virtue of which DRM / TPM has stormed up controversies around the Globe. This part also throws light on various practical cases like *Apple i-Tunes case*, *Sony BMG Rootkit case*, etc, which have stretched far in exposing the pessimism of DRM / TPM. The *third* part deals with the direct nexus of DRM / TPM technology with the User's interests. In addendum, it also raises the obligation on the part of the Content Owner's to disclose information while selling DRM / TPM encrypted material to protect the right to privacy of consumers. Prior concluding, the *fourth* part takes into consideration the endeavours put in by the Indian Legislature by incorporating Section 65(A) and 65(B) in the Copyright Amendment (Amendment) Act, 2012. The *last* part recommends certain changes to improve the position of the Indian User at par with the Content Owner and concludes.

II. DRM, TPM: Definition and Functioning

Introduction of DRM took place in 1994 as a panacea for control of accessing and handling the digital content.⁹ Since then, DRM have been a very controversial topic and the story of implementing DRM has been full of turns and twists. However, with the passage of time DRM started restricting the User to view, access and use the Digital Content.

The Article uses the term TPM and DRM, therefore, it will be unjustified to keep the concept of TPM untouched. The term DRM and TPM is often considered a synonym. But fundamentally the difference lies between their respective mode of application: TPM's¹⁰ are generally

9 MatějMyška, *The True Story of DRM*, 3 Masaryk U. J.L. & Tech. 267 (2009).[hereinafter MatějMyška]

10 “*“technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law*”, TPM has been defined under Article 6.3 of Directive 2001/29/EC of the

designed to impede access or copying, whereas DRM¹¹ systems do not impede access or copying *per se*, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders.¹²

DRM usually embeds with the Digital Content and aim to limit the ways in which Digital Content can be used, reducing the User's choice and generating interoperability problems. Through DRM, Content Owner's also access Users' personal information, posing a powerful threat to Right to Privacy. Such situation creates conflict with the interests of legitimate User, i.e. the Consumers rights and privileges¹³. DRM used to control distribution of an e-book, enforcing a 'read but don't lend' permission, restricting the ability of the individual to read the e-book on more than one computer.¹⁴ Other conditions which are being enforced by the DRM includes: 'read once', 'erase in two weeks', 'do not copy text', 'do not print' or 'do not copy'.¹⁵ DRM sometimes also restricts enjoyment of

European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society [hereinafter Infosoc Directive).

- 11 “..“rights-management information” means any information provided by rightsholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightsholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information” DRM has been defined under Article 7.2 of the Infosoc Directive.
- 12 LucieGuibault and NataliHelberger, *Consumer protection and Copyright Law*, ECLG/035/05, p. 9.
- 13 Kevin C. Earle, *No-Copy Technology and the Copyright Act: Has the Music Industry been Allowed to Go too Far in Diminishing the Consumers Personal User Rights in the Digital World?*, 2 J. Marshall Rev. Intell. Prop. L. 337-338 (2002-2003).
- 14 See general, Caitlin J. Akins, *Conversion of Digital Property: Protecting Consumers to the Age of Technology*, 23 Loy. Consumer L. Rev. 215 -251 (2010-2011).
- 15 See *Id*, “Digital rights often set out to control: ability to read a document; ability to read the document a number of times; preventing reading a document before a given date/time; preventing reading a document after a given date/time; preventing printing the document, limiting printing to a number of copies; preventing using the Print Screen feature to copy information, allowing low quality printing; allowing limited copying and allowing a program to be run”, David Fewer, Philippe Gauvin, and Alex Cameron, *Digital Rights Management Technologies and Consumer Privacy*, CIPPIC, September 2007, available at <http://www.cippic.ca>.

creative works by allowing its access through some specified type of device(s), such as an iPod, iPhone, and other Apple products¹⁶.

Due to the above-enumerated reasons, DRM generated huge controversy. The proponents of DRM / TPM, specifically the Content Owner, contend that DRM / TPM is imperative for protecting consumers against viruses and preserving the interest of Copyright Owner in the digital environment. Whereas, the opponents raise the contention that DRM has gone too far, by placing excessive control in the hands of copyright holders, which upsets the balance in Copyright law.¹⁷ However, though the first claim raised by the proponents lacks any evidentiary support, the second claim is indeed true.

The second claim of the Content Owners, on the face of it appears only a humble claim. But for the below mentioned instances it can be stated that in reality such interest of the Content Owners actually aimed to limit the legitimate interests of the User. A Celine Dion album released in 2002 by EPIC and Sony records is capable of crashing a User's computer upon insertion of the same in a CD-ROM drive.¹⁸ In the same year, Microsoft implemented Palladium system that combines software and hardware controls to create a 'trusted' computing platform. Palladium system embeds DRM into software and hardware.¹⁹ There are large numbers of such restrictions imposed by the Content Owners, which aims to cornerstone the User's rights and privileges.

III. Controversy Surrounding DRM and TPM

DRM is a great relief for copyright holders. DRM, though initially created to protect Digital Content,²⁰ turned out to be an oppressive weapon

16 See general, Nicola F. Sharpe and Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the i-Pod Fair Play DRM Controversy*, 5 Nw. J. Tech. & Intell. Prop. 332-350 (2006-2007). [hereinafter Nicola F. Sharpe]

17 See general, J. Thomas Rosch, *Keynote Address: A Different aspect on DRM*, 22 Berkeley Tech. L.J. 971-980 (2007).

18 *Digital Rights Management and Privacy*, EPIC, March 2004, available at <http://epic.org/privacy/drm/>.

19 Ian Roberts, *Digital Rights Management*, Parviz Carmini, Polytechnic University, 2004.

20 Brett Glass, *What Does DRM Really Mean?* PC MAG., Apr. 4, 2003, available at <http://www.pcmag.com/article2/0,2817,929861,00.asp>.

against the User. A simple technical discussion will help to establish the implications of DRM crystal clear.

DRM is specific computer code that works as a protective layer over the Digital Content, allowing Content Owners to limit a consumer's use of that product. To secure content, DRM users (Content Owner) usually takes two approaches: The first is 'containment' (or the wrapper), an approach where the content is encrypted in a shell so that it can only be accessed by authorized users.²¹ The second is 'marking' (or using an encrypted header), such as the practice of placing a watermark, flag, XML or XrML tag on content as a signal to a device that the media is copy protected."²²

DRM's unpopularity is because of the reason that it offers nothing to the User, other than a one-sided requirement, imposed by the Content Owner. The metaphor of User's right from the real world can be easily carried on to the cyber world. Hence the Statutes/ Rules enacted to protect User from deceptive marketing practices, negligent misrepresentation, unfair terms, or unfair business practices apply with full force in the digital world as well.²³

Till date legal battle against the Content Owners for imposing DRM or TPM has not been observed in India. Hence, following are the few instances of Conflicts, observed in the Western countries, between the Content Owners and the Users:

3.1. THE APPLE – iTUNES CASE²⁴

On April 2, 2007, Apple Inc. and EMI Music held a joint press conference in London, considered being the harbinger of significant

21 Nicola, *supra* note 6 at p. 93.

22 See *Id*; Digital Rights Management and Privacy, EPIC, March 2007, available at <http://www.epic.org/privacy/drm/>.

23 John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 897-98, 898 n. 13 (1999) (discussing methods of protecting consumers).

24 Pamela Samuelson & Jason Schultz, *Regulating Digital Rights Management Technologies: Should Copyright Owners Have to Give Notice About DRM Restrictions?*, March 2012, available at <http://people.ischool.berkeley.edu/~pam/papers/notice%20of%20DRM-701.pdf>.

changes in the digital music arena.²⁵ The conference relieved the User's by assuring them that their Apple Inc. will not disappoint them further by continuing the enforcement of DRM.²⁶ However, the situation was not the same before 2007.

The iTunes Music Store, a service of Apple Inc., enforces its standard contract terms by means of a DRM system called 'FairPlay' and according to the terms of service, the provider reserves the right, at its sole discretion, to modify, replace or revise the terms of use of the downloaded files.²⁷ In the European Communities ('EC') market, this behaviour is prohibited by law and considered unfair, particularly when applied in a standard form contract not subject to negotiation.²⁸

On January 25, 2006, based on the EC laws, the Norwegian Consumer Council presented a complaint with the Consumer Ombudsman (Mr. Bjorn Erik Thon) against iTunes Music Store for breach of fundamental consumer rights.²⁹ Although Norway is just an European Economic Area member, its copyright and consumer protection law fully

25 Nicola F. Sharpe, *supra* note 16 at p. 332.

26 Eric, Bangeman, *EMI goes DRM Free on i-Tunes Store*, ARS Technica, 2007, available at <http://arstechnica.com/apple/news/2007/04/emi-to-announced-drm-free-plans-tomorrow-reports.ars>.

27 Nicola, *supra* note 6 at p. 94-95; "*iTunes reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as 'Additional Terms') will be effective immediately upon release and incorporated into this Agreement. Your continued use of the iTunes Store [sic] will be deemed to constitute your acceptance of any and all such Additional Terms. All Additional Terms are hereby incorporated into this Agreement by this reference.*" Lars Grondal, *DRM and Contract Terms*, INDICARE MONITOR, February 2006, available at <http://www.indicare.org/tiki-readarticle.php?articleId=177>; For further technical comment refer, See general, Andrew W. Bagley and Justin S. Brown, *The Broadcast Flag: Compatible with Copyright Law & Incompatible with Digital Media Consumers*, 47 IDEA 607-657 (2006-2007).

28 Nicola, *supra* note 6 at p. 95; Council Directive 93/13, *Unfair Terms in Consumer Contracts*, 1993 O.J. (L 95) 29 (EEC), available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML>.

29 *Agreement on the European Economic Area*, January 1994, available at <http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/EEA-Agreement.pdf>

complies with the EC Copyright and Consumer *acquis*.³⁰ On January 2007, Norway declared Apple's DRM illegal and ordered them to remove the restrictions of FairPlay within October 2007.³¹

In the meantime, France and Germany also raised their voices against the unfair activities of the iPod giant. The tussle came however ended in 2009 when after the Apple Inc. withdrew its unfair 'FairPlay' restrictions.³²

3.2. SONY-BMG ROOTKIT

In 2005 Sony BMG Music distributed thousands of musical Compact Disks ("CD") that contained TPM software designed to embed itself in the Windows Operating System where it could monitor and restrict use of the musical files from the CD.³³ Because of the statement given by Thomas Hesse, Ex-President of Sony BMG's Global Digital Business that, "Most people don't even know what a rootkit is, so why should they care about it",³⁴ it is pertinent explain the concept of 'Rootkit'.³⁵

Sony BMG secretly included Extended Copy Protection (XCP) and MediaMax CD-3 software on millions of music CD, of various artists like Celine Dion, Neal Diamond and Santana in the mid-2000. The software designed to keep Users at bay from making too many copies of the CD's.³⁶ It was in form of a Rootkit, undetectable by anti-virus and anti-

30 See *Id.*

31 Norway and iTunes: The DRM War, GIGAOM, October 2008, available at <http://gigaom.com/apple/norway-itunes-drm-war/>.

32 Norway Drops its Legal Complaints against Apple, Macworld, February 2009, available at <http://www.macworld.com/article/1138649/norway-drops-its-legal-complaints-against-apple.html>.

33 Mulligan & Perzanowski, *Supra Note 6*; <<http://www.eff.org/IP/DRM/Sony-BMG/guide.pb>>. Retrieved from <<http://people.ischool.berkeley.edu/~pam/papers/notice%20of%20DRM-701.pdf>> on March 9, 2012 at 11:00am.

34 Sony BMG Rootkit Scandal: 5 Years Later, NETWORK WORLD, November 2010, available at <http://www.networkworld.com/news/2010/110110-sonybm-g-rootkit-fsecure-drm.html>.

35 See *Id.*

36 For some detailed legal and technical comments of the rootkit case, see general Megan M. LaBelle, *The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, 89-98 *Deny. U.L. Rev.* 79-134 (2006). [hereinafter Rootkit debacle]

spyware programs that opened the door for other malware to infiltrate computers.³⁷ Even if Sony BMG disclosed the existence of this software in the End User's License Agreement ('EULA'). The agreement did not disclose the real nature of the software being installed, the security and privacy risks it created, the practical impossibility of uninstalling and many other potential problems for the User's computer.³⁸

When users and consumer organizations were informed of this matter, they filed more than twenty lawsuits³⁹ against Sony BMG in Canada, United States and Europe.⁴⁰ The main motive was to restrict the content on the copy-protected CD's so that the data can only be transferred to certain media players and portable devices (i.e., those using Sony or Micro-soft products) and could not be transferred to an iPod device or iTunes media player.⁴¹ Though the iPod is the dominant portable device and that iTunes is one of the most popular media players, many purchasers of Sony's copy-protected CDs were denied the right to "space-shift"⁴² their music.

Following the discovery of the use of this surreptitious copy protection technology, in November 2005, the Attorney General of Texas filed a class action lawsuit against Sony BMG under Texas' Consumer Protection Against Computer Spyware Act of 2005 followed by a number of class action law-suit.⁴³ Those cases were the first cases in the US, based on consumer law as an instrument of defence against DRM technologies.⁴⁴

37 *See Id.*

38 Nicola, *supra* note 6 at p. 97.

39 *The State of Texas v SONY BMG Music entertainment, LLC* (2005), available at http://www.oag.state.tx.us/newspubs/releases/2005/122105sony_lawsuit.pdf.

40 Nicola, *supra* note 6 at p. 98.

41 Rootkit debacle, *supra* note 42.

42 Shift space "allows media, such as music or films, which is stored on one device to be accessed from another place through another device." Space Shifting, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Space_shifting; "space-shifting legally purchased music to a portable MP3 player is permitted under the fair use doctrine" Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d at 1079.

43 Nicola, *supra* note 6 at p. 93.

44 *See Id.*

3.3. REGION CODES⁴⁵

All hail to the Content Owner, DVD region coding system recently prevented the British Prime Minister from viewing a set of 25 “American classics”, which were gifted by President Barack Obama, considered to the most powerful person on Earth.⁴⁶

So what is this ‘Region Code’? DVD Region Coding is an early form of TPM.⁴⁷ DVD’s are often encoded with a numerical identifier that corresponds to a specific geographic region in which that DVD is authorized to play. For example, if one purchases a DVD with a European Region Code while on vacation in France that DVD may not play on most U.S. or India manufactured DVD players, thanks to the Region Code. Users who then travel or move from one region to another risk an unfair surprise in finding that the Digital Content, which they legally purchased, does not work with equipment(s) at their home. Though pervasive, most DVD manufacturers neither disclose this to the User either at the point of sale, nor through any agreement (like EULA), entered therein. Thus, the consumer is kept unaware of such TPM restriction imposed on them by the Content Owners in conjunction with the DVD Copy Control Association.⁴⁸

Such problems have also extended beyond the Digital Content. Like, Hewlett-Packard has started ‘region coding’ its printers to match only certain printer cartridges bought in the same region of the world as the printer⁴⁹. If the wrong cartridge is inserted, the printer refuses to print, even though it is functionally identical to the approved cartridges.⁵⁰

45 MatějMyška, *supra* Note 9.

46 DVD region code blocks British Prime Minister from enjoying Obama's gift, autoblog, March 2009, available at <http://www.engadget.com/2009/03/20/dvd-region-code-blocks-british-prime-minister-from-enjoying-obam/>.

47 DVD Region Coding, ZYRA, available at <http://www.zyra.tv/dvd-region-coding.htm>.

48 Amela Samuelson and Jasin Schultz, *Should Copyright Owners have to Give Notice of their Technical Protection Measures?*, 6 J. on Telecomm. & High Tech. L. 48-49 (2007-2008).

49 David Pringle and Steve Stecklow, *Electronics With Borders: Some Work Only in the U.S.*, Wall Street Journal, January 17, 2005, p. B1.

50 See *Id.*

3.4. EMI FRANCE⁵¹

A French court,⁵² to take another example, fined EMI Music France for selling CDs with DRM protection schemes that would not play on car radios and computers. EMI was held guilty for violating the consumer protection law⁵³ because it did not appropriately inform consumers of these restrictions. The Court ordered EMI to label its CD's with the text: "*Attention: cannot be listened on all players or car radios*" to aware the User of such restriction. Even the EMI Music was made liable to pay 3000 € as damages.⁵⁴

IV. DRM / TPM and its Direct Nexus with Consumerism

Copyright Act primarily deals with the rights of the Content Owners. Hence to ascertain the rights of the Users it will be useful to have a brief analysis of the Common law rights that the Consumers enjoys, which DRM / TPM contradicts. DRM / TPM tend to contradict mainly three distinct rights of the Users. *Firstly*, the right to know, i.e. the Content Owners have a disclosure obligation. *Secondly*, right to privacy. *Thirdly*, right to private copy, usually this right emanates from the Copyright Act.

4.1. DISCLOSURE OBLIGATIONS WHEN SELLING DRM / TPM ENCRYPTED MATERIALS

There is little doubt that disclosure and transparency are effective means of protecting the User's rights and interests, especially in cases of information asymmetry.⁵⁵ Users have a right to know about the

51 Urs Gasser and John Palfrey, *Case study on DRM - protected music Interoperability and EInnovation*, Berkman Publication Series, University of St. Gallen, 2007.

52 *Association CLCV v. EMI Music France*, Tribunal de Grande Instance (T.G.I.) [ordinary court of original jurisdiction] Nanterre, June 24, 2003, D. 2003, Somm.2823, full text available at <http://www.legalis.net/jurisprudence-decision.php?id-article=34>.

53 article L213-1 of the French Consumer law (Code de la Consommation), C. CONSOMMATION art. L213-1, Law No. 92-1336 of Dec. 16, 1992, Journal Officiel de la R6publique Francaise [JO.] [Official Gazette of France], Dec. 22, 1992 (eff. Mar. 1994), available at <http://www.legifrance.gouv.fr/WAspad/UnArticleDeCodecommun=CCONSO&art=L213-1>.

54 Nicola, *supra* note 6 at p. 99.

55 Howard Beales, Richard Craswell, & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 513 (1981).

permissible extent to which they are entitled to access a Digital Content.⁵⁶ This right is considered as the grand norm of Consumer jurisprudence.⁵⁷ It is an express obligation for the Content Owner to disclose any material limitations of access rights (including, but not limited to, technological limitations such as an inability to use the media on another platform) clearly and conspicuously before selling those to the Consumer.

Repeatedly the Content Owner's failed to provide full disclosure of DRM / TPM software(s), embedded in their Digital Content which in turn deprived User's of their basic rights. For instance, Sony did not inform Consumers that the Rootkit would collect information from Users' computers and use it to serve advertisements; which will ultimately compromise the security of the Consumers system. It is undisputable that the Users have right to play their CDs on their electronic systems, capable of processing Digital Contents, without being monitored and targeted for marketing.⁵⁸ The Commission in US has challenged this type of conduct by adware purveyors.⁵⁹

Indian Consumer Protection Act, 1986 does not specifically talk about the protection of Consumers from DRM. However, under Section 6(b) of the Indian Consumer Protection Act, 1986, Consumers have the rights to receive information about the quality, quantity, potency, purity, standard and price of goods or services. Hence, interpreting the statute, Content Owners selling DRM / TPM encrypted material in India may be obliged to disclose the same to the User.

56 Nicola, *supra* note 6 at p. 103.

57 Matthew Hilton, *The Duties of Citizens and the Rights of Consumers*, 15 CONSUMER POLY REV., January 2005, at 6, available at <http://www.allbusiness.com/management/consumer-demand-management/1021482-1.html>.

58 *In re Zango, Inc. et al.*, File No. 052 3130, November 2006 (consent order), available at <http://www.ftc.gov/os/caselist/0523130/index.htm>.

59 J. Thomas Rosch, *A Different Perspective on DRM*, March 2007, Federal Trade Commission, available at [http://www.ftc.gov/speeches/rosch/Rosch-Berkeley-DRM% 20 Speech-Mar9-2007.pdf](http://www.ftc.gov/speeches/rosch/Rosch-Berkeley-DRM%20Speech-Mar9-2007.pdf).

4.2. OBLIGATIONS TO PROTECT PRIVACY

Right to privacy is a fundamental right guaranteed by all major international human rights Covenants.⁶⁰ Users are not much aware of violation of this right through DRM / TPM. This violation takes place in such a way that it is not possible for a Consumer to identify it. A factual example will make it clear how this violation takes place.

Microsoft's Windows Media Player ('WMP') for Windows XP violated the privacy right of User's. WMP allowed Microsoft to track DVD movies been watched by users on their Windows PC. This problem was introduced in version 8 of WMP that were preinstalled on all Windows XP systems. Microsoft violated the Privacy Rights though the following process:

“Each time a new DVD movie is played on a computer, the WMP software contacts Microsoft Web server to get title and chapter information for the DVD. When this contact is made, the Microsoft Web server is given an electronic fingerprint, which identifies the DVD movie being watched, and a cookie, which uniquely identifies a particular WMP player. With these two-pieces of information, Microsoft can track what DVD movies are being watched on a particular computer. The WMP software also builds a small database on the computer hard drive of all DVD movies that have been watched on the computer. As of Feb. 14, 2002, the Microsoft privacy policy for WMP version 8 does not disclose that the fact that WMP ‘phones home’ to get DVD title information, what kind of tracking Microsoft does of which movies consumers are watching, and how cookies are used by the WMP software and the Microsoft servers. There does not appear to be any option in WMP to stop it from phoning home when a DVD movie is viewed. In addition, there does not appear any easy method of clearing out the DVD movie database on the local hard drive.”⁶¹

60 Article 19, Universal Declaration on Human Rights, U.N. General Assembly Resolution 217 A (III), 1948; Article 11, American Convention on Human Rights, “Pact of San José”, 1969; Article 8(1) Convention for the Protection of Human Rights and Fundamental Freedoms (E.C.H.R.), Council of Europe, 1950.

61 Richard M. Smith, *Serious Privacy Problems in Windows Media Player for Windows XP*, Computer Bytes Man, available at <http://www.computerbytesman.com/privacy/wmp8dvd.htm>.

This is not a single instance of privacy violation⁶² but there are many more instances hidden in the sacks that are appearing in forefront with the passage of time. In India also this DRM / TPM is violating the Privacy Right, may be in a much more aggressive manner. But mainly due to two reasons such violations are not being addressed. *Firstly*, India lacks any statutory enactment which expressly guarantees a general Right of Privacy to individuals; therefore, it is becoming increasingly difficult to protect the Privacy rights of Indian Users / Consumers. *Secondly*, there is a lack of awareness about privacy right in India.

However, elements of privacy right, traditionally embedded in the common law and criminal law,⁶³ have been recognized by Indian courts⁶⁴. But lack of any specific recognition of this right in the Digital World threatens the privacy rights of Indian Users / Consumers. However, recently the Indian Government issued *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('IT Rules')*, as a delegated legislation deriving its power from Section 43A⁶⁵ of the Information Technology Act, 2000.

As the Indian Content Owners falls under the definition of Body Corporate⁶⁶, hence they will be bound to protect privacy of Sensible Personal Data⁶⁷ of the Users. IT Rule covers only Body Corporate(s)

62 “According to Article 6 and 7 of the European Directive on Data Protection, personal data can only be collected if this is necessary for a specific lawful purpose and based on legitimate grounds.” LucieGuibault and NataliHelberger, *Consumer protection and Copyright Law*, ECLG/035/05, p. 18.

63 Juvenile Justice Act, 2000, Code of Criminal Procedure, 1973, Indian Penal Code, 1860 etc.

64 *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295. Two of the judges of the seven judge bench, saw the right to privacy as a part of Article 21 of Constitution of India, 1950, marking an early recognition of privacy as a fundamental right. Justice SubbaRao held “It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty”.

65 Section 43A of the Information Technology Act, 2000 prescribes punishment for the body corporate which possess, deals or handles sensitive personal data or information and subsequently due to negligent action or in absence of reasonable security practices cause wrongly loss or wrongful gain to any person.

66 Explanation 1 attached to Section 43A of the Information Technology Act, 2000.

67 ‘Sensitive Personal Data’ includes: password; financial information such as Bank account or credit card or debit card or other payment instrument details; physical, physiological and mental health condition; sexual orientation; medical records and history; Biometric information; any detail relating to above, received by the body

located in India, hence Content Owners located outside India will not be bound to abide by this delegated legislation. Further the consent, in writing, of the User also need to be taken, pursuant to the IT Rules to access the Sensible Personal Data.

4.3. OBLIGATION TO PROTECT ‘RIGHT TO PRIVATE COPY’

A User who buys a Digital Content from the Content Owner has the right to reproduce that article for his own purpose; academically this right has been referred to as ‘right to private use’.⁶⁸ This right is guaranteed under various international covenants dealing with the Intellectual Property rights.⁶⁹

In India, ‘Right to Private copy’ is enshrined under the doctrine of Fair Dealing. Fair Dealing is statutorily laid down under Section 52 of the *Indian Copyright Act, 1957*, which stipulates, that a Fair Dealing with a literary work for the purpose of criticism or review, whether of that work or of any other work shall not constitute infringement of copyright. In the case of *Wiley Eastern Ltd. and Ors.v. Indian Institute of Management*⁷⁰; the Delhi High Court traced the purpose of the enforcing Fair Dealing with reference to the Constitution of India:

“The basic purpose of Section 52 of the Indian Copyright Act, 1957 is to protect the freedom of expression under Article 19(1) of the Constitution of India...Section 52 is not intended by Parliament to negatively prescribe what infringement is.”

corporate for provision of services; and any information relating to above that is received, stored or processed by the body corporate under a lawful contract or otherwise, Rule 3 of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

68 “The Institute for Public Policy Research (IPPR) is calling for a ‘private right to copy’.” Copying own CD’s should be legal, BBC News, October 2006, available at http://news.bbc.co.uk/2/hi/uk_news/6095612.stm; See general William Davies and Kay Withers, Public Innovation, IPPR, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_10_06_public.pdf.

69 Article 9.2 of Berne Convention for the Protection of Literary and Artistic Works, 1886; Article 10 of the WIPO Copyright Treaty, 1967; Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1996; Article 5(2)(b) of the Infosac Directive.

70 61 (1996) DLT 281 ¶19.

Thus, the Content Owners have a duty to respect the 'right to private copy' and, therefore, the same may not be curtailed by imposing DRM / TPM.

V. Role Of Copyright Law In Protecting The Interest Of The Content Owners

In India, the only effective protection against DRM can be obtained though the Copyright Act, 1957 due to the 2012 Amendment. The recent amendment to the Indian Copyright Act drastically changed the Copyright regime of India. The anti-circumvention law introduced in India is quite different compared to that of the United States of America ('USA'). This part deals *firstly*, with the anti-circumvention law prevalent in USA and *secondly* with the recent amendment of the Indian Copyright Law, 1957 and the features of the newly inserted Indian anti-circumvention law.

5.1. USA: DIGITAL MILLENNIUM COPYRIGHT ACT, 1998

With the rising concern of Content Owners regarding their intellectual rights and adoption of the World Intellectual Property Organization ('WIPO') Treaty⁷¹; in 1998 Congress of the United States of America ('US'), enacted the Digital Millennium Copyright Act ('DMCA'). The DMCA and its anti-circumvention provisions for copy protection technology goes beyond the Audio Home Recording Act, 1992⁷²; DMCA not only prevents copying but also prevents unauthorized access. With the enactment of DMCA, scholars raised fear that the anti-circumvention legislation went too far to protect Copyright Owners and would directly contradict the US Constitution.⁷³

By virtue of DMCA, the Copyright Owners deploy DRM mechanisms that do not allow Fair Use of the Digital Content, resulting in a

71 WIPO Copyright Treaty, arts. 11-12, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, 71-72, available at http://wipo.int/clea/docs/en/wo/wo033en.htm#P88_11974.

72 In 1992, Congress passed the AHRA to amend the Copyright Act of 1976, 17 U.S.C. Section Section 1001-1010 (2000). The 1992 Act added Chapter 10 to Title 17 of the U.S. Code.

73 Kevin C. Earle, *No-Copy Technology And The Copyright Act: Has The Music Industry Been Allowed To Go Too Far In Diminishing The Consumers' Personal Use Rights In The Digital World?*, 2 J. Marshall Rev. Intell. Prop. L. 352 (2003).

curtailment of Users' ability to engage in lawful Fair Uses of digital copyrighted works.⁷⁴

5.2. INDIA: COPYRIGHT (AMENDMENT) ACT, 2012

Recently the Indian Parliament passed the Copyright (Amendment) Act, 2012 ('**Amendment Act**') which amended the Copyright Act, 1957 with certain changes for clarity, and aimed to remove operational difficulties by addressing certain new issues that have emerged in the context of digital technologies and the Internet. The Amendment Act aimed to bring the Copyright Act, 1957, in conformity with the two WIPO Internet Treaties, viz., the WIPO Copyright Treaty (WCT), 1996 and the WIPO Performances and Phonograms Treaty (WPPT), 1996 to the extent considered necessary and desirable⁷⁵. This Amendment imposed 'TRIPS plus' standards on India for which there was no legal obligation.⁷⁶

The Amendment Act allowed User's to break DRM / TPM on legally purchased Digital Content, as long as do not violate copyright terms.⁷⁷The Amendment Act inserted two new provisions, section 65A and section 65B to the Copyright Act, 1957, relating to protection of technological measures and protection of rights management information.⁷⁸

Section 65A has been drafted to provide certain rights to the Users.⁷⁹ However, many pressure groups like Indian Music Industry, RPG Enterprises-Saregama, Indian Performing Right Society Limited and many more tried to influence the Standing Committee of Parliament to enforce

74 Timothy K. Armstrong, *Digital Rights Management And The Process Of Fair Use*, 20 Harv. J.L. & Tech. 49 (2006-2007).

75 Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, RajyaSabha Secretariat India, November, 2010, ¶ 1.3 available at <http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf> (Last visited on November 1, 2012). (*hereinafter* PRS report)

76 *See id.*, 472.

77 *See Id.*

78 Section 65A and Section 65B of the Copyright Act, 1957 inserted vide Clause 37 of the Copyright (Amendment) Act, 2012.

79 Nicola, *supra* note 6 at p. 57.

stringent law in line of USAs' *Digital Millennium Copyright Act*, 1998⁸⁰, but the Committee refused to recommend so.⁸¹

Section 65A(1) of the Amendment Act, imposes punishment to the User of the Digital Content in the event of circumventing any DRM / TPM technology imposed by the Copyright Owner. However, Users are exempted from such punishment provided⁸²:

- a. the act of circumvention is not expressly prohibited by the Copyright Act;
- b. does anything necessary to conduct encryption research using a lawfully obtained encrypted copy: or
- c. conducts any lawful investigation; or
- d. does anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or
- e. operator; or
- f. does anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
- g. any measure is taken necessary in the interest of national security

Thus, the ambit of section 65A of the Amendment Act does not exclude the right of Fair Dealing, guaranteed under section 52 of the Copyright Act, 1957 unlike that of the DMCA. Section 65B prevents removal of the information regarding the management of rights included in the digital copies of the work.⁸³ This newly inserted section provides protection to the Content Owner against any removal of DRM / TPM, without authority. Section 65B mandates punishment to the User, who knowingly:

80 *Digital Millennium Copyright Act*, Pub.L. No. 105-304, 112 Stat. 2860 (1998).

81 Department Related Parliamentary Standing Committee on Human Resource Development, RajyaSabha Secretariat New Delhi, November 2010/ Aग्रहयाना, 1932 (SAKA), p. 56 available at <http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf>.

82 Section 65A(2) of the Copyright (Amendment) Act, 2012.

83 A.G. Scaria, *Does India need Digital Rights Management Provisions or Better Digital Business Management Strategies?*, 17 JIPR 464 (2012).

- a. removes or alters any rights management information (DRM / TPM) without authority; or
- b. distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that any rights management information (DRM / TPM) has been removed or altered without authority.

This provision also allows the Content Owner to obtain civil remedy,⁸⁴ in addition to the criminal punishment as per the Copyright Act, 1957.

However one serious concern can be raised here. TRIPS only require criminal procedures for copyright infringement in case of “*piracy on a commercial scale*”⁸⁵. DRM / TPM measures may be circumvented both in commercial and private non commercial level. Section 65A and 65B denies recognition of the difference between the two and thereby provides for criminal punishment to both.

Criminality is being judged depending upon the harm to the society as a whole. This general requirement of harm to society is not satisfied by instances of private non-commercial level circumvention. Hence, there is no justification to treat both commercial and non-commercial private circumvention equally.

VI. Conclusion

Personal computers entered the Indian market much later compared to the Western countries. Indian legislature though trying to bring the enactments dealing with Digital world at par with the Western counterparts, but the process is very slow. Positive attitude of the India legislature to address the international issues can be witnessed in recent years, post enactment of the Information Technology Act, 2000.

The Western Countries address the implications of DRM / TPM invoking their respective municipal laws. India, prior to the 2012 amendment of the Copyright Act, 1957, was unable to acknowledge, the

84 Section 55 of the Copyright Act, 1957.

85 Article 61 of TRIPS Agreement

presence of DRM / TPM, statutorily. With the 2012 amendment of the Copyright Act, 1957, India not only recognised the existence of DRM / TPM but also provided relief to the User's by allowing them to circumvent such technological measures in certain prescribed situations.

However, the Indian legislature failed to justify the treatment both commercial and non-commercial private circumvention equally. As it is already mentioned that TRIPS only require criminal proceedings against copyright infringement done on commercial scale, hence treating the both under equal footing may be unreasonable for the Indian Democratic setup.

Amendment Act though provides rights to the Content Owner's, failed to provide with a limit of such technological measures that aims to curtail the freedom of the User / Consumer. Taking non-digital world as a baseline for User's right, digital world does not allow the same level of freedom to them. Instead the rights of the User in the digital world are much narrower. Hence the burden lies upon the legislature to equalize the rights of the Users in both the world. Every right has a corresponding duty; hence the Content Owner though entitled to protect their Digital Content must also be bound to fulfil their obligations like: protect privacy rights of the Users; provide right to private copy; disclose the existence and implications of DRM / TPM software in a Digital Content.

However, this paper only attempt to deal with the Copyright Act and its role in controlling DRM / TPM but it is indisputable that Copyright law primarily aims to protect the interests of the copyright owner. Therefore, to protect the interests of the Consumers, laws relating to the Consumers right must also provide protection against encroachment of their rights by the Content Owners. With regard to the international perspective, it is pertinent to note the efforts of amending the UN Consumer Protection Guidelines for the safeguarding of consumers against the embargo created by DRM technologies.⁸⁶ Indian Consumer Protection Act, 1986, till date, does not provide for any such special safeguards in the digital world against the Content Owner.

86 Plan to amend UN Consumer Protection Guidelines to safeguard access to education and culture, September 2010, available at <http://a2knetwork.org/plan-amend-un-consumer-protection-guidelines-safeguard-access-education-and-culture>.

It is worth mentioning at end that the Indian legislature took a reasoned approach while protecting the DRM / TPM technology of the Content Owners through the Amendment Act. The Amendment Act did not provide any 'blanket prohibitions' against circumvention like that are present in the DMCA.⁸⁷ In near future Privacy Act⁸⁸ can also be expected in India which will protect the privacy of Users. Until then the Amendment Act will be the guiding star in dealing with DRM / TPM issues in India.

87 *Digital Millennium Copyright Act*, Pub.L. No. 105-304, 112 Stat. 2860 (1998).

88 There has been an attempt to pass legislation for Privacy Protection in India for quite some time. First serious attempt was made when the Personal Data Protection Bill, 2006 was presented to the Parliament in December 2006 along with Information Technology Amendment Bill, 2006. However the Bill was not passed and lapsed when the tenure of the previous Parliament ended. There is news that Government of India is under process of drafting a new version of the Privacy Protection legislation in the form of Privacy Bill, Natasha Vaz, *Privacy Matters — Analyzing the "Right to Privacy Bill"*, April 2012, available at <http://cis-india.org/internet-governance/right-to-privacy-bill-conference>.