



Anti-Circumvention laws to protect Digital Rights: An Indian Perspective

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¹ The views or arguments expressed in this article are that of the author and not the company. Please send your feedback to kalyan@brainleague.com

Introduction

Copyright Law encourages creation of works of authorship by granting exclusive rights for a limited period of time. It operates on the principle of 'Quid Pro Quo', which means 'give and take'. An author gives a creative work to the society and takes exclusive rights over it for a limited period of time, after the expiration of which the work falls into the public domain. The rationale behind providing copyright protection is both moral and economic. The moral rationale is that the author gets rights over his creations which form a part of his persona and the economic rationale is that the copyright law encourages authors to produce new works by providing exclusive rights for commercial exploitation.

A Copyright would be granted for an original work of authorship expressed on a tangible medium. The work created might be musical, artistic, dramatic, motion picture, sound recording, etc. . If the work falls into one of the subject matter categories and is expressed on a tangible medium, the author gets a bundle of exclusive rights, which include the right to reproduce, distribute, make derivative works, adapt, abridge and so on. The exclusive rights granted to the author are not unlimited, there are exceptions in the form of fair use, first sale, compulsory licensing and so on. Through these exceptions, the copyright law tries to balance the exclusive rights of authors and the rights of public to use the copyrighted works.

Traditional copyright law was functioning efficiently until the advent of digital media. The evolution of digital media has broken many barriers of communication and has reduced the cost of producing new copies to zero. It has allowed copyright owners/authors to develop a proficient system of commercially exploiting their works. Subject matter that can be transmitted digitally includes text, software, audio and video. The rights possessed by copyright owner on digital media are called digital rights. Such rights are not different from the traditional rights possessed by a copyright owner.

Though the digital media provides commercial advantages to the copyright owner, those advantages could be a nullity because easy reproduction and distribution of digital works increases piracy and uncontrolled proliferation of copyrighted works. In order to prevent piracy and to track the proliferation of copyrighted works, Digital Rights Management (DRM) systems such as encryption, watermarking, fingerprinting and so on

have evolved. Rather than tracking illegal uses after they occur, the latest DRM technologies seek to prevent illegal uses at the first place. New technologies like the Windows Media Rights Manager (WMMR) have great amenities to protect digital content. WMMR protects digital audio and video content not only until files are transferred to the user but also even after they are transferred. Microsoft's Palladium is an example of how strong DRM technologies would be in the near future.

Though DRM systems are getting stronger by the day, someone would definitely find a way to break them and that would result in free distribution of the content without the copyright owner's authority. In order to prevent breaking/circumvention of the DRM systems the support of law is very essential. To meet this need, laws have been enacted in various nations prohibiting circumvention of DRM systems designed to protect the digital rights of the copyright owner. Such laws protect the rights by making circumvention of technology measures to protect digital content illegal.

Anti-circumvention laws provide strong protection to the copyright owners but they deprive the public of the rights they have over the copyrighted works. As circumvention would be illegal, any such measures to make fair use of the work would also be illegal, thus depriving the public of their right to free use. Therefore, the anticircumvention laws give rise to a conflict in this modern era which springs bad consequences. The world is today struggling to find an amicable solution to this problem. Under such circumstances this article explores the need for an anticircumvention law in India and other developing countries.

Part I - Overview of Anti Circumvention Laws

International Treaties

a. WIPO COPYRIGHT TREATY (WCT)

WCT is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works. It was adopted with an aim to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible. Article 11¹ of the WCT provides the obligations of members concerning technological measures. According to Article 11, the contracting states shall have an obligation to 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 the WCT 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.

Article 12² of WCT, provides the obligations of member states concerning Rights Management Information. As per Article 12, the member states shall have the obligation to provide adequate and effective legal remedies against any person for knowingly inducing, enabling, facilitating or concealing removal or alteration of any electronic rights management information without authority and for inducing, enabling, facilitating or concealing distribution, import for distribution, broadcast or communication to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

b. WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

WPPT was adopted with an objective to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible. This treaty would not disturb the existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers,

Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (Rome Convention). Articles 18³ and 19⁴ of the WPPT provide similar obligations for performers and producers of phonograms to contracting states as provided under Articles 11 and 12 of the WCT.

Both the treaties obligate the member states to provide for laws prohibiting circumvention of digital rights management systems. They also obligate the them to provide for laws to prevent trafficking in tools meant for circumvention activities.

United States of America

US government has implemented the international treaties by passing the Digital Millennium Copyright Act (DMCA) in the year 1998. The Act has been codified under section 1201 of Title 17 of the United States Code which is the law relating to copyrights. Section 1201 prohibits circumvention of technologies that effectively control access to works protected under title 17⁵. It also prohibits manufacture, import, sale or other traffic in any product, service, device, component or part, which is primarily designed or produced for the purpose of circumvention or which has a limited use other than circumvention⁶. As per section 1201 "circumvention of a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner⁷.

Exemptions have been provided in the section for nonprofit library, archives, or educational institution to gain access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work⁸. Exceptions have also been provided for reverse engineering, encryption research, minors and security testing.

Though the DMCA provides a list of exemptions, they are just a nullity because they are too narrow and the actual act of circumvention is prohibited irrespective of the

purpose for which it has been done. The stringent provisions of DMCA have led to a large number of unintended consequences⁹ like arrest of scientists, numerous law suits, stoppage of research, etc.

European Union

The European Union Directive on copyright and related rights in the information society was adopted by the European parliament in the year 2001 with an aim to implement the provisions of WCT and WPPT¹⁰. The Directive mandates the implementation of the WIPO treaties by EU member states.

The EU directive provides that the member states shall provide adequate legal protection against the circumvention of any effective technological measures, designed to prevent or restrict acts not authorized by the right holders of any copyright¹¹. It further provides that the member states shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures¹².

The directive further mandates that the member states shall provide for adequate legal protection against any person for knowingly removing or altering any electronic right management information and for distributing, importing for distribution, broadcasting, communicating or making available to the public of works or other subject-matter from which electronic rights-management information has been removed or altered without authority¹³. The member states are required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002¹⁴. Only Denmark and Greece met this deadline. UK has made efforts to implement the directive through its 2003 regulations.

India

The Indian Copyright Law has not been amended to implement the anti-circumvention provisions under the WCT and WPPT. Therefore, there are no provisions that prohibit circumvention of digital rights management systems in India.

Part II - Problems with Anti-Circumvention Laws.

Legal protection against circumvention is good for copyright owners but it poses great problems to the public. Such protection has proved to be very destructive rather than constructive. The American experience with the DMCA shows that anti-circumvention laws have resulted in a large number of unintended consequences¹⁵. The anti-circumvention measures of the DMCA have resulted in stifling a wide array of legitimate activities rather than preventing piracy¹⁶.

The DMCA has today developed into a threat to fair use, free expression, scientific research, competition and innovation. The right of a person to make fair use of the copyrighted content has been provided with an aim to provide free access to public in legitimate cases like comment, news reports, teaching, scholarship, etc. The enactment of the anti-circumvention provisions through DMCA deprives access to the copyrighted works by making circumvention of any technologies designed to protect the copyrighted works illegal. DMCA disturbs free speech by preventing access to information protected by DRM technologies.

DMCA stifles scientific research by prohibiting research on DRM technologies and by making research activities illegal. Threats against Princeton Professor Edward Felten's team of researchers, and prosecution of Russian programmer Dmitry Sklyarov have chilled scientific research due to fear of arrest and litigation¹⁷. Anti-circumvention measures provide an opportunity for individuals and companies to suffocate competition by preventing others from manufacturing their DRM technologies even after the expiry of Intellectual Property rights. Circumvention of DRM technologies and tools to circumvent DRM technologies for the purposes of knowledge and research to make similar technologies is banned by DMCA. Such a ban prevents competition.

DMCA slows down invention and innovation by prohibiting research on the existing DRM technologies to make new ones and to design around the existing ones. Though some exceptions are provided for research and testing, they are too narrow to permit extensive research¹⁸.

The dramatic development of the digital media is the reason for the aforementioned consequences. The digital world is progressing so fast that the traditional copyright law is not able to catch up with it. As the law is being transformed to meet the wants of the digital world, a large amount of unintended consequences are surfacing. The legislators are trying to find a solution to the problems due to the anti-circumvention laws. Though a large number of bills have been introduced in the US Congress like the Wyden, Lofgren and others, they haven't been passed and none seemed to resolve the problem. Efforts are being made by the US government and other governments to arrive at policy measures and mechanisms to solve the problems with DMCA and other similar laws. Sooner or later the confusion will come an end and good policy measures would have to be developed to avoid bad consequences of anti-circumvention laws.

Part III - India and Anti-circumvention Laws.

India doesn't have any anti-circumvention laws to protect DRM technologies; the Indian legislature hasn't implemented the WCT and WPPT. India is a country filled with piracy, as the copyright law is not strictly enforced. Not many authors in India really bother about registering their works with the copyright office or enforcing their copyrights. Enough importance is not being given to copyright and other forms of intellectual property in India due to complicated reasons which fall out of the scope of this article.

Though the existence of widespread piracy is fatal to the ends of copyright law, it has certain advantages considering the fact that the copyrighted content is out of reach of the people of India because of the economics involved. The availability of pirated copies provides advantages to both content owners and users.

Advantages to Users

The users obviously get the better half of the deal. They get the copyrighted content at a very low and affordable cost or even sometimes free of cost. Through the pirated copies, they get access to information, knowledge and entertainment, which would otherwise have been not available to them. The availability of pirated books gives access to information and knowledge. The availability of pirated music and movies in the form of compact discs and video cassettes provides entertainment. And the availability of software and books helps people to make a good career for themselves. The prosperity of Indian software industry can be attributed to the availability of abundant number of software professionals who have emerged partly because of the easy accessibility to pirated software and books.

Advantages to content owners

Content owners basically lose out on the deal but they also get certain advantages. They get fame and popularity, which would act as a major source of inspiration to create new works. Such fame and popularity could be used by them to make profit in future endeavors and in other forms of business. For example, the content owners of motion pictures and music could make profit through public performances, television shows and theatre shows. I

Content owners of software lose out on selling original copies of their software but they could get good business if their software becomes famous and is available to lots of users because while deciding to buy, a software, the availability of qualified professionals who could use the software is an important issue for a company. If more people are trained in the software then more companies would buy it because the company would have abundant qualified professionals to work with it. The availability of pirated software has been helping the development of software Industry in India because of the profuse availability of qualified software professionals.

The conflict and its resolution

If legal protection for DRM systems develops to a stage where piracy could be largely controlled, the people living in India would get the stick, as they would lose access to information, knowledge and entertainment. On the other hand strong protection for DRM systems is good for developed countries because the objectives of copyright law which is to promote the progress of useful arts would be furthered if piracy is controlled. In the digital world there are no territorial limits and so different rules can't be framed based on the the development status of a nation. This gives rise to a conflict between the interests of developing countries like India and developed countries. The developed countries want a strong protection against circumvention of DRM technologies and the developing countries like India want a weaker protection in order to get piracy advantages. The interests of both developed and developing countries can't be satisfied in the digital world due to lack of territorial limits. Under such circumstances, it is sensible to make policies best for the world as a whole.

With a strong DRM system in place the content owners in the world would be encouraged to do more business on the internet and would gain more profits because of the wide reach and quality offered by the digital world. Such a scenario would provide good economic incentives, which would result in an increase in the creation of useful arts. That would be very beneficial to the society as a whole.

On one hand, if piracy is reduced to a considerable extent, the authors would be encouraged not only in developed countries but also in developing countries. This would encourage authors who were not too keen at putting full time efforts in creation of useful arts because of lack of economic incentives as an end to piracy would increase the economic incentives. Therefore, a strong DRM system would have a good impact on both developed and developing countries.

On the other hand, a weak DRM system would help India and other developing countries in getting access to information but that would reduce creativity all over the world. If there is less creation there would be less information, knowledge and entertainment. Such a result is not good for the society.

There are no efficient alternatives other than the copyright system to promote the progress of useful arts and the copyright law would not work efficiently with a weak DRM system. Therefore, the world is better off with a strong laws against circumvention of DRM systems. That would help curb piracy to a large extent, which would in turn encourage the development of useful arts. Though the people in India and other developing countries might have to suffer slightly such burden is necessary for the good of mankind as a whole. In order to make sure that India would not be deprived of vital information and knowledge, the government could ensure supply of content at a low cost by subsidizing it. The content owners might also be willing to sell content on Compact Discs or other media for which rules could be made based on territorial basis at a low price because they make most of their profit through business in developed countries and any profit that they get in developing countries would be a bonus.

Therefore, for the good of world as a whole and for encouragement of creation of useful arts, it would be advisable for India to have strong anti-circumvention laws.

Part IV - Conclusion

Implementing strong laws against circumvention of DRM systems, which could stop piracy completely, promotes progress of useful arts in developed countries but will deprive access to information, knowledge and entertainment to people in developing countries like India. Because of the non-divisible nature of the Internet and the web, it cannot be divided like land into different territories in order to make different rules for different countries based on the development status of the country. Under such a situation, a system that would be beneficial to the world as a whole should be adopted. After looking at the interests of both developed and developing countries, it would be advantageous for the world as a whole to have a strong legal protection against circumvention of DRM systems because that would encourage creativity in useful arts which would in turn be beneficial for mankind. If there is no creation there would be no information, knowledge and entertainment. Therefore, instead of putting an end to

creation as a whole it is better to encourage its progress by implementing strong anti-circumvention laws in India and all nations of the world.ⁱ²

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Article 11, WIPO Copyright Treaty (WCT), Geneva, adopted by the Diplomatic Conference on December 20, 1996.

Article 12, WIPO Copyright Treaty (WCT), Geneva, adopted by the Diplomatic Conference on December 20, 1996.

³ Article 18: Obligations concerning Technological Measures: Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law. Article 18, WIPO PERFORMANCES AND PHONOGRAMS TREATY, adopted by the Diplomatic Conference on December 20, 1996.

⁴ Article 19: Obligations concerning Rights Management Information: (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority. Article 19, WIPO PERFORMANCES AND PHONOGRAMS TREATY, adopted by the Diplomatic Conference on December 20, 1996.

⁵ 17 USC Section 1201(a)(1)(A) (2003).

⁶ 17 USC Section 1201(a)(2) (2003).

⁷ 17 USC Section 1201(a)(3) (2003).

⁸ 35 USC Section 1201(d)(1) (2003).

⁹ Unintended Consequences: Three years under the DMCA, V.1.0 (May 3, 2002). For latest www.eff.org

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Official Journal L 167 , 22/06/2001 P. 0010 - 0019.

¹¹ Article 6(1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Official Journal L 167 , 22/06/2001 P. 0010 - 0019.

¹² Article 6(2), EUCD Journal L 167 , 22/06/2001 P. 0010 - 0019.

¹³ Article 7, EUCD Journal L 167 , 22/06/2001 P. 0010 - 0019.

¹⁴ Article 13, EUCD Journal L 167 , 22/06/2001 P. 0010 - 0019.

¹⁵ Unintended Consequences: Five Years Under the DMCA 1
v.3 (September 24, 2003), www.eff.org

¹⁶ Id.

¹⁷ Id. At page 1.

¹⁸ Id.