



**DIGITAL RIGHTS MANAGEMENT
AND RIGHT TO FAIR USE: A
CRITICAL ANALYSIS ON RELATED
LAWS OF INDIA AND UNITED
STATES**

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ABSTRACT

Digital Rights Management is a system which provides an additional protective measure to copyrighted works along with the conventional protection given to it. When a double protection is given, the access to such works are completely denied, which tends to affect the well recognized copyright law principle of 'fair use'. Laws of various countries also recognise DRM system. The primary purpose of this paper is to analyse legal provisions relating to DRM systems and bring out the threat it poses to 'right to fair use'. As a part of the said analysis, the paper will look in to the laws relating to DRM in India and United States. There is a need to balance the rights of fair users and copyright owners. The paper thus includes certain suggestions to ensure the rights of copyright owners as well as the claimants of right to fair use.

Key Words: Digital Rights Management, Copyrights, Fair Use

1. INTRODUCTION

Intellectual properties are intangible properties made out of specialized skill, knowledge and ability of human mind and

human intellect which includes rights relating to literary, artistic and scientific work, as well as performance of performing artists, inventions in all fields, scientific discoveries, trademarks etc.¹ Copyright is a part of Intellectual Property Rights and means the exclusive right to do or to authorise others to do certain acts in relation to literary, dramatic, musical and artistic works; cinematographic films, and sound recordings.² The main object of copyright is to protect the creator of original work from the unauthorized reproduction or mistreatment of the creator's works. With the advent of internet, the copyright owners were perceived with the fear of their works being vulnerable to piracy, as internet makes it possible for any person to widely disseminate a work. Technology has provided the copyright owners a system by which they can limit the access and use of their works. Digital Rights Management is a system for protecting the copyrighted data circulated via the internet or other digital media by enabling secure distribution and/or disabling illegal distribution of the data. DRM can come in many different forms. They are embedded in physical media (i.e. CDs or DVDs) and in content distributed online, such as music files, e-books, texts, images and games distributed online etc. Now, there are various legislations across the world that gives legal validity to the DRM system. The legislations validating DRM are based on two international instruments namely: World Intellectual Property Organization Copyright Treaty, and World Intellectual Property Organization Performances and Phonograms

¹ Article 2 (viii), WIPO Convention.

² Ishita Chatterjee, Copyright Law, 1st Ed. Central Law Publication, (2011)



Treaty. India and United States had incorporated those DRM provisions in their domestic laws.

Debate over the DRM system started with the culture clash between the copyright owners and the claimants of right to fair use of data, facts or information. A fair use is use of a copyrighted material for purposes like commenting, criticizing, or making parody etc. Using copyrighted works for academic purposes, media reporting, scholarly utilization etc are also fair use. Such uses can be done without permission from the copyright owner. Fair use is also a defence against a claim of copyright infringement. If use of a copyrighted work qualifies as a fair use, then it would not be considered an infringement.³

Claimants of right to fair use believe that the access to knowledge must be free and unrestricted whereas, copyright owners believe that access to their works be controlled and use of their works must be paid for. The legal provisions as to DRM pose threats to this well established principle of copyrights law- the right to fair use. Enforcing rights of one class of people should not be at the cost of the rights of another class of people. When a double protection is given to the works of copyright owners, it should not affect the rights of fair users of the work. Hence there is a need to set right a balance between the DRM system and Right to Fair Use. Realizing the right to fair use in a digital rights management environment will require some technical mechanism to allow public access and

reclaim the privileges equivalent to those deemed fair earlier.

2. DIGITAL RIGHTS MANAGEMENT – AN OVERVIEW

In the context of laws relating to copyrights, the intellectual properties of the owners of copyrights are managed and controlled by them also through a technological mechanism apart from the conventional copyrights protection. DRM is an additional protective measure which one applies to his/her intellectual property. DRM systems can take the form of software packages or hardware technological restraints that limits the use of digital files as a part of protecting copyright. DRM systems are equipped to restrict access to files such as number of views and extent of views. The system can also control modifying, copying, saving, printing of a copyrighted work. These technologies may be contained within the operating system, program software, or in the actual hardware of a device. There are mainly three approaches to the DRM systems. One approach is where the work of a copyright owner is encrypted in a crust and the access to the same is provided only to the authorized users. Another approach is where the work of a copyright owner is ‘marked’ or an ‘encrypted header’ is used. This approach includes the practice of placing a water mark, flag, XML (Extensible Mark-up Language) or XrML (Extensible Rights Mark-up Language) tag on the work. Such marks on the contents serves as an indicator that the content is copyrighted. The third approach is where copyrighted work is placed on a secured and dedicated reading device. Microsoft’s Windows Media Rights Manager (WRRM), IBM’s

³ Section 52 of Copyrights Act, 1957; Sec.107 of Title 17 of U.S.Code



Electronic Media Management System (EMMS), Inter Trust's Rights System and Real Network's Real Systems Media Commerce Suite (RMCS) are some among the promising DRM software. Companies like Adobe, IPR Systems, Liquid Audio, Sealed Media provides DRM Solutions too.⁴ By this system of Digital Rights Management, the copyrighted works may remain out of the reach of the public. The use which is otherwise permitted by the laws of land also cannot be done by the general public.⁵ Thus, this system tends to affect the well recognized principle of copyright law-Right to fair Use.

3. LEGAL PROVISIONS RELATING TO DIGITAL RIGHTS MANAGEMENT

Even though the deployment of DRM is still at an early stage, they are recognized by law. The advent of new technologies had boosted copyright infringement in many ways. Availability of copyrighted materials in digital form or in internet had facilitated faster and easier copying and exploitation of copyrighted materials. This issue had paved way for formulation of international treaties and national legislations ensuring protection of copyrights. Use of technology in copyright protection was thus recognized

⁴ Dr. Sabuj Kumar Chaudhuri, Digital Rights Management –a Technological Measure for Copyright Protection and its Possible Impacts. Available at: http://eprints.rclis.org/13110/1/Digital_Rights_Management-Impact_on_Libraries.pdf Retrieved on 05-05-2017

⁵ Divyesh Pratap, Is 'Fair Use' of Copyrighted Work a thing of the past?, Available at: <http://lexpress.in/law-development/digital-rights-management-provisions-and-indian-copyright-law> Retrieved on: 04-05-2017

and circumvention of such technologies was considered as offence under the law. However, no law till date recognizes the term 'Digital Rights Management' as such.

3.1. INTERNATIONAL LAW

In order to cope up with the problem of infringement of copyrighted digital materials, the WIPO came up with two international treaties. WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) now regulate digital copying. The anti-circumvention provisions under these treaties prohibit circumventing a DRM system (e. hacking) or assisting others in so doing. The parties to the treaties are obliged to have an 'adequate and effective' legal remedy to prevent the circumvention against effective technological protection measures of copyrights.⁶ The treaties also vest obligation on the parties to have adequate and effective legal remedies against the unauthorised tampering of rights management information which is provided by the owner and also dealing knowingly with the copies of tampered rights management information.⁷

3.2 INDIAN LAW

Even though India is not a party to the WIPO treaties, it has incorporated the provisions relating to DRM as in the treaties. By an amendment in 2012, Sections 65A and 65B was included to Copyright Act, 1957. The said provisions deal with protection of technological measures and tampering of rights management information respectively. One of the reason why India

⁶ Article 11 of WCT & Article 18 of WPPT

⁷ Article 12 of WCT & Article 19 of WPPT



brought DRM provisions in to its copyrights law is because of the continuous Listing of India in United States Trade Representative's Special 301 Report, which lists the countries which do not provide 'adequate and effective' protection to the intellectual property into their country.⁸

According to Section 65A(1) any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Copyrights Act, with the intention of infringing such rights, shall be punished with imprisonment which may extend to two years and shall also be liable to fine. Clause (2) of Section 65A provides for certain exceptions to clause (1). The exempted activities where circumvention is allowed includes encryption research, lawful investigation, security testing of a computer system or a computer network with the authorization of its owner or operator, protection of privacy, and measures necessary in the interest of national security.⁹

According to Section 65B any person intentionally removes or alters the Rights Management Information from the digital content or sells and distributes the content with the knowledge that the same has been tampered or removed shall be punished with 2 years of imprisonment and fine.

The Information Technology Act, 2000, under Sec.65¹⁰ also provides for punishment

for tampering with computer source documents. Vakul Sharma opines that the idea behind the section is to protect the "intellectual property" invested in the computer programmes.¹¹ As circumventing DRM system amounts to tampering with computer source documents, the provision under IT Act can also be applied in such cases.

3.3 UNITED STATES

Copyright Act, 1976 is the first legislation of United States that introduced laws relating to DRM. In order to cope up with the rapid advancements in digital technology, amendments were made to the Act. Provisions relating DRM as proposed under WIPO treaties were incorporated under US laws through Digital Millennium Copyright Act, 1998, amending the Copyright Act. Under Title one of the Act, it is provided that it is illegal to circumvent technological measures taken to prevent accessing or copying of a work which is protected under the law. The title also prohibits the public from developing any device or software which facilitates circumvention of technological protection measures. The title itself enumerates certain exceptions to these anti-circumvention provisions. The exceptions mean that under certain circumstances, circumvention of technologically protected copyrighted

any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years or with fine which may extend up to two lakhs or with both.

¹¹ Vakul Sharma, Information Technology: Law and Practice, Universal Law Publishing Company, New Delhi (2012)

⁸ Supra 7

⁹ Ibid

¹⁰ Section 65 of IT Act deals with Tampering with computer source documents and states that whoever knowingly or intentionally conceals, destroys, or alters or causes another to conceal, destroy or alter



materials is permitted. The exceptions includes access to copyrighted works by non-profit libraries and educational institutions, reverse engineering to check compatibility of two different software, encryption research to determine the flaws of a copyright protection technology, circumvention when the copyrighted work tends to affect personal privacy, circumvention to test the security of the protection technology. However, permission of owner is necessary for reverse engineering and security test. The title further makes it illegal to alter the Copyrights Management Information (CMI) attached to digitalized copyrighted works without the permission or to knowingly distribute works in which the CMI has been illegally altered. CMI includes things like the title, the author, and terms and conditions for use of a technologically protected copyrighted work.¹² Under Title Two, the Internet Service Providers are not responsible for the actions of their clients that infringe any copyrights. For this title to be applicable, the ISPs need to meet a number of provisions stated within the Act.¹³ According to title three, even though the owner of a computer can fully exploit any computer application installed legally for the purpose of maintenance or repair of the computer, it must be destroyed after the purpose is served.¹⁴ Title four contains miscellaneous provisions. It allows technological protection and prevents circumvention in various fields like motion pictures and webcasting. Title Five of the

Act deals with protection of original designs.

3.4 ANALYSIS OF THE LAWS

On analysing the provisions relating to DRM, it can be understood that the parties will be penalized on circumventing technological protection, only if it is done intentionally and with the knowledge that it is illegal to do so. The activities that amount to circumvention are only the acts prohibited explicitly by copyright law and not any other activities. Moreover, the provision provides for certain exceptional activities, though in the nature of circumvention, will not amount to circumvention. The provisions relating to punishment for tampering or altering copyright protecting technologies are more rigid as it do not provide for any specific exception in the law for such acts. Further, it provides for availing civil remedies under the copyright law for infringement of copyrights along with criminal remedies under provisions relating to DRM to the copyrights owner which also shows a stricter approach.

It can be understood that the copyright owners are vested with more rights than ever. It poses a threat to the development and use of digital technologies. The laws are framed in such a way that it restricts even the access to copyrighted works apart from restricting the use of copyrighted works. The laws also prove to be detrimental in some aspects. It affects the well settled doctrine of Fair Use of copyright law. The provisions will be creating a Para Copyright regime and provides relatively higher protection to the works, totally forgoing the rights of the public to access information and also these provisions are against the very notion of

¹² Title one deals with WIPO treaties Implementation

¹³ Title Two deals with Online Copyright Infringement Liability Limitation

¹⁴ Title Three deals with Computer Maintenance or Repair



collective administration of rights which in particular is prevalent in the Indian legal system of copyright.¹⁵

On comparing the laws of India and United States relating to DRM, the first thing that needs to be considered is vastness of the laws. In India, when it is just two provisions that deals with DRM, United States has an Act that provides for provisions relating to DRM. India is not a signatory to the WIPO treaties where as US is a signatory to the same. When the Indian law provides for 'anti-circumvention' provision generally for all the areas, the law of United States provides provision relating circumvention of technological protection in different fields separately. It has been more than a decade since US had incorporated DRM provisions in to its laws. The provisions suit their economic conditions and the nature of piracy taking place in the country. The situation is different in India as it is still a developing country. The law relating to DRM is not incorporated on the grounds of proper economic analysis and the nature of piracy in India is still mainly through offline modes and not using internet as in other developed countries.¹⁶ Thus, the provisions relating to DRM in India is prospective in nature to meet the needs of future.

DRM AND FAIR USE

DRM system, beyond doubt is an appreciable innovation with regard to additional protection of copyrights. There are certain advantages to the DRM systems

and for giving legal validity to the same. There will be no unauthorized use of any intellectual property in digital form as DRM protected contents can be accessed only by un-tampered components created by official DRM system developers. In cases of music, videos and movies, having such a system would ensure that the end users get only good quality, virus free contents through the authorised dealer of such contents. The need for developing DRM system arose when there were numerous instances of unauthorised use of copyrighted works and the law came in to force to support DRM system when there were instances of tampering the DRM system itself. Rigid protection to copyrights was mandated when the works were misused instead of fairly using it.

However, the laws relating to DRM create its effect on the principle of right to fair use. Fair use plays an important and role in the dissemination and transmission of cultural products. However, the well recognized principle of fair use is threatened by a newly developed technologies and the legal protection granted to those technologies. The DRM system tries to protect a work from being accessed by public and unlike other form of copyright protection; DRM restricts the privileges earlier enjoyed by the consumers by way of fair use. It allows the public to use the copyrighted works only for the exceptions provided under the DRM law provisions. It had literally become impossible to avail this right of fair use with the legal recognition given to DRM systems. Another issue that need to be considered is that when a consumer purchases a copyrighted work, he enters in to a unilateral contract with the copyright owner which makes him unable to exercise his right to

¹⁵ Supra 7

¹⁶ Arul George Scaria, "Does India Need DRM provisions or better digital Business Management Strategies?", Journal of Intellectual Property Rights, Volume 17, September 2012, PP 463-477



completely exploit the product. Thus the rights available under the copyright law will vanish replacing the rights of a consumer with contractual obligations and limitations.¹⁷ It is not possible to enforce right to fair use in DRM system as the technologies as of now are not made as to distinguish between authorized and unauthorized access and use of protected works. This also have an impact on the works available in the public domain.

When DRM is used to block public access to copyrighted works in public domain or otherwise, and/or to block fair uses of such works is equivalent to the unauthorized fencing of public lands.¹⁸ There were laws to prevent unauthorized fencing of public lands. But the anti-circumvention provisions does not provide for anything to ensure that the public continues to enjoy their right to fair use like the "easements" or "rights of way" under law of property. This reveals that the public rights are no longer recognized. However, in the opinion of Burk Dan L and Cohen Julie E,¹⁹ the current laws as to DRM give no indication of such public access rights having repealed or annulled. To the contrary, the statutes explicitly state certain limitations as to the scope of conventional copyright continue to be in force even in digital media. Yet the current

language of the statutes makes no provision for such fair access and use of copyrighted works.

The efficacy of any DRM system for protecting fair use depends in large measure on the extent to which such system grants the public, any individual use, or category of uses. Currently, the DRM technologies offer poor or no protections for fair use because the determination of such uses is largely at the discretion of copyright holders or their assignees. Although the most widespread DRM implementations available today adopt a "closed-universe" approach in which any right not described by the system is deemed not to exist, proposed alternative systems would establish different default behaviours that may better accommodate fair use rights.²⁰

4. BALANCING DRM AND FAIR USE

Enforcing the right of fair use in a DRM environment will also require some technical mechanism to allow public access and use of copyrighted and technologically protected works. It is also necessary to reuse the privileges equivalent to those deemed fair prior to the invention of technological protection. On a broader view, there are two possible ways to design such systems. First, the DRM system can itself be designed to detect and regulate fair access and use. A framework can be created to assert the rights of users whereby the power to access or use the protected work in any fashion they wish

¹⁷ Anjali Gupta, "Digital Rights Management", S-39, PL, November 2011

¹⁸ Burk Dan L and Cohen Julie E, Fair use infrastructure for rights management systems, Harvard Journal of Law & Technology, 15 (1) (2001) 49 and Burk Dan L, Legal and technical standards in Digital Rights Management technology, Fordham Law Review, 74 (2) (2005) 558 Available at : <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1516&context=facpub>, Retrieved on 02-05-2017

¹⁹ Ibid.

²⁰ Timothy K. Armstrong, Digital Rights Management and the Process of Fair Use, Available at: http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1144&context=fac_pubs, Retrieved on 08-05-2017.



without the necessity of prior approval by an outside decision maker can be acquired. Second, there can also be an external decision maker to the DRM system that authorizes would-be fair users to override the controls instituted by DRM systems. There can also be a 'fair use infrastructure' that combines elements of both approaches. There are chances that these approaches do suffer some demerits. It can however be overcome. For an instance, the rulemaking authority can institute a set of exemptions to the ban on circumvention of DRM system that preserves the conventional principle of fair uses. However, to question the constitutionality of DRM provisions would be a heinous step.

CONCLUSION

When technology protects only the interest of one class of people, it departs more from the law. Law relating to copyrights conceptualizes copyright as a balancing of interests, with the ultimate goal of promoting creative expression as well as making the creations available to the public. However, the current scenario reflects a perverse situation. The technological inventions and measures are being allowed to supersede the laws and especially the fair use doctrine. There is no explanation from the part of the law makers as to why there fair access and use of a copyrighted work differs in online and offline world. Only by recognizing and accommodating the rights of parties on both sides of the fair use equation, ie., copyright owners and claimants of fair use, the "digital rights management" will be truly worthy of the name. Further, implementing strong laws against circumvention of DRM systems may stop piracy completely and can promote

creativity but will in turn deprive access to information, knowledge and entertainment to the public. 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 also be adopted.

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