

The Future Development Of Copyright In India

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Abstract: *In this technologically advanced and dynamically changing new India the copyright laws are set to change as new amendments propose to introduce the anti-circumvention and Rights Management Information provisions in India. Although we also must understand that India is under no obligations to introduce these changes as it is not signatory to WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). The main purpose of these provisions and measures is to prevent piracy, a menace which has hard hit the Indian movie and music industry. Although India has amended its copyright legislation over the years to accommodate the technological changes and prevent piracy but the problem has only escalated over the years. As we all are well aware of the Indian movie industry, popularly known as “Bollywood” has been influential in shaping the copyright legislation to great extent and the latest proposal to change the legislation to accommodate anti- circumvention provisions is a result of the same influence to tackle piracy, which has been the contentious issue to amend the legislation previously as well. The concern of this article will be to understand whether these provisions have been actually successful in preventing piracy in other jurisdictions by locking them technically from the society and preventing the society to derive the benefits which the copyright system is meant to provide. Taking Bollywood and Hollywood as the one of the case studies which influences the technological and copyright protection of works, the article would try to outline how such industries actually affect the law making. Drawing upon these experiences, the article will consider what steps India should take in considering the flexibilities of the Berne Convention and the TRIPs agreement which enable access to knowledge and information, and prevent similar monopolization of information and knowledge, and ensure easy access to copyrighted materials in respect of educational, private or general use, particularly given the socio- economic condition of India where digital technology can play a vital role in the coming years.*

I. INTRODUCTION

Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation of the work and translation of the work. The scope and duration of protection provided under copyright law varies with the nature of the protected work. In 2006, Copyright office in India posted proposals to amend the Copyright Act, 1957 on its website. One of the proposed amendments seeks to introduce the Digital Rights Management (DRM) in the Indian copyright law. The purpose for such introduction in the Indian copyright laws has been to “keep pace with national and international developments and

advance in technologies,” a technological measure which is not only still in the evolutionary stages but the policy itself is being reviewed by various countries, particularly USA, which spearheaded the introduction of such rights in the realm of international law. The proposed introduction of such provisions in the Indian copyright in spite of the fact that India not being a signatory to the World Copyright treaties, is not under any obligation to introduce such changes, particularly, at this stage of Indian socio-economic development when digital technology can play a vital role in the developmental process. The rationale behind the introduction of these provisions in Indian law is rather obscure but if it intends to tackle the escalating problem of piracy then such introduction requires a better analysis in the light of the manner in which these provisions came into existence in the realm of international as well as other national legislations and what

has been the consequent development following adoption of such provisions.

II. DIGITAL PIRACY

Piracy of copyrighted materials and demand for a stronger intellectual property rights is not a new phenomenon and comes to light every time technology comes up with methods of better reproductions, starting from printing machine to VCRs. At all times, the copyists have made efforts to free-ride on the labour of others and policy makers have come up with solutions to curb this practice by providing strict measures to curb copyright infringement and provide incentive to create. The most important aspect of digital content is that access to the content is synonymous with control of the content which added with the low cost of content reproduction and dissemination causes virtual loss of ownership in terms of the content's economic value. This is a major problem for the content owners. Digitization has affected the copyright material in several ways – simplification of reproducibility, reduction in costs of reproduction, easier substitutability of the digitized copies and equally inexpensive dissemination of digitized products. Digital reproducibility has enhanced the compression and storage of digital content, easier extraction of digital content from such storage media and easier communication of such digital content over internet. The obvious fall out has been that copyright material has come under threat of unauthorized copying which tends to deprive the author and copyright owner of the economic returns on their investment of labour and capital which in turn is a disincentive for such production. This also affects the developmental theory of copyright because if unauthorized digital copying affects creative production it also affects the development based on such copyright industries. Copyright industries, particularly the audio- visual industries (AVI) are the worst hit by such piracy because the digital technologies have mostly been adopted by these industries over the years. AVI players sought to contain this threat by 'regulating technologies that aid infringement.'

III. INTERNATIONAL LEGISLATION

The WIPO Internet treaties, among other provisions, provided the stakeholders, the copyright industries, mostly the AVI and mostly from U.S. with a legal basis to protect the content by technological means, a move supported by EU, that required contracting parties to adopt 'adequate and effective legal measures to regulate devices and services intended for technology – defeating purpose', known as the anti circumvention provisions. The treaty did not define 'Technological Protection Measures' which the legal provisions supposed to protect except that such technological measures were not inhibiting the normal function of the equipment or services, the use of which they intended to apply and control. The treaty left it open for the contracting parties to define the technological measures in their domestic legislations and only covered those measures which are used to exercise the rights. The treaties also introduced the

provision to protect the copyright management information (CMI) 'from depredations by would –be pirates who would strip the CMI from distributed copies of digital content, falsify, or otherwise tamper with CMI in aid of infringing activities'. The definition of the copyright of rights management information provided that – "information which identifies the work, the author of the work, the owner of any right in the work and any numbers or codes that represent such information when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public" and the provision for 'information about the terms and conditions of the work' was introduced later from the proposal by U.S. Unlike the TPMs, RMIs, did not create any separate right for authors but merely sought to remedy any acts in relation to RMIs which will induce, facilitate or conceal an infringement of author's right. In a way these provisions are closely linked with the provision for TPM because the RMIs that were to be provided in a digital work were themselves in a way TPMs. The technologies providing the RMIs in the digital works are called Digital Rights Management Systems (DRM). This provision was unprecedented in the legislation of any country and was reactionary to future developments in the digital world. The treaties in order to maintain a balance between the rights of the copyright authors and owners on one hand and larger public interest particularly education, research and access to information, on the other hand, introduced the limitations and exceptions provision, in which is embedded the three – step- test provision of Berne Convention.

IV. NATIONAL LAW ADOPTION OF WIPO TREATIES IN INDIAN COPYRIGHT ACT

Section 65A adopts the anti – circumvention provision of Article 11 of the WCT and Article 65B adopts Article 12 of the WCT. On closer analysis of the proposed amendments in the Copyright Act, 1957, it is observed that the provisions introducing anti- circumvention measures and DRMs have been closely guarded to include several exceptions and limitations that concerns India.

The proposed amendments have not dealt with the 'preparatory acts' concept of the internet treaties and has only provided for 'anti – circumvention only' provision under section 65A:

"(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine." Although the act prohibits importation of infringing goods within Indian territories under section 53 but the concept of preparatory acts for circumvention cannot be equated to importation of circumventing goods alone and wider definition it seems, has been avoided.

The proposed sub-section (2) to section 65A provides:

"Nothing in sub- section (1) shall prevent any person from –

✓ Doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person

facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

- ✓ Doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or
- ✓ Conducting any lawful investigation; or
- ✓ Doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or
- ✓ Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
- ✓ Taking measures necessary in the interest of national security.

Section 52 of the Copyright Act, 1957 includes in itself the principle of limitation and exception as envisaged under Article 10 of WCT. The Act expressly allowed under Indian law include fair dealing with a literary, dramatic, musical or artistic work (not including a computer programme) for the purposes of – private and personal use including research, criticism or review, the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy –

- ✓ In order to utilize the computer programme for the purposes for which it was supplied; or
- ✓ To make back –up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied.

The amendment of 1999 introduced the following provisions:

“Section 52(1) (ab) allows ‘the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available for the purpose of observing, studying or testing “of functioning of the computer programme in order “to determine the ideas and the principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied; (ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non - commercial personal use;”

The other acts allowed under the section 52 includes a fair dealing of works for the purpose of news reporting or cinema, for judicial proceedings, for legislative purposes, for educational and instructional purposes, for nonprofit and private consumption of sound recordings (but not cinematographic works), reproduction of any work for disabled persons including their lawful importations.

These exceptions deal with most of the concerns that anti –circumvention provisions raised at the time when they were adopted in the U.S under the Digital Millennium Copyright Act (DMCA), 1998 such as 'access control' measures under section 1201 (a) (1) which is absent in the proposal, the anti-trafficking provisions, which were considered to be in breach of free speech under the First Amendment of the U.S.

constitution is also absent in the Indian provisions. The ‘fair use’ doctrine, which was provided as a blanket provision under DMCA, and which was eventually found to be missing under the act upon interpretation of the anti- circumvention provision in *Universal City Studios, Inc.v.Corley*, is provided under section 52 of the Act. However, the reach and extent of the provision is very limited and the term ‘any circumvention used in section 65A read with ‘with the intention of infringing such rights’ may be interpreted to include almost any act barring those specified under section 52 to fall under requirement of anti- circumvention. The proposed exceptions under the Indian laws are wide enough for a more a liberal interpretations provided the legislator clarify the objective behind the introduction of the TPMs and anti-circumvention provisions in the legislative history rather than merely putting it as ‘to keep pace with the rapid advance of technology.’

The provision for RMIs under the proposed section 65B is an absolute reflection of the provisions for the internet treaties in this regard and the definition for the RMI is provided in the definition clause under section 2(xa) with a proviso for privacy right by excluding ‘any device or procedure intended to identify the user’ from the definition. The utility of this provision in the Indian context, as discussed later, is questionable when these technologies are still in various developmental stages.

The rule making power under the Indian Copyright Act vests with the central government acting through Registrar of copyrights and Copyright Board, the provision similar to the rule making powers under the DMCA. Entrusted to Librarian of Congress which would revise the classes of work to which the act of circumventing technological measures by certain person is permitted, may be provided to the Registrar of Copyrights under the Indian law

V. THE CULTURAL FACTOR

Bollywood has evolved independent of the Hollywood style studio- system and has prospered in an environment infested with piracy and has yet over a period of time, established itself as a trans – national cultural institution and as a ‘public culture’⁴⁸ catering to the taste of a multi- cultural pluralistic society. The capacity of Bollywood to meet the demand of this multi-lingual society has in way shielded off any influence of Hollywood in the indigenous market. A phenomena which Hollywood Studios sought to break after its success of *Jurassic Park* dubbed in Hindi in 1994 which earned \$6 million but later the formula of dubbing Hollywood movies in regional languages met with only partial success. It might be true that an unorganized and star based film sector like Bollywood, has not used the copyright law to achieve absolute commodification of its cultural products unlike Hollywood Studios which have justified such commodification and copyright protection to encourage investment in the copyright works. The control over the film distribution and exhibition through cinema chains would leave the studios with the ultimate power to decide the content and would consequently reduce independent film making. As already witnessed, Hollywood through its capital power and technological expertise is making inroads into the cultural

shield that Bollywood had created through its languages and dubbing of films into not all but the major regional languages can destroy the market of the local producers. On the other hand the vertical integration between production – distribution- exhibition assisted by investing in multiplexes across India and controlling the distribution not only through advanced technologies like DRM but also through the copyright laws as proposed which would only help the Hollywood Studios gain ever increasing concentration of monopolistic power. The proposed amendments would strengthen the position of copyright owners, who are no more the traditional Bollywood producers but multinational corporations whose power to persuade the legislations in its favour at international as well national levels has been discussed earlier. The situation would be more so vulnerable for India as it is not a party to the internet treaties and this may be an advantage for the lobbyists to argue for even stricter copyright laws surrounding the DRMs and TPMs as it is under no obligation to provide for the limitations and exceptions of the treaty. The copyright owners may influence the decision making in favour of excessive copyright provisions with incentives of greater investments etc. but that cause a social inequality in an already imbalanced social order.

VI. CONCLUSION

To conclude we must understand that the problem that TPMs (Technological Protection Measures) and DRMs (Digital Rights Management) seek to remedy is piracy but that is not sure and guaranteed. On the other hand we must also understand that the various DRM technologies are still not standardized and questions of interoperability are uncertain. The Indian government should be cautious before introduction of such high-end very expensive. Technological solutions to protect copyright materials in its copyright regime, particularly when the legal principles surrounding these provisions are still undergoing modification in countries like U.S. Moreover, unlike in past, DRMs leave the control over the design of international rights into the hands of private corporations which may fail to honour the interest of consumers or the society at large.

The debate between stronger intellectual property rights, innovation and investment, on one hand and the reverse that intellectual property makes information costlier and adversely affects progress is of special relevance for India particularly when Indian economy tends to get more knowledge –based. Knowledge is not only power but also source of profit in modern economy as rightly described by Peter Drucker that the basic economic resource ‘is and will be knowledge.’ Digital technology may be helpful in closing the wide gap between haves and have –nots in India and can play a positive role particularly in the sphere of education and research.

It is important to remember the purpose of copyright is public welfare and Enlightenment ‘the encouragement of learning. Justice Hugh Laddie observed, ‘The whole human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done, not necessarily as parasites

but simple as the next generation. It is at the heart of what simply we know as progress.’

The provision for DRM and TPM may concentrate the copyright materials with the powerful corporation, particularly the Hollywood Studios and this may not only lock away various copyrighted materials from public domain whose access would be unaffordable for the population of a country whose 70% of population still live in rural areas (Economic Survey, 2006) but may also seriously erode the common cultural products through a systematic homogenization thereby also affecting the most prolific, colourful and culturally diverse industry, Bollywood.

REFERENCES

- [1] Bollywood has attained widespread popularity throughout the world, not only in other third world countries, middle–east and south–east but also in countries like UK and US. Further, it is establishing itself as a trans– border cultural institution exporting Indian culture to the world, a phenomenon which has been the hallmark of Hollywood over the years. Indian producers receive 25-30% of total receipts from overseas market wherein US and UK are major destinations; the increase in export is by 17% from 4.5 Billion Rupees in 2000 to 5.25 Billion rupees in 2001: UK Film Council Report, 2002 by Parminder Vir, John Woodward, Neil Watson. The Indian Media and Entertainment Industry, p.2 [hereinafter ‘Council Report’]
- [2] The proposed amendments are available at <<http://copyright.gov.in/view%20comments.pdf>>
- [3] Proposed Section 2(xa) defines “Rights Management Information” and proposed sections 65B Protection of Rights Management Information and section 65A introduces the anti- circumvention measures
- [4] Tobias Bauchage, Digital Rights Management : Economic Aspects, The Basic Economic Theory of Copying , Digital Rights Management , Technological, Economic , Legal and Political Aspects , Springer Berlin/ Heidelberg, p. 234-249, at 239
- [5] Development of Ripping technology : WIPO Standing Committee Report on Copyright and related Rights, 2004,SCCR/10/2/Rev. [hereinafter WIPO-SCCR]
- [6] Samuelson, p. 28. U.S. by this time already had a stint with use of copyright to prevent technological development that aided infringement in the Betamax case of Sony Corp. of America, Inc. v. Universal City Studios, Inc., 464 U.S. 340 (1984) (motion picture copyright owners held not entitled to control sale of videotape recording machines because of substantial non- infringing uses); Vault v. Quaid 847F2d 255 (1988) (permitting the sale of software that bypassed technical protection because it enabled consumers to make backup copies, which meant it had a substantial noninfringing use). Later in 1992 came the Audio Home Recording Act which prohibited the circumvention of any device, programme or circuit that implemented a particular kind of technological measure – the Serial Copy Management System which was used to protect digital recording and digital interface devices.

- [7] Article 10 of WCT.
- [8] Alongwith an Explanation: "The storing of any work in any electronic medium for the above purposes, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright."
- [9] Amendment proposed.
- [10] Section 121(a) (2) of DMCA
- [11] The concerns raised in USA v. Elcom Ltd. Et al as cited Mathias Lejeune, DRM, Protection under US Copyright Law, p. 373.
- [12] Section 1201 ©(1)
- [13] 273F.3d 429 (2dCir. 2001)
- [14] Section 78 of the Indian Copyright Act.
- [15] Section 1201 (a) (1)(c) of DMCA.
- [16] Although the term Bollywood may seem to denote only the Hindi film industry based in Bombay/ Mumbai, the film industry in India comprises films made in 22 languages in 2000 of which Hindi (243), Tamil (157) Telugu (143) dominate the film market whereas films made in languages or dialects such as Bhojpuri or Sindhi are as low as 1 film a year : Dodona Research, 2006 also see Pendakur, p. 26-27
- [17] The Hindu Business Line Dubbed Hollywood flicks boost box office, Mumbai, May 17.
- [18] Sony has started investing in multiplexes apart from film, productions and 20th Century Fox already owns a major movie channel called Star TV in India but has also launched into production: Dodona Research, p. 43.
- [19] Stuart Haber, bill Horne, Jo Pato, Tomas Sander, Robert Ender Tarjan, If Piracy is the problem, Is DRM the Answer? Digital Rights Management, Technological, Economic, Legal and political Aspects, Springer Berlin / Heidelberg, p. 224.
- [20] WIPO-SCCR, p.34
- [21] Registrar of Copyrights, US Copyright office under its rule making procedure under DMCA section 1201(a)(1)(c) on 17/11/2006 made recommendation to the Librarian of congress for several exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control technologies which included amongst others Literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read -aloud function or of screen readers that render the text into a specialized format.