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CRITICALLY ANALYSING SECTION 65A OF THE COPYRIGHT ACT, 1957

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I. INTRODUCTION

Copyright law has always had a close nexus with the access rights of the public and protection of the labour of the creators which was provided through exclusive entitlement to prevent unauthorised use of copyrighted works. The primary objective behind the enactment of modern copyright laws is to strike a balance between the interests of the society in accessing knowledge and information and the incentives to be given to creators for their efforts, innovation and intellect by giving the latter the right to reproduce and enjoy monetary benefits from the distribution of protected works.[1]

However, with the global transition to a digitised world, the proliferation of proprietary works has become easier, faster and inexpensive. Large amounts of data can be stored and transmitted to any corner of the world in a matter of a few seconds. This development of technology, thus, adversely affects the rights of copyright owners.[2] To counter this exponential increase in the number of instances involving the unauthorised use of copyrighted works, right-holders also turned to the same technology for seeking protection. Therefore, digital technologies were simultaneously developed to curb digital piracy and ensure continued enjoyment of exclusive rights by the copyright holders. Such technologies are commonly called Digital Rights Management ('DRM'), and the two most widely used forms of DRMs are Technological Protection Measures ('TPMs') and Rights Management Information ('RMIs').

TPMs are used in order to restrict access or reproduction of the underlying protected copyrighted material through passwords, digital watermarks, digital locks, cryptography, etc. RMIs are used primarily in order to communicate, record and transmit data with respect to licensing, payment and authenticity.[3] However, technology is not biased towards copyright holders who use digital technology to protect their work online as these technological measures can be circumvented by the very same technology through the process of reverse engineering or subsequent advancement in technology. Therefore, in essence, these technological measures only make it difficult for an ordinary user to access protected works, often infringing their fair use

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[1] P. Samuelson, *Copyright, Commodification and Censorship: Past as Prologue-But to What Future, in* THE COMMIDIFACTION OF INFORMATION 68 (Neil Weinstock Netanel and Niva Elkin-Koren eds., 2002).

[2] I Kerr et al., Technological *Protection Measures: Tilting at Copyright's Windmill*, 34 OTTAWA L. REV. 9 (2002).

[3] Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L. J. (2003).

rights, but does not make it entirely impossible to circumvent these defence mechanisms employed by right-holders.[4]

Thus, copyright holders are lobbying to restrict the proliferation of these circumvention technologies and devices by calling for the stronger legal protection of DRMs, since DRMs must derive their power externally in order to effectively safeguard the copyright holders' interests.[5] This is where anti-circumvention provisions come into the picture as they make it illegal to "tamper with, alter, or otherwise work around the technical implementation of TPMs".[6]

The scope of this paper is limited to analysing Section 65A of the Copyright (Amendment) Act, 2012 which introduced anti-circumvention provisions into the Indian copyright regime. That is, the paper would deal solely with the legal regime surrounding Technological Protection Measures ('TPMs'). The paper would also shed light on the conflict between access rights and protection rights, particularly within the scope of 'fair use' which attains a new dimension in the digital world. The paper would also attempt to answer the glaring question of whether the decision of the Indian legislature to introduce anti-circumvention provisions in order to keep up with global developments and achieve a balance between the interests of the rights holders and consumers has been realised through the 2012 amendment.

II. EVOLUTION OF ANTI-CIRCUMVENTION LAWS IN THE ARENA OF DIGITAL COPYRIGHT LAW

TPMs are technological measures that, in order to safeguard the interests of the copyright-holders, *restrict* what can be done with a file by the user. This restriction can be in the form of "*altering, copying, converting, examining, sharing, distributing, saving or using the digital media in which the copyright holder's interest lie*."[7] They are broadly classified on the basis of the functions performed such as: Access Control Technology which controls or restricts access to work,[8] and Copy Control Technology which restricts the use/reproduction of the protected work, [9] and Passwords, digital watermarks, digital locks, cryptographs, etc, which are commonly used TPMs to curb piracy and prevent unauthorised access to protected works. However, these measures

[4] Kerr, *supra* note 2.

[5] Swaraj Paul Barooah, *Disruptive (Technology) Law; Examining TPMS and Anti-Circumvention Laws in the Copyright (Amendment) Act, 2012*, 5 NUJS L. REV. 583 (2012).

[6] Robert C Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Non-infringing Use*, 31 COLUM. J. L. & ARTS 209 (2008).

[7] *Id.*

[8] Denicola, *supra* note 6. "Access control technological measures are of various types including: (1) control access at the outlet, e.g., 'regional codes'; (2) control access at user level; (3) control access of acquired copy of the work, e.g., content scrambling system (CSS); and (4) control over subsequent access, e.g., serial copy management system (SCMS)."

[9] Denicola, *supra* note 6. "They are called 'copy control TMs' because the majority of such TMs are used to prevent unauthorized copying though some are used to prevent other activities like unauthorized printing, etc. Examples of such TMs include CSS, CD Cops, key2Audio, MediaMax CD-3, etc."

have certain drawbacks as well. There has been a considerable amount of evidence suggesting that TPMs and DRMs are counterproductive and fail to effectively curb piracy as "*they will continue to be circumvented and persons pirating or facilitating piracy cannot be mostly located in the vast ocean of digital sphere*."[10]

As can be seen in the recent *Nintendo Co. Ltd.* v. *Sky UK Ltd. and others*,[11] a case where Nintendo had to seek an injunction for blocking piracy websites despite avoiding pirated copies of its video games being downloaded by users, in spite of the use of TPMs. Further, the failure of TPMs to curb piracy of music CDs, *et cetera* has been extensively documented. TPMs, when imposing access restrictions, also impose excessive transaction costs, as such measures need to be designed with great caution to ensure that they do not infringe users' rights unnecessarily. Also, the burden to ensure that TPMs do not overstep the boundary of fair and genuine restrictions is, directly or indirectly, on the copyright owner who makes use of these measures to protect their work.[12] There is, thus, a clear conflict of interest and consequently, interests of users are often compromised.

The widespread use of TPMs show that the rights of the users are subordinate to those of the copyright owners since it is the latter that controls the former's access to the protected material. The physical/virtual holding of material does not automatically mean that the material can be accessed and be used in a way not allowed by the copyright owner. Thus, the issues of (1) restricted usage; (2) problem of interoperability; (3) issues of privacy; (4) lockouts; and (5) market disorientation[13] in using TPMs led consumer interest groups to adopt technology capable of circumventing these virtual defences employed by the copyright holders.

This technical situation was in constant flux and prompted right holders to seek legal protection for these technological measures.

Consequently, rights holders lobbied to get protection for these technological measures incorporated in the WIPO Copyright Treaty (WCT)[14] as well as the WIPO Performances and

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[10] Alain Strowel & Severine Dussolier, *Legal Protection of Technological Systems*, WCT-WPPT/IMP/2 (Nov. 23, 1999), https://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_2.pdf

[11] Nintendo Co. Ltd. v. Sky UK Ltd. and others, [2019] EWHC 2376 (Ch).

[12] Kerr, *supra* note 2.

[13] Sensarkar Nilanjana, *The potential impact of digital rights management on the Indian entertainment industry*, 6(1) J. INT'L TRADE L. & POLICY 47 (2007).

[14] Article 11 states that, "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 authors in connection with the exercise of their rights under this Treaty 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."

Phonogram Treaty (WPPT) in 1996.[15] Following the incorporation of the anti-circumvention provision in WIPO Treaties, many member states, particularly, the United States,[16] England,[17] and later India[18], enacted national legislation to protect technological measures applied by copyright owners to safeguard their works."[19]

Anti-circumvention provisions, while protecting works of the copyright holders, diminish the access rights of the users, and thus threaten fair use, research, innovation, freedom of expression and competition. Experience of abuse of anti-circumvention provisions across the world has shown that these unintended consequences far exceed the intended gain of curbing piracy and incentivising creators to continue to innovate.[20] Thus, excessive protection to TPMs stifles the growth of the public domain and increases the information asymmetry as knowledge is controlled by few at the cost of the entire society.[21] For instance, in *USA* v. *Elcomsoft & Dmitry Sklyaror eBook Reader*,[22] Elcomsoft's software which was capable of reading Adobe eBooks was sued by the Adobe Software for illegal use, or suits filed by Sony against developers who create 'emulators', that is gaming consoles for their video games.[23] These restrictions harm innovation in the industry, as well as legitimate manipulation by consumers to suit their individual requirements as TPMs last until the circumvention technology becomes ubiquitous but traditional copyright protection was limited by time to ensure public access to knowledge and information.

III. INDIAN COPYRIGHT (AMENDMENT) ACT, 2012 AND THE ANTI-CIRCUMVENTION PROVISIONS

The Indian Copyright Act, 1957 was amended in 1994 to make it compatible with the latest technological developments of the time. The 1994 amendment had incorporated 'plate' to protect anti-circumvention technology. According to Section 2(t), plates were defined to include "*any stereotype, negative, duplicating equipment or other device used or intended to be used for printing or*

[15] Article 18 reads as follows, "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."

[16] Digital Millennium Copyright Act of 1998, 17 U.S.C.A. (West 2008).

[17] The Copyright, Designs and Patent Act 1988, c. 48, (Eng.).

[18] Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

[19] Marlize Jansen, *Protecting Copyright on the Internet*, 12 JUTA'S BUS. L. 100 (2004).

[20] Fred Von Lohmann, *Unintended Consequences: Twelve Years After the DMCA*, ELEC. FRONTIER FOUND. (Feb. 2010), https://www.eff.org/files/eff-unintended-consequences-12-years.pdf.

[21] Peter Jenner, *Copyright in the Digital Age Benefitting? Users and Creators*, 8(2) REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES, 55(2011).

[22] USA v. Elcomsoft & Dmitry Sklyaror eBook Reader, N.D.Cal. ,203 F.Supp.2d 1111 (2002).

[23] Sony Computer Entertainment America LLV v. George Hotzet. al., D.Cal. , Case No. 11-cv-000167 SI.

reproducing copies of any work, and any matrix or other appliance by which sound recording for the acoustic presentation of the work are or are intended to be made." In other words, plates include devices that aid the reproduction (or duplication) of existing copyright-protected works. However, technology, the purpose of which is not to make copies but to prevent unauthorised access to the copyright-protected work, does not fall within the ambit of 'plates' as all the devices that come within its purview are capable of making copies.[24]

This gap in the protection extended to technology, wherein copy control technology is protected by 'plates' but not the access control technologies, which, in the digital context, appears to have paved the way for a specific provision dealing with technological measures and circumvention. This was also required as an equation of plates and circumvention technology in the digital context also adversely affects the rights of third parties to use copyright-protected works for enjoyment and enrichment.[25] Therefore, a separate provision was required to accommodate ever-evolving circumvention technologies such that the rights of the copyright owners are balanced with the interests of the society in accessing the protected work or information.

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

The Indian Copyright (Amendment) Act, 2012 expressly recognised legal protection for technological measures in digital context *via* Section 65A after learning from the experiences of the United States, European Union and Australia where the anti-circumvention provisions were statutorily recognised at least a decade before the 2012 amendment. Thus, it made the Indian copyright law compatible with the World Intellectual Property Organisation ('WIPO') Internet Treaties – World Intellectual Property Organisation Copyright Treaty ('WCT') and the World Intellectual Property Organisation Performances and Phonograms Treaty ('WPPT')[26] It is thus, discerned that taking into consideration the various international standards and practices allowed the lawmakers to use the WIPO flexibilities in striking a balance between the rights of the owners of the copyright and the public interest.[27]

1. What led to the incorporation of anti-circumvention laws in India?

The Copyright (Amendment) Act, 2012, was passed due to considerable pressure on the Indian legislature from various quarters, both at domestic and international level by the right-holders and trading partners, to incorporate anti-circumvention provisions as even the WIPO Internet

[24] Ragavi Ramesh, *Balancing Protection and Access in Digital Locks: Analysing Recent Amendments in Indian Copyright Law*, 3 NAT'L L. UNIV. DELHI STUD. LJ 84 (2014).

[25] *Id.*

[26] Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

[27] Barooah, *supra* note 5.

Treaties (which stipulate a minimum standard of legal protection that is to be accorded to TPMs) were not binding upon India in 2012. USA's Special 301 Report routinely placed India on its priority list and emphasised the failure of Indian Copyright law to include anti-circumvention provisions.[28] In addition to that, Consumer International in the *IP Watchlist Report 2009 to 2012* ranked India amongst the top 3 pro-consumer copyright regimes which further enraged developed countries like the USA where the copyright regime is more pro-industry.[29]

There was also strong pressure exerted by right-holders on the government to introduce anti-circumvention provisions, as can be discerned from the view expressed by various stakeholders recorded in the Parliamentary Standing Committee Report.[30] The majority of the stakeholders – comprising mainly of the film, music and publishing industries - in the consultation process, with the exception of Yahoo India and Google India,[31] lobbied for stringent anti-circumvention provisions.[32] The committee, however, noted that public interest in accessing digitally protected works cannot be compromised unreasonably. Learning from the abuse of anti-circumvention provisions in developed countries like USA, EU, etc. where such provisions have been abused to block research and development, innovation as well as create monopoly rule over information and knowledge, and also factoring in the socio-economic status of the Indian population, the Standing Committee observed that the Indian law would prevent circumvention of TPMs but without compromising public interest.[33] Consequently, Section 65A was worded as follows:

> "*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*

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[28] Office of the United States Trade Representative, *Special 301 Report,* (April 30, 2009), https://ustr.gov/sites/default/files/2009%20Special%20301%20Report%20FINAL.pdf.

[29] Mark Perry, *Towards Legal Protection for Digital Rights Management in India: A necessity or Burden?* (2011), https://www.academia.edu/12343232/Towards_Legal_Protection_for_Digital_Rights_Management_in_India_Necessity_or_Burden.

[30] Parliamentary Standing Committee on Human Resources Development, *277th Report on the Copyright Amendment Bill 2010* (Nov. 23, 2010), http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf.

[31] Both Google India and Yahoo India emphasised upon the importance of reasonable restrictions and fair use of copyright protection during the consultation process. They opined that anti-circumvention provisions often exceed the stated objective of protecting the works of the right holders from unauthorised access " *by technologically blocking even legitimate activities which users are otherwise permitted to do under copyright law.*"

[32] The Indian Broadcasting Federation asked for increasing the term of imprisonment from 2 to 3, and making the offence of circumvention cognizable and non-bailable. They also argued or shifting the "burden of proof" to the infringer. The Business Software Alliance supported the inclusion of both civil and criminal liability upon the infringer to make the Indian law compatible with WIPO Internet Treaties. the right-holder sought to criminalize the mere act of interfering with TPMs.

[33] Wencke Basler, *Technological Protection Measures in the United States, the European Union and Germany: How Much Fair Use Do We Need in the Digital World*, 8 VA. J. L. & TECH. 1 (2003).

be punishable with ***imprisonment*** *which may extend to two years and shall also be liable to fine."* (Emphasis supplied)

2. Subject-matter of Section 65A of the Copyright (Amendment) Act, 2012

Section 65A was primarily enacted to curb the piracy of protected works in the digital environment. The provision, while incorporating anti-circumvention laws in India, makes any person, who intentionally circumvents an effective technological measure, criminally liable. It is also clear from the wording of the provision that, the application is restricted to rights expressly granted under the Indian Copyright Act, 1957. In that regard, the provision under Indian law is closer to its EU counterpart, as the EU Directive[34] too, extends legal protection to technological measures that protect works covered by copyright law.[35] Unlike the EU, the US provision prohibits the very act of interfering/circumventing TPMs. This provision of the US has been widely criticised for overstepping the requirements prescribed by the WIPO Internet Treaties.[36]

The practical implication of adopting the Indian approach is that circumvention of the technological measure is not *per se* illegal if the content that is protected by the TPM is not protected by the copyright law, thus ensuring that "*all the limitations and fair dealing provisions applicable to works in which copyright subsists shall continue even when TPMs are used*."[37] On the other hand, as per the provision contained in the DMCA "*there is no direct link between circumvention and infringement, leading to a situation where the remedy can be granted under the copyright regime even in the absence of copyright infringement*."[38] Statutorily providing that circumvention is necessarily linked with copyright infringement avoids abusing these technological safeguards for anti-competitive activities. Thus, by linking circumvention with infringement Indian law has done better in comparison to the USA.

Further, Indian anti-circumvention provisions take into consideration the intention of the copyright infringer, unlike the USA which is not at all concerned with the intention of the infringer.[39] European Union, on the other hand, *as per* the EU Directive 2001/29 is concerned

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[34] 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, art. 6 (3), 2001 O.J. (L 167).

[35] Fred Von Lohmann, *Unintended Consequences: Twelve Years After the DMCA*, ELEC. FRONTIER FOUND. (Feb. 2010), http://www.eff.org/files/eff-unintended-consequences-12-years.pdf.

[36] John A Rothchild, *The Social Costs of Technological Protection Measures*, 34 FLA. ST. U. L. REV. 1181 (2007).

[37] Venugopal K. Unni, *Indian Copyright Law and anti-circumvention provisions: can a please-all regime meet global yardsticks?*, 10(5) J.INTELL.ECTUAL PROP. L. & PRACTICE 336 (MAY, 2015).

[38] D. L. Burk, *Anti-circumvention Misuse*, 50 U.C.L.A. L. REV. 1095 (2003).

[39] Intention means, "A purpose or desire to bring about a contemplated result or foresight that certain consequences will result from the conduct of the person" as contained in G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 75 (2nd edn., 1999).

with the knowledge on part of the infringer. However, relying on 'knowledge' standard to attach liability for circumvention is misplaced in the digital arena, for a person can be held liable even though a particular result was not desired by him/her, if knowledge or mere awareness of the consequence of an act is established.[40] Thus, by placing reliance on 'knowledge' as the requisite mental element for deciding liability would lead to every act of circumvention attracting liability irrespective of the purpose of such circumvention.

In addition to that, the Indian framework prohibits the circumvention of an effective technological measure and imposes liability on the person "who circumvents", thus takes facilitation of circumvention out of the scope of Section 65A. Therefore, "*the act of circumvention is prohibited but not the tools per se*"[41] although liability for abetting infringement can still be imposed on such persons. In this regard, the Indian provision is better in comparison to EU Directive 2001/29 and DAA which impose liability on people who facilitate circumvention of TPMs[42] For instance, Section 65A takes into consideration situations where a person, for example, a blind person, may be required to circumvent a TPM even for the legitimate exercise of his right to use the material but may not possess the technical expertise to do. In such a scenario, the assistance of a third party may be required, and the Indian law accommodates the same.[43] Section 65A refers to third parties that facilitate such circumvention and exempts them from liability if they maintain the records of the purpose and person who asked for circumvention.[44] This aspect of maintaining records by facilitators requires a reconsideration for given the size of the Indian population and that the practice is largely self-administered, its proper implementation seems like a logistical nightmare.

3. Many terms have been consciously left undefined in Section 65A to avoid complexity?

Section 65A of the Indian Copyright (Amendment) Act, 2012 uses the terminology "effective technological measure" but does not define it. Corresponding provisions in the WIPO Internet Treaties,[45] left these terms undefined in order to allow member states to interpret them keeping the domestic interests and needs in mind. Unlike India, the USA under Section 1201(a)(3)(B) of the Digital Millennium Copyright Act, 1988 and Australia under Section 10(1) of the Digital Agenda Act, 1968 guide the interpretation of 'effective technological measure' in the context of

[40] *Id.*

[41] Unni, *supra* note 37.

[42] Basler, *supra* note 33.

[43] Unni, *supra* note 37.

[44] *Id.*.

[45] WIPO Copyright Treaty, art. 11, Dec. 20, 1996, 36 I.L.M. 65 (2002), http://www.wipo.int/clea/docs/en/wo/wo033en.htm; WIPO Performances and Phonograms Treaty, art. 18, Dec. 20, 1996, 36 I.L.M. 76 (2002), http://www.wipo.int/clea/docs/en/wo/wo034en.htm.

access control. The European Union *via* the EU Directive 2001/29 enumerates technologies like scrambling, encryption, etc. to be 'effective' technological measures.[46]

The Indian legislature has left these terms undefined, possibly to keep TPM "technologically neutral" and leaving interpretation of these terms large to the judiciary on a case to case basis.[47] However, the absence of these definitions creates a gap in the intention of the legislature and interpretation of that intention by the courts and also adds a layer of uncertainty. For example, the inclusion of the term "effective" before 'technological measure' is confusing as to, first, how can an actually 'effective' measure be circumvented? Second, what is the standard of measuring this "effectiveness"?

In the US, *as per* Section 1201(a)(3)(B) of DMCA, a technological measure is effective if in the ordinary course of its operation, it limits access to the protected work. In brief, the standard in the US to measure the effectiveness of a TPM is the intention of the copyright holder to use such measures to protect its work.[48] As per the EU Directive 2001/29, under Article 6(3) a TPM is effective if it achieves the intended protection.[49] The Indian provision, however, is completely silent on the basis of differentiating between 'effective' TPM and a non-effective TPM[50] and left it entirely for the judiciary to adjudicate upon policy matters like these which is not a very wise approach. Some form of legislative guidance with respect to the identification of effective technological measures should be provided to avoid unnecessary conflicting interpretations by the courts.[51]

4. Express Exceptions under Section 65A vis-à-vis Section 52 of the Indian Copyright (Amendment) Act, 2012

In order to balance the interests of copyright owners and the public, the copyright law exempts

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[46] M Fallenbock, *The Digital Millennium Copyright Act, the European Community Copyright Directive and Their Anticircumvention Provisions*, 7 INT'L. J. COMM. L. & POL'Y (2002–3).

[47] Pranesh Prakash, *Technological Protection Measures in the Copyright (Amendment) Bill, 2010*, CENTRE FOR INTERNET AND SOCIETY (April 28, 2010), https://cis-india.org/a2k/blogs/tpm-copyright-amendment.

[48] Fallencovk, *supra* note 44.

[49] Basler, *supra* note 31.

[50] B.V. Rajasingh, *India Enacts Laws to Protect Copyright over Digital Content*, 8(4) J. INTELL. PROP. L. & PRAC. 265 (2013).

[51] Barooah, *supra* note 5. It is opined that while providing guidance for interpreting these terms, they should be measured against an average consumer and not an expert. That is if an average consumer is able to circumvent a TPM than that should no longer be considered effective. Further, who constitutes an average consumer should be determined at the relevant time of circumvention.

In addition to that, since courts in India are slow to react to technological challenges (and the more universal problem of law always playing catch-up to technology) it may be a good idea to invest the Indian Copyright Office with the task of reviewing exceptions to such anti-circumvention laws on a periodic basis. This would be identical to the current practice followed in the United States where the Librarian of Congress, every 3 years, announces the exceptions to the DMCA by establishing the 'Rules for Exemptions Regarding Circumvention of Access-Control Technologies'.

certain acts from the purview of anti-circumvention provisions.[52] Section 65A makes it explicit that technological measures are protected by legal sanction only when circumvention would result in infringement as *per* Section 51 of the Copyright Act, 1957 which specifically lists the activities that are expressly prohibited by the Indian Copyright framework.[53] This provision recognises that certain activities, as provided for in Section 52 of the Indian Copyright Act, 1957, are not considered to be infringing upon the right of the owners of copyright and hence are permissible. Section 52 enumerated fair deal exceptions under Indian copyright regime which includes,

> *"reproduction for fair use in literary, dramatic, musical and artistic work; for cinematograph film; for private use including research, criticism and review; for purpose of reporting current events, for legislative and judicial proceedings; for educational and instructional purposes; for libraries; communication of the work through reading and recitation in public of reasonable extracts; by amateur clubs; religious institutions; etc."*

For any of these above stated purposes an effective technological measure can be circumvented.[54] Under Section 65A (2)(b) of the Copyright (Amendment) Act, 2012 encryption research has also been exempted from attracting liability following the DMCA and the Australian model.

From the exceptions provided under Section 65A, it becomes abundantly clear that the Indian regime follows the principle that the purpose of copyright law is to prevent infringement of copyright. In this pursuit of avoiding copyright infringement, technological measures can be employed to make infringement less feasible. However, infringement of copyright is distinct from infringement of technology, and in the context of India, liability is imposed for the former. The latter is considered only if it results in infringement of copyright.

5. *Indian Anti-circumvention provisions are not anti-copyright holders*

Anti-circumvention provisions in India attempt to strike a fair balance between the conflicting interests of two groups: the copyright owners and the consumer. However, the law is seen as largely pro-consumer legislation, but the same is not at the cost of the interests of the copyright holders. In fact, the rights of the creators to avail TPM protection have been upheld by the courts even before the incorporation of Section 65A in 2012. In *Sony Computer Entertainment*

[52] The Copyright Act, 1957, § 65A(2), No. 27, Acts of Parliament, 1957 (India).
[53] Majority of such prohibited activities are the ones that make *unauthorized* use of protected works which cause economic loss to owner of the copyright. *See* Prakash, *supra* note 47.
[54] Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17(4) J.INTELL. PROP. RTS. 324-334 (2012).

Europe Ltd. v. *Harmeet Singh and others,*[55] the court issued an *ex parte* injunction as it was convinced that the defendant had circumvented the TPM used by the plaintiff to create an infringing copy. Thus, anti-circumvention provisions under the copyright law and judicial approach towards the same is not to deny right holders the protection but only to balance their rights with those of the users as *per* the mandate of the WIPO Internet Treaties.

IV. INDIA'S ACCESSION TO THE WIPO INTERNET TREATIES

In July 2018 India acceded to the WIPO Internet Treaties – WIPO Copyright Treaty, 1996 ('WCT') and WIPO Performance and Phonograms Treaty, 1996 ('WPPT') in furtherance of the objectives laid in the National Intellectual Property Rights (IPR) Policy adopted by the Government of India on 12th May 2016 which "*aimed to get value for IPRs through commercialization by providing guidance and support to EPR owners about commercial opportunities of e-commerce through the internet and mobile platforms.*" [56]

Though Section 65A is largely in compliance with the standards laid down by these Internet Treaties, there was no legal obligation on the part of India to do so prior to accession. But, with India's accession to these treaties, there is likely to be an adverse impact on Section 65A's progressive and fair provisions aimed at balancing copyright owners' interests in the realm of copyright infringement and digital piracy, which has grown exponentially with the development of cyberspace, and the public's interest in the digital era. [57] Therefore, pro-industry lobbyists like the US and EU are likely to challenge India's domestic anti-circumvention provisions for being 'inadequate' and diluting the rights of the copyright owners more than what is the practice in most countries of the world.[58] For example, US law on TPM under Section 1201, Title 17 of the United States Code prohibits circumvention of effective technological measures as well as prohibits trafficking in 'circumvention devices.' Trafficking in circumvention devices/technology implies "*manufacture, sale, import or rental of such technology which is primarily designed for circumvention of devices or technology which has a very limited commercial purpose other circumventing TPM.*"[59] Thus, any kind of circumvention and trafficking in circumvention technologies are prohibited.[60] However,

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[55] Sony Computer Entertainment Europe Ltd. v. Harmeet Singh and others, CS(OS) 1725/2012. *See* Amlan Mohanty, *Sony Play stations to be Illegal in India? - First Test of the Newly Inserted s. 65A of the Indian Copyright Act, 2012* , SPICY IP (2013), http://spicyipindia.blogspot.com/2013/02/ jailbreaking-sony-playstations-to-be.html.

[56] See Press Information Bureau, Cabinet approves accession to WIPO Copyright Treaty, 1996 and WIPO Performance and Phonograms Treaty, 1996 (July 4, 2018),

https://pib.gov.in/newsite/PrintRelease.aspx?relid=180389.

[57] Sheetal Chopra, *Inadequate Protection against Piracy: Copyright Amendments Inadequate,* 5 INDIAN J. INTELL. PROP. L. 20 (2012).

[58] *Id.*

[59] Sony Computer Entertainment America Inc. v. Game Masters, 87 F. Supp. 2d 976 (N.D. Ca. 1999).

[60] Robert C Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to*

Section 65A of the Indian Copyright (Amendment) Act, 2012 does not prohibit trafficking in circumvention technologies so as to not cause hindrance in the development of technology. Allegations of similar nature are likely to be levelled against India, now that it would have a recognisable obligation to adequately protect technological measures. India will have an obligation to strengthen anti-circumvention provisions in order to protect the interests of the right holders but this will be done at the cost of users' right to reasonable restrictions and fair use.[61]

V. CONCLUSION AND RECOMMENDATIONS

Section 65A embodies that striking a fair balance between the protection of copyrighted works from unauthorised access and piracy as well as access rights of the public *via* anti-circumvention provisions is not practically impossible. The use of technological measures without safeguards can lead to abuse of technology by the copyright owners by obstructing the rights of the users.[62] Thus, by connecting copyright infringement to circumvention, the scope of Indian anti-circumvention has been restricted to avoid abuse unlike the provisions contained in the EU Directive 2001/29 and the DMCA which incline disproportionately towards the right holders at the cost of the public. Developed countries, for instance USA under Section 1201 of the Digital Millenium Copyright Act,[63] by not-linking infringement to circumvention have led to the abuse of anti-circumvention provisions in the form of perpetual copyrights, monopoly rule, unfair restrictions on the access rights of the users, etc.[64] They further raise questions of consumer's ownership rights and fair usage, as excessive restrictions are placed through these digital locks. For instance, when Microsoft closed its eBook store in 2019 and closed its servers, books purchased by its customers also ceased to exist and they were refunded for it.[65] However, it still left the larger question of consumer ownership over those books unanswered. The limited remedy of "fair use" failed to protect the consumer and their ownership rights.

Learning from the experiences of developed countries, India sought to avoid the problem by

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Preserve Non-infringing Use, 31 COLUM. J. L. & ARTS 209 (2008).

[61] Unni, *supra* note 37. India should be ready to firmly counter these allegations by using the provision of the WIPO Internet Treaties which provide countries the leeway to determine the type and extent of protection to be accorded to TPM in domestic statutory provisions (Art. 10 WCT), and that countries like US have in fact exceeded the minimum requirement under these treaties to establish a pro-industry regime which is better suited its demographic than that a of a developing country like India.

[62] Marlize Jansen, *Protecting Copyright on the Internet*, 12 J. BUS. L. 100 (2004).

[63] Brian Leubitz, *Digital Millennium - Technological Protections for Copyright on the Internet*, (2003) 11 TEX. INTELL. PROP. L. J. 417.

[64] Burk, *supra* note 38.

[65] Mike Masnick, *You Don't Own What You've Bought: Microsoft's Books Will Stop Working*, TECHDIRT (2019), https://www.techdirt.com/articles/20190701/17405342503/you-dont-own-what-youve-bought-microsofts-books-will-stop-working.shtml.

adopting a different approach of linking circumvention with infringement as well as increasing the scope of Section 52 which deals with "fair dealing". The said approach encourages the spread of knowledge and information but not legitimising *unauthorised* use of copyrighted material, and is better suited to the socio-economic condition of a developing country like India.

However, though the Indian approach better balances the rights of the public with that of the copyright owner, it still is not '*full proof*'. The India legislature, thus, should take into consideration the following recommendations to improve upon the existing provision: [66]

(1) Define terms like 'effective', 'technological measure', etc. in the statute. It would also be appropriate to provide legislative guidelines with respect to the standard of 'effectiveness' such as a technological measure capable of being circumvented by common man should not be considered effective. Further, a practice similar to the USA where the Library of Congress announces exception to outdated technology every 3 years can be adopted to introduce some degree of certainty in the dynamic area of policy making.[67]

(2) Replace criminal liability with civil liability as the former is excessive, and lacks commercial prudence. As Section 65A of the Indian Copyright Act makes the intention to circumvent an 'effective' TPM a criminal offence punishable with imprisonment to prevent digital piracy, it increases the burden of proof on prosecution's side as mere circumvention without the requisite intention does not attract criminal liability. In addition to adding to the burden of courts in India to adjudicate matters of individuals violating or infringing circumvention for personal use and not for profits or public dissemination, as most cases are likely to be. Lastly, as a matter of principle criminal liability should be resorted to for more reprehensible wrongful acts committed against the society at large, and not in cases such as the one in question where an injunction and damages for the loss caused serves as a more prudent remedy than imprisonment.

(3) Transitioning from merely protecting fair use rights of the users to casting an active obligation upon copyright owners, who use TPMs to protect their works, in ensuring that fair use rights are exercised by the users. This is possible by providing circumvention means to the users falling with the ambit of fair dealing provisions.[68] Application of this obligation would also require active disclosure of employment of technological measures

[66] S. Pandit, *Evolving an Indian Anti-Circumvention Law: Lessons from the United States and Japan*, 30(6) EIPR 244, 249 (2008).

[67] J.H. Reichman *et al. A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L. J. 981 (2007).

[68] *See* Prakash, *supra* note 47.

by the copyright owners to the users[69] as well as providing support services to facilitate circumvention for a legitimate purpose. For instance, by facilitating an e-book buyer to manipulate, in terms of note-making, annotation, *et cetera,* her copy protected by a TPM by the seller himself would enable better exercise of consumer rights. This would also reduce the potential security risks associated with the use of TPMs, as the customers would no longer resort to unethical or unsecured means of circumventing the TPMs to suit their personal requirements.[70]

[69] Robert C Denicola, *Fair's Fair: An Argument for Mandatory Disclosure of Technological Protection Measures*, 11 MICH. TELECOMM & TECH. L. REV. 1 (2004).
[70] Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice about their Use of Technical Protection Measures?*, UC BERKELEY L. REV. 48 (2013).