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(I.S.S.N 2321- 6417 (Online))

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## ISSUES SURROUNDING DIGITAL RIGHTS MANAGEMENT SYSTEM: A CRITICAL ANALYSIS OF LEGAL POSITION IN INDIA\*

### Abstract:

Digitalization has altogether transformed the methods of copying protected works and in turn has enabled easy infringement of copyrighted work over the internet. To combat online piracy, private copyright protection organisations have employed digital mechanisms that can restrict access to the digital works. But, like always, the pirates have started using the same digital technologies to circumvent the digital measures employed by the right holders to protect their work. Laws against circumvention of technological measures used for protection of copyrighted works are a recent subject-matter for many nations, whereas the World Intellectual Property Organisation has developed such anti-circumvention provisions during the end of the 20th century. In this paper, Indian laws related to such technological protection measures, enforcement and their pros and cons have been discussed to determine if the DRM protection mechanism in India is balanced enough for offering better protection for the right holders and the end users.

### Key Words:

DRM, Copyright, Online Piracy, Digital Rights Management, Anti-Circumvention, Infringement, Circumvention, Technological Protection Measures, Rights Management Information

### Introduction

The emergence of globalization and sharp advancement of technologies have steadily transformed our society, making it more knowledge intensive than ever.<sup>1</sup> The digital revolution promises both new opportunities and strains in utmost every industrial sector. The expansion of connectivity through digital technology has been extremely beneficial to many human endeavours, such as

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<sup>1</sup> Invitation of Views on the draft National IPR Strategy as prepared by the Sectorial Innovation Council on IPR, DIPP, 26<sup>th</sup> September 2012. Available at: [http://dipp.nic.in/English/Discuss\\_paper/draftNational\\_IPR\\_Strategy\\_26Sep2012.pdf](http://dipp.nic.in/English/Discuss_paper/draftNational_IPR_Strategy_26Sep2012.pdf) (last visited on 21<sup>st</sup> March 2014).

communication, education, commerce, transportation, and recreation etc.<sup>2</sup> However, the digital technology has prompted many new and serious concerns about the role of protection and function of the digital property and it does not leave the Intellectual Property industry alone. The IP industry, in itself, also has grown and changed domestically and internationally with the help of technological revolutions.<sup>3</sup>

There has been a paradigm shift during the 20<sup>th</sup> century that started leading the world towards an altogether new direction. And today, with the advanced technologies & specialised devices such as telephone, radio, desktop computers, laptop computers, mobile phones and tablets, users can directly access, make, modify, develop, promote, distribute, re-distribute, consume, and maintain, the text, music, software and gaming etc., through internet from any place, at any time in a lightning speed. Also the speed of the network has been constantly updated in a similar fashion, for instance 2G, 3G, 4G and fiber-optics broadband in India, and ultra-speed networking in the developed countries.

Advancement in digital technologies has bestowed lots of benefits and opportunities with respect to the intellectual property industry. However, it also brought about a bunch of legal and technical challenges universally. Digitalization of protected works and its transmission over internet led to widespread infringement of copyright. Authors started losing control over their protected works in digital format with the newly available distribution methods over internet and computer broadband networks. Digital technology and internet made it possible to reproduce the copyrighted works instantly without any harm to the quality of reproduced work. It is believed that if the rights of the holders are not protected in the cyberspace, then the success of global information network established under the institution of internet would be compromised.<sup>4</sup> There was a need for mechanism which monitors or regulates the copyrighted contents which are being transmitted with the help of computer networks. It is a common perception that if one wants to keep control over a certain object then it should be watched closely. But with materials transmitted

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<sup>2</sup> In particular, in less than 20 years, the Internet has affected every element of modern society. Worldwide Internet usage increased from almost nothing in 1994 to nearly 2 billion users worldwide at the start of 2012. Information Technology has been contributing 6.4% of GDP of India. It became the fastest growing segment among export industries and grew by 22.7% in 2010 with aggregate export revenue of USD 50 billion and domestic revenue of USD 17 Billion and providing employment to 2.4 million software professionals in India. Software and services exports grew rapidly from USD 2 Billion in 1998 to USD 50 Billion in 2010. See, Annual Report, Department of Information Technology, Government of India, 2010-2011, quoted in Rajaraman V., "History of Computing in India", (1955-2010)", IEEE Computer society (2012).

<sup>3</sup> See, Paul Goldstein, "Copyright's Highway: From Gutenberg to the Celestial Jukebox", Stanford Law University press, p.163 (2003).

<sup>4</sup> Charles Clark, "The Answer to the Machine Is in the Machine" in P Bernt Hugenholtz (ed.) The Future of Copyright in a Digital Environment (1996) pp.139-146.

Also see, Paul Goldstein, "Copyright's Highway: From Gutenberg to the Celestial Jukebox", Stanford Law University press, p.165 (2003);

over wire/air, it became impossible to oversee all contents owned by one. To fill the gap, technological measures were adopted to monitor the use and distribution of digital works transmitted online.<sup>5</sup>

A solution in the name of Digital Rights Management (DRM) was first introduced by the private entities since they invested huge amount of money, labour and promotional advertisements with respect to the works which were involved. *The (DRM) systems* embedded in entertainment industries,<sup>6</sup> which are to great lengths protected by copyright. It was launched on to both the physical (CDs, DVDs and other media related hardware goods) and online distribution, for example, the online delivery of music files, e-books,<sup>7</sup> games, or pay TV and video-on-demand and software.<sup>8</sup> DRM is an umbrella term which includes the technological means used or applied by a content owner to restrict or allow access to works protected by copyright which are communicated to the public in digital format. These technologies are intended to identify the digital content protected by copyright laws and enforce the usage rules laid down by the right holders or as prescribed by the required legislation.

#### **Circumvention of digital measures:**

Digital environment and its unique features proved DRM designs as an effective method for protection of digital works from unauthorized use by third parties. As correctly noted by Lessig, technological measures have the potential to regulate the conduct of content owners and users according to industrial standards.<sup>9</sup> However, problem with technological measures are that it cannot guarantee hundred per cent protections as with advancements in technology it is possible to circumvent the technological layer attached with the protected digital contents DRM systems.

Circumvention technology and devices are widely employed by infringers to decrypt the contents of DVD's, software and other digital products. Once a circumvention technology is developed then it is freely transmitted over internet and computer networks and there are number of websites which provide information regarding different kinds of DRM design and means to circumvent

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<sup>5</sup> Paul Ganley, "Access to the Individual: Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests", Vol.10, International Journal of Law and Information Technology, p. 241 (2002). Available at SSRN: <http://ssrn.com/abstract=876905>

<sup>6</sup> Current leading DRM vendors are Microsoft partners, EMC (Authentica), Oracle (SealedMedia) and Adobe.

<sup>7</sup> Famous DRM system based e-books services are Amazon, Mobipocket, Kindle, portables, iPhone, and other portables. And then some DRM e-readers are Partnership retailer with Barnes & Noble.

<sup>8</sup> Microsoft, iOS and android etc., In particular now, mobile phone DRM softwares are famous in all mobile such Apple, Microsoft and Anroid. The Indian and European IPR law does not protect the software under patent laws. However they are protected under the copyright laws. See, Samik Mukherjee, "Innovators in India- on the road to Innovation Hub" in World Intellectual Property Day 26th April, 2014. Available at: [http://ipindia.nic.in/iponew/world\\_IP\\_Day\\_22August2014.pdf](http://ipindia.nic.in/iponew/world_IP_Day_22August2014.pdf) (last visited on 23<sup>rd</sup> December 2014).

<sup>9</sup> Neil Weinstock Netanel, Impose a Non-commercial Use Levy to Allow Free Peer-to-Peer File Sharing, 17 HARV. J.L. & TECH. 1, 14 (2003).

them.<sup>10</sup> An average person may not be able to launch an attack against an effective DRM technique and even a professional might fail in such attempts, but only one successful attempt which can be merged with software and transmitted online would enable even an amateur to succeed in further circumventions.<sup>11</sup> Dissemination of circumvention technology makes content owners vulnerable to piracy and other copyright infringement.<sup>12</sup> The economic loss suffered by the content owners due to development in circumvention technology are twin folded; firstly, the heavy economic loss unauthorized and illegal use of copyrighted works and secondly, the investment they put on creating and employing DRM systems. This situation raised demands for inclusion of anti-circumvention provision within intellectual property regime for effective protection of rights of content holders. Anti-circumvention rules were considered as needy not just to ensure that the DRM systems employed by the content holders are respected but also to deter third parties from engaging in circumvention of installed technological measures. DRM systems are universally viewed as a technological strategy to deal with challenges raised by advancements in digital technology. However technological measures alone cannot handle these challenges, a conjoint effect of both technology and law is therefore required to offer protection to the works of copyright holders in digital world.

### **Laws relating to DRM and Anti-circumvention in India**

The importance of copyright was recognised only after the invention of printing press which enabled the reproduction of books in large quantity practicable. In India the first legislation of its kind, the Indian Copyright Act, was passed in 1914 which was principally based on the U.K. Copyright Act of 1911.<sup>13</sup> This act was in force in the country until after independence when a new copyright Act (The Act of 14 of 1957) came into effect in 1958 (hereinafter referred to as the principal Act). Apart from the fact that the United Kingdom Act does not fit in with the changed constitutional status of India, it was felt necessary to enact an independent self-contained law on

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<sup>10</sup> Michael J. Freedman, Tomas Sander and Joan feign, "Privacy Engineering for Digital Rights Management Systems" 2003.

<sup>11</sup> Information Resources Management Association (ed.), "Digital Rights Management: Concepts, Methodologies, Tools, and Applications", IGI Global Snippet Publications, (2012).

<sup>12</sup> Hector Postigo, "The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright", MIT Press (2012).

<sup>13</sup> The copyright in India has travelled a long way since it was introduced during the British rule. Indian copyright law has grown out of English common law and statutory law. The first law on copyright was enacted in the year 1847 by the then Governor General in India. When Copyright Act 1911 came into existence in England, it became automatically applicable to India, being an integral part of British Raj. The Indian Copyright Act, 1847 was in operation from 1847 – 1911. The Imperial Copyright Act, 1911 then came into force which extended throughout the British dominion and was brought into force in British India with effect, from 31.10.1912. The existing law relating to copyright is contained in the Copyright Act, 1911 of United Kingdom (hereinafter referred to as the United Kingdom Act) as modified by the Indian Copyright Act, 1914. See, Statement of Objects and Reasons of the Copyright Act, 1957.

the subject of copyright in the light of growing public consciousness of the rights and obligations of authors.

### **A brief of DRM Protection under Indian Copyright laws**

The Copyright Act, 1957, in its re-arranged form of the main principles of the existing 1914 of Copyright Act, has introduced several new features including the establishment of copyright office, copyright board, enlarged definition of “copyright”, separate chapters for cinematograph, assignment & licensing of copyright work, the term of copyright period from 25 to 50 years, universal copyright protection and fair dealing provision etc.<sup>14</sup>The original version of the 1957 Act does not contain any express provision to deal with DRM designs;<sup>15</sup> however a few authors have opined that certain provision of this legislation can be interpreted to provide protection to technological measures installed by the copyright holders.<sup>16</sup>Like for example, section 2(4) of the Copyright Act, defines the term plate to include any stereotype or other plate, stone, block, mould, matrix, transfer, negative, duplicating equipment or other device used or intended to be used for printing or 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. The word “other devices” used in this context could be interpreted to include any kind of device which has the potential of aiding reproduction or duplication of work. It can be argued that circumvention technologies developed by the infringers are fit to be called as plate.<sup>17</sup>

The act has undergone multiple amendments during the last six decades to increase the term of protection from fifty to sixty years, redefine the ambit of powers of the Copyright Board,

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<sup>14</sup> On 22<sup>nd</sup> November 1951, SampathIyengar filed a suit in the Madras High Court under Section 6 and 7 of the copyright act, 1911, against the defendants Sir Jamshedji B. Kanga, N.A.Palkhiwala and N. M. Tripathi for a decree of injunction, damages and for taking account. The plaintiff (SampathIyengar) claimed, had cunningly changed words here and there, transferred passages from footnote to the body and vice versa, in a dishonest attempt to camouflage their acts of plagiarism, infringement and piracy. This suit came up for final hearing within just six months before an eminent ICS Judge of the Madras High Court Justice A. S. PanchapakesaAyyar. He held that there was no proof of plagiarism, piracy of copying. Surprisingly, this important judgement has not been reported in any law journal. See, Palkhiwala as Defendant: The SampathIyengar Copyright Case (chapter – 4) on Soli J Sorabjee and Arvind P Datar, “NaniPalkhiwala the Courtroom Genius”, pp. 19-28, 5th reprint LexisNexis, (June 2015); SampathIyengar v. Sir Jamshedji B. Kanga (C. S. No. 350 of 1951) on pp. 321-364(Appendix part).

<sup>15</sup> See, InterTrust Technologies Corporation’s DRM system objectives <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg77094/pdf/CHRG-107shrg77094.pdf>

<sup>16</sup>At present India is one of the fastest growing economies in the world especially in ICTE area. As India is enriched with a rich cultural heritage, a huge potential is foreseen as far as copyright is concerned. The software industry is expected to grow to a \$90 billion industry by 2008 (with predicted exports of \$50 billion). That industry was also predicted to contribute 7.5% to GDP growth by this period; software exports would account for 30% of all Indian exports by 2008. The music and motion picture industry is predicted to become a \$15 billion industry by 2005. A study done in 1995 concluded that the copyright industries represented over 5% of GDP.

<sup>17</sup> See, Sec.2 (t) of the Copyright Act, 1957.

introduce specific rights for performers, include definitions for the terms computer and computer programme and provisions for software copyright so as to make the Act deals with protection of both analog as well as digital works in India. But none of those amendments have directly dealt with the issues related to DRM until recently in the year 2012 with the passing of the Copyright (Amendments) Act, 2012.

### **The reason behind the Copyright Amendment Act, 2012**

A decade ago, there was limited Internet access in India, except for a few major cities and most of the internet web networks predominantly were in the hands of the government. Within a decade's time, there has been a great increase in Indian content on the Internet. According to the Internet & Mobile Association of India (IAMAI- hereinafter) the low cost of broadband has helped increase Internet usage. In the Internet arena, unlawful transactions are often carried out in a "fearless manner" on the digital environment. After the Digital technology developments, the intellectual property rights (IPR) protection and management of multimedia content has gradually become a critical issue, primarily because reproduction costs are much lower for both legitimate IPR holders (content owners) and those infringing intellectual property legislation. Digital copying via the Internet posed fundamental challenges for the economic relation of both the entertainment and technology industries, and these largely agree that current internet marketplace suffers from an unacceptable level of piracy of copyrighted works. In 2007, a news article of a famous national newspaper reported that the report on counterfeiting and piracy in India's entertainment industry shows that, as much as Rs.16,000 crores are being lost every year due to piracy.<sup>18</sup>

The right holders were always interested in implementing DRM technologies because they have the potential to restore scarcity to their markets and continue to preserve the incentive to creative new works. Users of copyright works were concerned about the interaction between DRM and the traditional exception to copyright. They were also concerned with the potential of DRM and to reduce the benefits of the new network environment and possibilities for double payments to rights holders from a parallel system. The 227th Report of the Parliamentary Standing Committee on Human Resource Development in November 2010<sup>19</sup> has studied the issue and expressed its object & reasons as follows:

- To make the provisions of the Act in conformity with the WIPO Copyright Treaty (WCT, Geneva, 1996) and WIPO Performances and Phonograms Treaty (WPPT, Geneva 1996);

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<sup>18</sup> *ISIBC ties up with Ernst & Young To tackle Piracy. The Economic Times, 18th May 2007.*

<sup>19</sup>Parliament of India, 227th Report on the Copyright (Amendment) Bill, 2010 (Parliamentary Standing Committee on Human Resource Development, Rajya Sabha, November 2010).

- To provide for definition of new terms, such as “commercial rental”, “Rights Management Information” and “visual recording” and to amend the existing definitions of the terms “author”, “cinematograph films”, “communication to the public”, “infringing copy”, “performer” and “work of joint authorship”;
- To make provisions for the protection of technological protection measures and rights management information used by the owner for the protection of copyright in a work.
- To introduce safe harbour provision for internet and online service providers with liability to act on notice of infringement from the right holders.
- To make provision for storing of copyrights material by electronic means in the context of digital technology and to provide for the liability of internet service providers;
- To make provision for formulation and administration of copyright societies by the authors instead of the owners; and
- To strengthen enforcement of rights by making provision of control of importing infringing copies by the Customs Department, disposal of infringing copies and presumption of authorship under civil remedies.

The Government of India have published the draft for public consultation, but very few have actually responded of which the private societies in large gave their suggestions and objections regarding the TMP and RMI. The Indian Broadcasting Federation suggested *“the person tampering with encryption of content to be punished.”*<sup>20</sup> The Business Software Alliance expressed, *“both civil and criminal liability needed to be imposed.”*<sup>21</sup> The Motion Picture Association stated that, *“this section appears to allow unlimited acts of circumvention for the viewing of movies on all digital devices by individual viewers, since, among other things, “access controls” are not covered and the viewing of a work streamed to digital devices may never involve an infringement by the person viewing that film.”*<sup>22</sup> With a differing view, Google India wanted, *“the act of unlawful circumvention to be made a civil wrong punishable by damages and not a criminal offence”*.

After extensive discussion with a number of organizations/associations from the film, music and publishing industry, authors’ organizations, lyricists/music composers, internet service providers, copyright boards and other organizations, the government passed the Copyright (Amendment) Act, 2012 to bring the Indian Copyright Act, 1957 in with the WCT and WPPT.

### **DRM and the Copyright (Amendment) Act, 2012**

The Copyright (Amendment) Act 2012 came into force on 21 June 2012 and in reality has gone much beyond the WIPO internet treaties and has introduced many changes to the existing

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<sup>20</sup>Ibid.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

copyright legislation.<sup>23</sup>The major provisions introduced under the amendment that precisely deals with DRM are as follows;

- i. Section 2(xa) to define the term 'Rights Management Information'
- ii. Section 65A for the protection of technological measures against circumvention
- iii. Section 65B for the protection of rights management information against illegal removal and alteration.

The newly inserted Section 65A makes circumvention of technological protection measures used by the owners to protect their copyright an offence punishable with two year imprisonment and fine. An offence under Section 65A of the Copyright Act, 1957 culminates when the accused circumvent an effective technological measure which is applied for the purpose of protecting any right under the Copyright Act, 1957 with an intention of infringing such right. It is noteworthy that even in the said provision or otherwise anywhere in the Act, the term 'Effective Technological Measure' is not defined.<sup>24</sup>Contrary to the Indian adoption of the anti-circumvention measures, the equivalent provisions under the copyright laws of the United States of America and the European Union adequately explains the term "effective technological measures".<sup>25</sup>

In lieu of any such definition of "effective technological measure" in the Copyright Act, 1957, the legislature has left untied the horse with no name.

Similarly, section 65B of the Act penalise the act of unauthorised removal or alteration of any rights management information and distribution or communication of any copy of a work knowing that the rights management information has been removed or altered is punishable with two years' imprisonment and fine. Unlike technological protection measures, which were left for the interpretation of the court, the amendment has clearly defined the term rights management information under Section 2(xa). As per the new definition clause, right management information includes title of the work, name of the author, and name of the owner of rights and terms and conditions of use of the copyrighted work. Thus, the amendment makes is clear that anyone who

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<sup>23</sup>The Copyright (Amendment) Bill 2010 introduced the parallel importation provisions for books in accordance with Article 6 of the Trade Related Intellectual Property Rights (TRIPS) Agreement. A provision intended to provide readers in developing countries with books at cheaper prices.

<sup>24</sup>Subhash Bhutoria, "Technology Protection Measures Under Indian Copyright Laws: A Horse With No Name", Available at: [http://www.ijcl.co.in/uploads/8/7/5/1/8751632/ijcl\\_vol\\_13\\_-\\_guest\\_article.pdf](http://www.ijcl.co.in/uploads/8/7/5/1/8751632/ijcl_vol_13_-_guest_article.pdf) (Last visited on 24th January 2016).

<sup>25</sup>Digital Millennium Copyright Act, 17 USC §1201, at (3) (B). ("technological measure effectively control access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.); Article 6(3) of EU Copyright Directive provides that the technological measures as defined under the said Article shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.



alters or removes electronic information in a work including the terms of use and any codes related to it shall be penalised under the Act.

### **Disregarded Subjects Related to Section 65A and 65B**

Anti-circumvention provisions under copyright amendment act, 2012 attaches liability on every person who “circumvent an effective technological measure (Sec.65A)” or who “removes or alter any right management information (Sec. 65B)”. It is relevant to note that neither the term circumvention nor the term effective technological measure has been defined in the Act.<sup>26</sup> The WCT and WPPT have also not given an appropriate definition for these and the basic reason for this was with a view to facilitate the member countries to provide for an approach that satisfy their domestic need and interests. The corresponding domestic legislations of US (Digital Millennium Copyright Act (DMCA), EU (European Union Copyright Directives) and Australia (Australia Copyright Act) have defined the terms effective technological measures with specific importance to access control, in relation to infringement activities. However copyright Amendment Act failed to take motivation from these domestic legislations and left behind the opportunity to these terms based on Indian’s national interests.<sup>27</sup>

In absence of definition of the term technological measures it is not clear whether provision relates to access control measures or rights control measures. The inclusion of the terms rights conferred by this act, could be interpreted to mean that the protection offered are only limited to right control measures and not to access control measures. The main reason for this argument is that the right to grant access to copyrighted works were never part of exclusive rights granted to the copyright holder under Copyright Act.<sup>28</sup> Although this provision does not lay any guideline as to how to differentiate between effective and non-effective technological measure, the term effective technological measure would simply imply those technological protection measures which in its normal course of operation are used by the content holder to restrict access to digital works. From the words of this section it is quite clear that the legislature has left it entirely to the

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<sup>26</sup> The term ‘works’ is defined under Section 2 (y) of the Indian Copyright Act 1957, (hereinafter ICA) as any of the following works, namely:- (i) a literary [Sec.2(o)], dramatic[Sec.2 (h)], musical [Sec.2 (p)] or artistic work [Sec.2 (c)]; (ii) a cinematograph film[Sec.2 (f)]; (iii) a sound recording (sec.2(xx)). Thus, UK CDPA, 1956, Part I and Part II Sections 1 to 16 defined “works”. Here remember that, ICA does not consider broadcast as a work. But UK CDPA, 1988, Section 1 says that, broadcast is also a work just like literary, dramatic and musical works. Even UK copyright Act 1956 had recognized the broadcast as work. Therefore the wording “work” should be read as in same context further.

<sup>27</sup> The Indian and UK laws on fair dealing of works comes within the framework of the listed actions. On the other hand, the American law of fair use maintain flexibility. The laws of India and UK both are characterized as restrictive, giving an exhaustive list of actions which come under the scope of exception of fair dealing.

<sup>28</sup> Section 14 related to the exclusive rights in respect of a work has been amended “to reproduce the work in any form including depiction in three dimension of a two dimension of three dimensional work;” Substituted by Act 27 of 2012 (w.e.f. 21-06-2012, vide S.O. 1393(E), dated 20th June, 2012).

judiciary to decide what would constitute an effective technological protection measure and what would constitute circumvention.<sup>29</sup>

However a policy decisions specifying the kinds of technologies that would fall under the purview of this section would have a minimum adverse effect on the legitimate interest of the public along with protesting the interests of the content owners. Additionally if the Indian courts while interpreting these provisions took same line as their American counterpart by deciding anti-circumvention to have no link with infringement might lead to shifting of copyright balance.<sup>30</sup>

### **Understanding the Term Circumvention**

The anti-circumvention provision under the copyright Amendment Act, 2012, provides the content owner remedy against any person who circumvent an effective technological measure (Sec.65A) employed by him for protection of any right covered by the Act.<sup>31</sup> Since the amendment does not include definition of the term circumvention, like US or EC legislation it is necessary to understand the actual meaning of the term circumvention. The term circumvention in common language means to evade or elude or go around or bypass. This shows that for inviting liability under section 65A these need to be an activity which is intended to bypass the technological measure installed by the content owner. This takes out from the purview of liability of the provision any person who facilitates circumvention by making available, the circumvention technology i.e. any person who is engaged in preparatory acts for circumvention. This is in contrast with the provisions of DMCA and EUCD which expressly imposes liability on the person who in one way or other assist in circumvention of technological measure.

Advantage of this omission lies in those situation where a person who need to circumvent a TPM for any legitimate purpose and are not possessing the requisite technological knowhow on circumvention technology. Such person can now take assistance of a third party who can share any circumvention technology without causing liability for the said third party. Conversely the impact of this omission upon control of distribution of circumvention technology and even effective enforcement of the anti-circumvention provision are disputable. However a conjoint reading of section 65(1) and proviso to section 65(2)(a) give a picture that any person who facilitate a person to circumvent an installed technological measure for a purpose not allowed under the Act would

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<sup>29</sup> See, PraneshPrakash, “Technological Protection Measures in the Copyright (Amendment) Bill, 2010”, 28th April 2010. Available at: <http://cis-india.org/a2k/blogs/tpm-copyright-amendment> (last visited on 23rd December 2015).

<sup>30</sup>Deborah E. Bouchoux, “USA IPR law book Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets” 4<sup>th</sup>Edn, Delmar, USA (2012).

<sup>31</sup> See, 65A of the Copyright Amendment Act, 2012. Act 27 of 2012 (w.e.f. 21-06-2012, vide S.O. 1393(E), dated 20th June, 2012).

be liable for anti-circumvention. It is actually left out to the judiciary to decide on the correct interpretation of this provision.

Another important aspect of section 65A (1) is the use of word 'the intention of infringing such rights'.<sup>32</sup> This section invites liability only when there is an intention to infringe the exclusive rights granted to the copyright holder. This means that the activity of a person is covered only if he does such act with an intention to make an infringing copy. Under DMCA there is no direct link between circumvention and infringement and this has led to the situation where people were held liable under anti-circumvention provisions even when they have not committed any copyright infringement. Inclusion of these words also brought this section under the purview of fair use provisions which could be used to prove the intention of innocent infringement. On the other hand, section 65B creates liability on all persons who alters any rights management information or distributes altered works. It is pertinent to note that this provision in contrast with the above one creates liability on all people who are engaged in distribution or sale of those technologies which are intended to alter or remove any right management information included by the content owner.<sup>33</sup>

### **The Exceptions to Anti-Circumvention Provisions**

Like any other domestic legislations which provides for exceptions to the general rules, the copyright amendment act has also provided for certain specific situations where circumvention of installed technological measures is permissible.<sup>34</sup> This section specifically says that it does not

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<sup>32</sup>See, Sec. 65A (1) of the Copyright Act, 2012.

<sup>33</sup>NanditaSaikia, "ISP/OSP Safe Harbours and Takedown Laws: Copyright and Information Technology", 15th JUNE, 2012. Available at: <http://copyright.lawmatters.in/2012/06/safe-harbour-for-osps-and-isps-in-2012.html> (Last visited On 28th June 2014).

<sup>34</sup> The Copyright (Amendment) Act, 2012, which gives expression to this fair use model through Sections 52(1)(b) and (c), reads thus:

52. Certain acts not to be infringement of copyright. - (1) The following acts shall not constitute an infringement of copyright, namely:

(a) to (ad) - \*\*\*\*\*

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;

From a plain reading, it is clear that two important exceptions are carved out: one, in respect of the technical process of electronic transmission and the other, in respect of providing electronic links, access or integration. The material distinction between these exceptions is the presence of a take-down proviso in respect of the latter kind of activity, i.e. when providing electronic links, access or integration. This window of opportunity is not provided to

prohibit any person from doing anything referred therein for a purpose not expressly prohibited by this act. The activities which are not prohibited by the copyright act are falling under the fair use provisions.<sup>35</sup> Thus section 65A(2) specifically subjects the anti-circumvention measure to the already established fair use provisions. This is the first time in a domestic legislation fair use provisions are expressly included as exceptions to anti-circumvention measures.<sup>36</sup> Another important feature is the proviso to section 65A(2)(a), while most of the domestic legislations attach liability to those person who facilitate circumvention without any regard to fair use provisions, the Indian proviso expressly provides that a third party who helps a person to circumvent a technological measure for legitimate purpose provide under the act shall not be liable under section 65(1). An uncertainty that emerges from the proviso is that it requires the third party who facilitates circumvention to keep records of his action. However the sections nowhere mention what penalty he would be facing if he didn't comply with the said requirements.

Other specific exemptions includes encryption research, lawful investigation, security of a computer system or a computer network, circumvention of technological measure for identification or surveillance of a user for national security purposes. In India, Section 67 of Information Technology Act, 2000, provides exceptional circumstance like sovereignty or integrity of India, etc. when the controller can give directions to a subscriber to extend facilities to decrypt information. But, there is no provision specially providing for technical protection measures in IT Act. Most of these purposes fall in line with DMCA of the United States<sup>37</sup>. Unlike other domestic legislations on anti-circumvention rules which prescribe both civil and criminal remedies against any person who circumvents any technological measures installed by the content owners, in India, the anti-circumvention rules only provide for criminal remedy that too for two years imprisonment and fine. Civil remedies are only available in case of alteration or removal of any right management information installed by the copyright holder.

### **Impact of Anti-Circumvention Provisions in India**

Each legislation before its enactment or entering into force needs to be subjected to an adequate and appropriate economic analysis which could present beneficial insights into how the said

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the copyright owner when the third party is an ISP involved in the pure technical process of electronic transmission of data.

<sup>35</sup>Arul George Scaria, "Does India Need Digital Rights Management Provisions Or Better Digital Business Management Strategies?", Vol.17 JIPR pp.463-477 (2012).

<sup>36</sup>PraneshPrakash, "Technological Protection Measures in the Copyright (Amendment) Bill, 2010", 28th April 2010. Available at: <http://cis-india.org/a2k/blogs/tpm-copyright-amendment> (last visited on 23rd December 2015).

<sup>37</sup>In the United States, in addition to Section 230, which established exemptions from limited liability, the DMCA in 1998 established caveats to the liability exemptions, in the form of "safe harbours" for internet intermediaries from copyright infringement.

legislation is going to influence various actors associated with it.<sup>38</sup> It is argued by several authors that the anti-circumvention provisions in India were never subjected to proper economic analysis before its enactment.<sup>39</sup> Arguments have been advanced from several corners that anti-circumvention measures were introduced in a haphazard manner due to international pressure for making India's copyright regime comply with the international requirements under WIPO treaties.<sup>40</sup> This is evident from the callous manner the anti-circumvention provisions are drafted in the new act leaving room for judiciary to decide upon important policy questions. Unfortunately no empirical research on impact of these provisions on Indian industries and legitimate rights of the public to access these works has been conducted yet.<sup>41</sup>

The major positive impact of anti-circumvention rules is based on the incentive theory of intellectual property. Anti-circumvention measures are considered to be an additional assurance to copyright holders against challenges of digital market. Further anti-circumvention provisions are believed to provide a boost to digital market and provide for development of new business models based on DRM systems and licenses where both the user and the content owners can get benefitted using ecommerce. The entertainment industry specifically the music industry would be one of the biggest beneficiaries of new anti-circumvention provisions.<sup>42</sup> DRM system helps in identifying the user and providing them services or production products which are needed by them and thereby preventing arbitrage.<sup>43</sup> For example the user might be having the purchasing capacity or interest for a single song in an album rather than the entire album, the DRM technologies help the content owner to identify the user and his requirement and deliver him what he requires along with enforcing the terms of usage.<sup>44</sup> However these price discrimination strategies would be fruitful only if legal backing is given to the technological measures applied by the content

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<sup>38</sup> Lisa N Takeyaman and Wendy J Gordon (eds.), *Developments in the economics of copyright: research and analysis* 2005, p-2-15.

<sup>39</sup> Arul George Scaria , "Does India Need DRM provision of better Digital Business Management Strategies?" *JIPR*, Vol. 17 September 2012. Pp-463-477.

<sup>40</sup> Statement and objects of new amendment bill and parliamentary standing report 220.

<sup>41</sup> Content Management Information (CMI) includes the following information: (1) The title and other information identifying the work, including the information set forth on a notice of copyright; (2) The name of, and other identifying information about, the author of a work; (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright; (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work; (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work; (6) Terms and conditions for use of the work. (7) Identifying numbers or symbols referring to such information or links to such information. (8) Such other information as the Registrar of Copyrights may prescribe by regulation, except that the registrar of Copyrights may not require the provision of any information concerning the user of a copyrighted work. 17 U.S.C. § 1202(c).

<sup>42</sup> AlkaChawla, "Law of Copyright: Comparative Perspectives", 1st edition, LexisNexis, Haryana (2013).

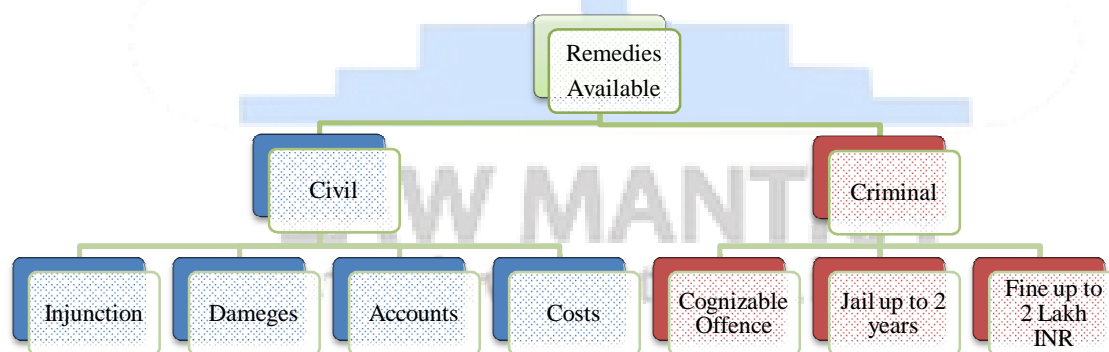
<sup>43</sup> Petrick Paul, "An economic and legal analysis of the digital technology on music industry," Berkman centre for internet & Society Research Publication no. 2004-09.

<sup>44</sup> See, InterTrust Technologies Corporation's DRM system objectives <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg77094/pdf/CHRG-107shrg77094.pdf>

owner to give them confidence to constantly engage in e-commerce and distribution of creative works.

Despite all these, it is significant to look into the negative implication of DRM measure with regard to public interest and social welfare. Copyright law aims at creating a balance between two conflicting interests firstly, protecting interests of copyright holders by granting them certain exclusive rights as incentive for creativity and secondly, to protect public interest by providing access to copyrighted works. The introduction of anti-circumvention has brought along with it certain apprehension specifically relating to access to information and fair use and thereby tilting the copyright balance.<sup>45</sup> Even though it is provided that the anti-circumvention provisions are subject to fair use provisions and the user can take the help of a third party for circumventing the technological measure for fair use purpose these exemptions make a presumption that normal users in India are having access to circumvention technology. The anti-circumvention does not create a corresponding duty for the content owner who applies technological measures in their works. The act does not make it obligatory for the content owner to provide a tool or keys to bypass the technological measure to the user who approaches him for the same under fair use provisions. The corresponding Spanish legislation can be taken as an example which under Article 161,<sup>46</sup> requires the content holders who install TPM's facilitate access to the beneficiaries of copyright limitations. There are a lot of ambiguities with respect to the exception to anti-circumvention provision as provided under section 65A(2).

### Remedies against Circumvention of DRM



<sup>45</sup>Aparna Viswanathan, “The Copyright Amendment Bill 2010: on the death of books and the digital environment”, The Hindu, July 4, 2011. Available at: <http://www.thehindu.com/opinion/op-ed/the-copyright-amendment-bill-2010-on-the-death-of-books-and-the-digital-environment/article2156475.ece> (Last visited on 28th June 2013).

<sup>46</sup>Available at: [http://noticias.juridicas.com/base\\_datos/Admin.rdleg1-1996.13t5.html](http://noticias.juridicas.com/base_datos/Admin.rdleg1-1996.13t5.html). (last visited on 23rd December 2015).

The owner of the copyright has two mechanisms available for enforcing his right against the circumvention of DRM techniques. The India's administrative machinery has consisting been of Registrar of Copyright, the Copyright Board and the Customs authorities under Customs Act.<sup>47</sup> And then, legal machinery consisting of the Courts of appropriate level.

### **Interlocutory Stage for Such a Long Time**

The experience has shown that in our country, suits relating to the matters of patents, trademarks and copyrights are pending for years and years and litigation is mainly fought between the parties about the temporary injunction.<sup>48</sup> Experience shows that the parties primarily look for temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally.<sup>49</sup> Proviso (a) to Order XVII Rule 1(2) C.P.C. states that when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for exceptional reasons to be recorded by it the adjournment of the hearing beyond the following day is necessary. The Court should also observe clauses (b) to (e) of the said proviso. In our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit.<sup>50</sup>

### **John Doe Orders in India**

The "John Doe" is an order against an undisclosed person who, the owner/plaintiff claimed, were wrongfully benefitted from infringing materials. The order against unidentified wrongdoer/defendants was sought to be justified on two broad grounds: (i) Section 151 of the Code of Civil Procedure, 1908, which gives courts the inherent power to evolve a fair and reasonable procedure for meeting exigent situations, and (ii) international practice in the form of John Doe orders issued by courts in various countries including the United States, United Kingdom, Canada and Australia.

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<sup>47</sup> Section 9 of the Copyright Act requires for establishment of an office to be called the Copyright Office for the purpose of the Act. The Copyright Office is to be under the immediate control of a Registrar of Copyrights to be appointed by the Central Government, who would act under the superintendence and directions of the Central Government. The Copyright Office is currently located at the following address: 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi – 110001.

<sup>48</sup> *Bajaj Auto Limited v TVS Motor Company Limited* 2009 AIR 2591.

<sup>49</sup> *M/s. Shree Vardhman Rice & Gen Mills vs. M/s Amar Singh Chawalwala* (Special Leave Petition(C) No.21594 of 2009 decided on 07th September, 2009).

<sup>50</sup> *Multi-Screen Media Pvt Ltd v. SunitSinghandOrs* CS(OS) 1860/2014. Available at: [http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=119642&yr=2014](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=119642&yr=2014) (Last visited on 23rd April 2015).

In the case of *Billy Joel v Various John Does*,<sup>51</sup> court applied the principle of *ubi jus ibi remedium*<sup>52</sup> while granting the John Doe Orders, the observed that “Were the injunction to be denied, plaintiffs would be without any legal means to prevent what is clearly a blatant infringement of their valid property rights. While the proposed remedy is novel, that in itself should not weigh against its adoption by this court. A court of equity is free to fashion whatever remedies will adequately protect the rights of the parties before it.”<sup>53</sup> The order issued in *Tej Television Ltd. v Rajan Manda*<sup>54</sup>, was the first of its kind against unidentified defendants in the Indian legal landscape. The court empowered the Commissioner to take the assistance of technical experts and police officials in carrying out this order, and directed him to prepare a report after gathering evidence of cable piracy in the form of video recordings and photographs. The court also considered itself at liberty, on the basis of this report, to issue notices to all alleged violators, and after the hearing, to initiate civil and criminal action against them in accordance with law. The Court Commissioner was also empowered to issue warnings to such prospective violators though there was no mention of any contempt proceedings against the violators for ignoring the warning given by the Commissioner. Upon close examination, this order was nothing but a mild modification of the power vested in the court under Order XXVI, Rule 9 of the CPC.

In the case of *Luxottica S.R.L v Mr.Munny&Ors*<sup>55</sup> the Delhi High Court has enunciated, with sufficient clarity, the procedure to be followed while granting interim orders against unidentified defendants. The High Court of Delhi observed that, “The Commissioners are also authorized to visit any other premises/warehouse/store where they may have reason to suspect and/or information be received that counterfeit/pirates goods bearing the owner/Plaintiffs trademark are being stored/sold/offered for sale and thereafter. In respect of the defendants, upon the seizure of any infringing/counterfeit products, the Commissioners shall forthwith serve to the defendants with a complete set of papers and a copy of the notice and summons. The Commissioners will seize and make an inventory of all the infringing goods including packaging material, cartons, stationery, literature, dyes, blocks, moulds, etc. bearing the impugned contents of trademark and sign all books of accounts including ledgers, cash books, purchase and sale records etc., and return the seized goods on suprdari to the defendants and obtain undertakings from each of them that they will produce the seized goods as and when directed by the court.” Furthermore, “the object

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<sup>51</sup> 499 F.Supp.791 (1980).

<sup>52</sup> Where there is a right, there is a remedy in law.

<sup>53</sup> In *Tony Blain Pty.Limited v Splain and other Persons Unknown*, [1994] F.S.R. 497 the New Zealand High court stated that, “in circumstances where it is plain that persons are infringing proprietary interests which the law recognises, or deceiving the public by way of trade in a manner which may indirectly affect the commercial interests of others, the law should, if it reasonably can, provide a remedy.”

<sup>54</sup> [2003] F.S.R. 22

<sup>55</sup> The Delhi High Court Order dated 25.09.2009 in C.S. (O.S.) 1846/2009. Available at: [http://courtnic.nic.in/dhcorder/dhcqrydisp\\_o.asp?pn=173895&yr=2009](http://courtnic.nic.in/dhcorder/dhcqrydisp_o.asp?pn=173895&yr=2009) (last visited on 24<sup>th</sup> January 2015).



behind this order seems to be the prevention of any destruction of the evidence. In consonance with this object, the High Court has even made provision for return of the seized material to the unnamed defendants during the pendency of this order, and given them the option of approaching the court and vacating the *ex parte order* of injunction issued against them.” This decision provided a clear roadmap for courts that pass such orders in the future.

The website blocking order is an extension of the John Doe orders, and it is blocking access to certain websites that upload, or permit the uploading of, copyrighted content such as sound recordings and cinematograph films, without authorisation from the copyright owner. Ananth Padmanabhan argues that the Information Technology Act, 2000 read with the Information Technology (Intermediaries Guidelines) Rules, 2011 do not in any manner permit the Government to override the provisions of the Copyright Act, 1957 (as amended) while facilitating the denial of access to websites on grounds of copyright infringement, because the Copyright Act, 1957, is a complete code by itself.<sup>56</sup>

### **Inference on DRM Protection under Indian Copyright Regime:**

The rationale given by the Madras High Court that “No man is entitled to steal or appropriate for himself the result of another’s brain, skill or labour even in such works”<sup>57</sup> has been followed in several cases.<sup>58</sup> But, there is an urgent need for an empirical study which would really look into whether the anti-circumvention measures are going to affect both users and content owners. This is particularly relevant to understand whether the country is ready to take such a risk which might provide a minimal incentive for innovation and competitive at the cost of public interest’s in free access to information and creative works. The use of DRM designs and anti-circumvention measures conferred altogether a new form of rights favouring content holders in relation to providing access and control over use of works, after the sale of their works. The creation of these new rights by application of technological measures and anti-circumvention measures has in fact shifted the balance of copyright legislations in favour of the authors. The use of technological measures have created certain unintended consequences like unnecessary restriction of use of the work, problems of interoperability, lock out in use of certain works and device, issues of privacy etc. in spite of all these problems indicating the importance of managing digital rights.

Even though India is not a party to WIPO internet treaties, India have made changes to its copyright legislation by the latest Copyright Amendment Act 2012 which introduced sections like 2(xa), 65A, and 65B to deal with protection of digital measures to counter infringement of

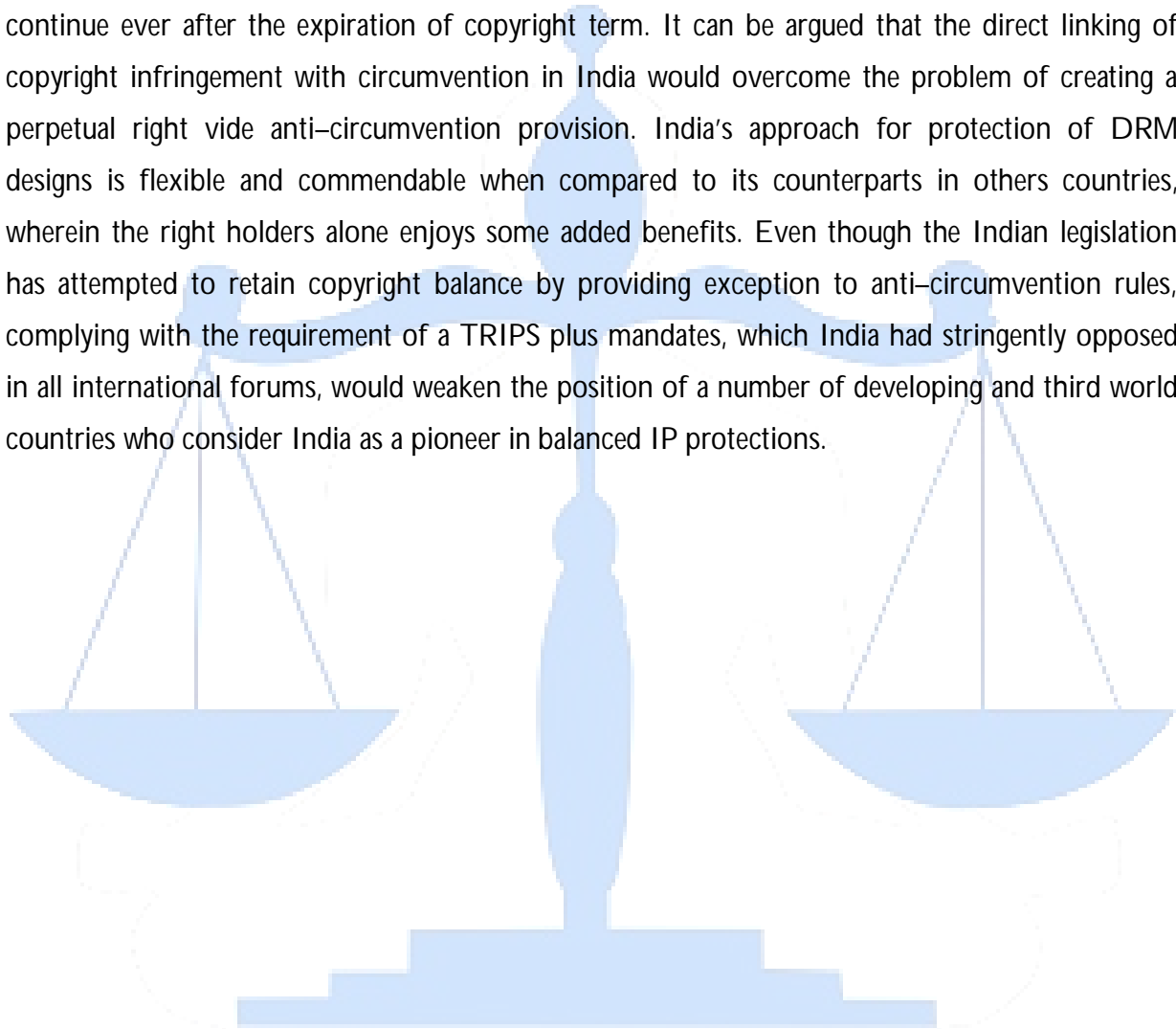
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<sup>56</sup>See, Can Judges Order ISPs to Block Websites for Copyright Infringement? (Part 3). Available at: <http://cis-india.org/a2k/blogs/john-doe-orders-isp-blocking-websites-copyright-3> (Last visited on 23rd April 2015).

<sup>57</sup>*Govindan v Gopalakrishna AIR 1955 Madras 391.*

<sup>58</sup>*Burlington Home Shopping Pvt. Ltd. v Rajnish Chibber & Anr. 1995 PTC (15) 278.*

copyright. The anti-circumvention provisions under the new amendment act are different from that of the stringent provision of US and UK which has the potential of fostering growth of industries at the cost of the public. One of the major problems with the anti-circumvention rules in developed countries is due to the non-linking of circumvention to infringement of copyright and thereby granting authors a perpetual right against circumvention techniques which would continue ever after the expiration of copyright term. It can be argued that the direct linking of copyright infringement with circumvention in India would overcome the problem of creating a perpetual right vide anti-circumvention provision. India's approach for protection of DRM designs is flexible and commendable when compared to its counterparts in others countries, wherein the right holders alone enjoys some added benefits. Even though the Indian legislation has attempted to retain copyright balance by providing exception to anti-circumvention rules, complying with the requirement of a TRIPS plus mandates, which India had stringently opposed in all international forums, would weaken the position of a number of developing and third world countries who consider India as a pioneer in balanced IP protections.



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