

## Copyright Protection through Digital Rights Management in India: A Non-Essential Imposition

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Copyright is a bundle of rights granted to the creator in recognition of his effort, creativity and expression. However, copyright is limited by public interest considerations whereby the society is entitled to the benefits of the copyrighted work subject to certain restrictions that a copyright holder or creator may impose. This presents an unresolved problem of achieving a fair balance between competing interests of an owner of copyright and society at large. The present paper critically examines the introduction of digital rights management in Indian Copyright Law in contrast to larger public interest. In the context of digital content and easier digital replication of copyrighted content, the dilemma is to achieve a balance between the contesting claims of copyright holders and fair-users to fully realise right to freedom of speech and expression.

**Keywords:** DRM, TPM, Digital Rights Management, copyright, digital-piracy, fair-use

As has the cyberspace advanced, so has copyright infringement if understood 'in a strict sense'. The digital age has brought with it umpteen challenges in terms of technology, its use and its abuse. Traditionally, the concept of copyright infringement was restricted to physical imitation of copyrighted work, and reproduction or copying of the work accompanied with unauthorised sale/distribution of copyrighted material. The number of physical copies produced determined the extent of piracy. With the upsurge of digitalization and technology, piracy has become much easier. Legislations across the globe have incorporated technological protection measures in their copyright regimes so as to better protect, or rather restrict, the access and use of copyrighted works. Looking at it from sociological perspective, some authors propose that copyright infringement or piracy may not be as serious a crime as theft in physical world.<sup>1</sup> This may be due to dissemination of information till a deep level through digital space and use of technological advancement in gadgets, softwares, etc. Nevertheless, the opposing views have presented a set of competing claims, spaces, rights and requirements before Legislatures today. Combating 'piracy' appears to be the only challenge being taken seriously by the Legislatures of the world. India has joined the race and imposed TPMs<sup>2</sup> by

amending the Copyright Act, 1957 vide the Copyright (Amendment) Act, 2012.<sup>3</sup> This is despite India not having signed, and thus, not being a Contracting State for either the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty.

The present paper attempts to analyse the competing spaces that emerge from the copyright holder on the one hand, and the ordinary consumer on the other hand, who has the right as well as the responsibility to make the 'correct' choice. The paper further analyses if India is ready for TPMs. By analysing the competence of current Indian Copyright Law to control online copyright infringement, far reaching consequences of the new provisions are highlighted. The paper presents a viewpoint that imposition of digital rights management (DRM) in India impinges upon various public policy concerns and also to an extent infringes the fundamental right to freedom of speech and expression guaranteed under the Constitution of India.

### **Fair Balance: Creator's Interests v Public Interest**

The fundamental idea behind copyright violation or imitation is "*thou shalt not steal*". This forms the moral basis of the protective provisions with regard to copyright infringement.<sup>4</sup> The Indian Copyright Act, 1957 (hereinafter called the Act) defines 'copyright' in respect of a work or any substantial part thereof as the exclusive right to do or authorize the doing of the

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acts enumerated under Section 14. This right includes the right to store the work in any medium by electronic means.<sup>5</sup> The Copyright Act, 1957 explains 'copyright' under Section 14. It provides that the owner of the copyright has certain rights exclusively with himself or herself in respect of his copyrighted material. These rights include, the right to reproduce the work (literary, dramatic and musical work) including the storing of it in any electronic medium [Section 14(a)(i)]. This right has been extended to the artistic works and cinematograph films through the Copyright (Amendment) Act, 2012.<sup>6</sup> Further, Section 57 of the Act gives moral rights to the author which remain with the author of the work even after all rights in the work have been assigned. These special rights include right to claim ownership of the work, that is, the author has the right to be recognized as the author of her work at all times, places and spaces wherever her work is mentioned,<sup>7</sup> and secondly, the right to restrain any distortion, mutilation or modification or other act in relation to the work which is prejudicial to the honour and reputation of the author.<sup>8</sup> The author can even claim damages in respect of the latter right.

'Copyright infringement' is explained under Section 52 of the Act. According to this section, copyright in any work is infringed when any person does anything to do which only the owner of the copyright has an exclusive right to do or permits for profit any place to be used for the communication to the public of the work where such communication is an infringement of copyright in the work, both actions carried out without any license granted (by owner of such copyright or Registrar of Copyrights) or in contravention of the conditions of such license. Further, copyright is also infringed when any person sells or lets for hire or makes for such sale or hire, distributes (for trade or to an extent that it prejudicially affects the owner of the copyright), or exhibits by way of trade or imports into India any infringing copies of the work in which copyright subsists under the Copyright Act, 1957. Read together, the conclusion is that if any musical, literary, or dramatic work is stored in any electronic medium, or any work is reproduced, the same shall constitute 'copyright infringement' under the Act if it is stored or reproduced without license or permission from the copyright owner.

The scope and risk of infringement of economic and moral rights of owners and authors, respectively, greatly increases in the cyberspace. A copyrighted

work may be displayed on a website, for example: a painting the photograph of which was clicked in an exhibition and then uploaded on an internet user's blog without mentioning the author thereof, and such act may go undetected owing to vastness of cyberspace. Movies downloaded from P2P networks (without permission of the copyright owner) may be stored in a user's personal computer or any external storage device without attracting any penalty for such storage if the same goes undetected. The provisions with respect to storage of copyrighted content directly target the innocent internet user, who is always in a dilemma as to spend hundreds of rupees for buying legitimate material or to download the same from the internet free of cost. Once such infringement is established, the penalty for the same is also strict and may even lead to imprisonment. The fact that piracy occurs and law and technology together have considerably failed in eliminating it, poses a question as to the need and usefulness of such penal provisions.<sup>9</sup> It cannot be denied that such provisions coupled with provisions as to powers of police to seize infringing copies would help curb and redress organized copyright infringement, particularly in cinematograph films, however, the same may be applied in a similar fashion to genuine and ordinary internet users. The entire copyright law including the international treaties governing copyright give an impression that online piracy of copyrighted material is a gross and serious crime and must be met with stringent measures. The said view, however, is one-sided and does not speak of the internet user's right to access and use, which can act as legitimate limitations upon the exclusive rights of the copyright owners.<sup>10</sup>

Copyright law can best be defined by constant strained tussle between exclusive private rights on the one hand and the freedom to read and express oneself<sup>11</sup> as one wishes on the other hand.<sup>12</sup> This dichotomy of interests often results in the balance leaning towards the copyright holders. Digital Rights Management (DRM) is one such technological measure that has now received legislative acceptance and incorporation in India. Essentially, DRM is meant to protect the 'exclusive rights' of copyright holders, which right encompasses within itself the right to exclude others from use, in any form, of the copyrighted material. However, by its very nature and functioning, this measure disrupts the balance between public rights and private interests that copyright law seeks to achieve, or rather, had sought

to achieve at the time of its introduction in independent India.<sup>13</sup>

Rights granted under copyright protection act as incentive for authors, artists, and other creators, and encourage investment in the dissemination and exploitation of works for the ultimate benefit of the public. Further, by enabling the creator to derive a financial reward from his work, his artistic independence and right to create and publish according to his own wish and conscience is assured.<sup>14</sup> However, technological measures such as DRM have potential to lead to an unnecessary expansion of the rights granted to a copyright holder under Copyright Law.

Article 27 of the Universal Declaration of Human Rights (UDHR), 1948 recognises the concept of public interest against the rights of copyright owner.<sup>15</sup> Article 19 of UDHR provides, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, *receive and impart information and ideas through any media and regardless of frontiers.*' (Emphasis supplied). These rights are also manifested in the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant for Economic, Social and Political Rights (ICESCR).<sup>16</sup>

The public interest element of copyright protection can be derived from the Directive Principles of State Policy envisaged under Part IV of the Constitution of India. Article 38(1) directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 39(b) and (c) specifically mandate that the State shall direct its policy towards securing: '(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.' Additionally, the fundamental duties as to every citizen's endeavour being 'to develop scientific temper, humanism and the spirit of inquiry and reform';<sup>17</sup> and 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement',<sup>18</sup> may be called upon to justify limits on copyright protection.

Thus, the right to freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution of India cannot be exercised without limitations. These limitations include not only those as contained under Article 19(2),<sup>19</sup> but also the principles as provided for under Part IV, since the State is under obligation to legislate keeping in view the principles of common good and common ownership. Just as an author or creator of a work has right to express himself, and consequently get protection for his work, every citizen also has a right to receive information.<sup>20</sup> Thus, no law can negate or abridge freedom of speech and expression expressly guaranteed to all citizens under the Constitution of India.

### Contours of Digital Rights Management

The digital dilemma with respect to copyright law is torn between the technological advances which make it possible to make perfect copies of movies, music, academic content, software etc. in no time and distribute the same globally through internet, and the control and regulation of content and its distribution over the digital medium. To effect such control, digital copies of content are fed with TPMs. When combined with legal sanctions, TPMs make it possible to control access to and distribution of content to an unprecedented degree.<sup>21</sup> Using TPMs, distributors of digital works may not only preserve existing markets for their works, but they may also create new market.<sup>21</sup> Thus, even the content that has fallen in the public domain and should thus be freely available may be wrapped up in TPMs with minor changes making them a subject-matter of copyright and justifying applying DRM thereto.<sup>22</sup> TPMs like encryption, trusted systems, and digital watermarking technology are being used in today's digital market to assert the rights of copyright holders.

To offer a better and rather strict protection to content and to create a profitable market for authorised production of digital content, technological standards have been integrated into operational software programs. According to some authors, in many cases these standards have begun carrying normative legal substance, as their influence on user behaviour has expanded.<sup>23</sup> The emerging DRM technology, which is being popularized extensively by copyright driven industries, is one such prominent example.<sup>24</sup> When legal commands that regulate form are promoted through legal rules, they are characterized by a high level of specificity backed by an authoritative executing mechanism that leaves little room for judicial discretion.<sup>25</sup>

### Trusted Systems

Trusted system is a technological measure whereby the system administrator can define and limit the number or set of people who can access the information circulated within its network. In some cases a trusted system can also limit the number of times a legitimate and authorised user can access the content shared therein. For example, Real Audio, an alternative to MP3, relies upon trusted systems technology to distribute digital content in a format that can limit the ability of users to play, copy, or save files.<sup>26</sup> Files saved in RealAudio format can only be played with a RealAudio player, and the player is programmed to determine whether any particular use is authorized or unauthorized. In DRM, trusted computing can be used to create sealed storage thereby preventing the user from opening the file with an unauthorised computer,<sup>27</sup> or remote attestation whereby the system generates a certificate of authenticity of the software running on a computer. In this form of DRM, companies providing the software can keep a regular check on tampering of the software by users and can also identify any unauthorized changes made to the software in order to circumvent TPMs.

Thus, in laptops or desktops using a pirated Windows Operating System, a message flashes each time the computer is booted indicating that the Windows copy in the system is not genuine. 'Pay-per-view' mode to watch a movie at the authorised television is also an example of a trusted system employed to implement DRM system. Trusted systems enable a secured network since they give the content provider a way to verify the authenticity of any message it receives that claims authorization to read a digital work.<sup>28</sup> They allow the content provider to make the works available only to persons the content provider knows have paid for access. Therefore, even after having sold the product for a hefty price, the content provider can exercise control over how and to what degree can a user can make use of the bought content. In short, trusted systems have the capability to be an 'extraordinarily effective and profitable means of controlling, and rationing, access to works of information and entertainment'.<sup>28</sup>

### Digital Watermarking and Fingerprinting

DRM technology performs two separate functions.<sup>29</sup> First, it identifies digital versions of copyrighted works, just as International Book Standard Numbers (ISBN) identify hardcopy books.

Digitally identifiable versions of copyrighted works are generally created through two well-accepted existing technologies, known as "watermarking"<sup>30</sup> and "fingerprinting".<sup>31</sup> The identification function tracks works electronically, such as when they are transmitted over basic peer-to-peer networks<sup>32</sup> in the form of email or instant message attachments. Second, DRM software may also provide copyright owners with control over the various excludable rights of copyright ownership, including access to their works and the ability to make copies of and redistribute the works.<sup>33</sup>

Digital watermarking is the act of hiding a message related to a digital signal (i.e. an image, song, video) within the signal itself.<sup>34</sup> The added watermarks help identify if the data is copyright protected, and also in owner identification. Being able to identify the owner of a specific digital work of art, such as a video or image can be quite difficult,<sup>35</sup> nevertheless, it is important for digital works from the point of view of copyright owners. The technology of digital watermarking is also beneficial for compactness of products. Instead of including copyright notices with every image or song, the owner could simply use watermarking to embed the copyright in the image or the song itself.<sup>34</sup> In this, the watermarking technology is revolutionary. The second function of transaction tracking of DRM can be achieved through watermarking as well. In this case the watermark embedded in a digital work can be used to record one or more transactions taking place in the history of a copy of the work.<sup>34</sup> For example, watermarking could be used to record the recipient of every legal copy of a movie by embedding a dissimilar watermark in each copy. If the movie is then leaked online, the source of the leak could be identified through the unique embedded watermark.

Copy control is another useful application for digital watermarking. In this application, watermarking can be used to prevent the illegal copying of songs, images of movies, by embedding a watermark in them that would instruct a watermarking compatible CD or DVD writer to not write a song or movie because it is an illegal copy.<sup>34</sup> The motion picture industry of the United States has adopted a similar approach with digital copies of movies distributed on DVDs. Each DVD is encrypted<sup>36</sup> by a Copy Protection System known as the Content Scramble System (or CSS). DVD of a movie fed with the CSS can only be viewed on DVD players or

computers using CSS-licensed technology. Further, the player or the equipment is programmed to permit the user to play, but not copy, the movie.<sup>37</sup>

### Limitations on Copyright

Copyright is an exclusive right, yet certain statutory limitations are imposed upon it in order to meet the 'public benefit' element thereof.

### Doctrine of Fair Use

The Doctrine of Fair Use under the Copyright Act, 1957 specifically exempts certain acts from the purview of copyright infringement.<sup>38</sup> According to Section 52 of the Act, 'the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy in order to utilize the computer programme for the purpose for which it was supplied or to make back-up copies purely as a temporary protection against loss, destruction, or damage in order only to utilize the computer programme for the purpose for which it was supplied',<sup>39</sup> would not be copyright infringement. In a similar manner, 'the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme is not a copyright violation if such information is not otherwise readily available'.<sup>40</sup> Further, there will not be any copyright violation in 'the observation, study or test of functioning of the computer programme in order to determine the ideas and principles, which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied'.<sup>41</sup> The provision also provides that making of copies or adaptation of the computer programme from a legally obtained copy for non-commercial personal use will not amount to copyright violation.

A 'fair dealing' with a literary, dramatic, musical or artistic work for the purposes of private use including research is also exempted from liability. Further, the use of copyrighted material for the purpose of review or criticism, or for reporting as news, or in connection of any judicial proceeding etc. cannot be said to be copyright infringement but is covered under 'fair use doctrine'.<sup>42</sup> These provisions rightly protect the genuine user or researcher and cannot be said to have a negative impact on the copyright owner so as to discourage him to create new works.

However, there exist certain insurmountable difficulties with respect to fair use over the internet. Most of the fair use provisions are dependent on the distinction between private use and public use. Law permits fair dealing for private, non-commercial use, whereas the public commercial use can only be done with the permission of the right holder. This distinction gets eroded in the digital environment where an individual is able to transmit over the internet a work to millions of users scattered over the entire globe and who may download the same in the privacy of their homes.<sup>43</sup> Can a computer user who uses scenes from a cinematograph film to create a fan video-mix and backs it with a popular song or musical piece and uploads the finished 'work' on the internet be said to have infringed copyright in the cinematograph film and the music piece/song, more so when the act of uploading may not fall under 'private use' to exempt user from liability? Will such a user be a creator or an infringer, or both? Further, should this 'finished work' be protected as a 'work' in itself? This could easily be said to be a multimedia work. Considering that a multimedia work has a value *beyond* the value of its individual components since the extra value flows from having diverse inputs brought together in one work,<sup>44</sup> they can form subject-matter of protection.

In *Chancellor Masters and Scholars of the University of Oxford v Narendra Publishing House and Ors.*,<sup>45</sup> the Delhi High Court has aptly summed up the policy behind fair dealing. The court held that the doctrine "legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and at the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use."<sup>45</sup>

### Copyright Misuse

Copyright misuse is a defence to copyright infringement allegations which operates to preclude enforcement of a copyright if is improperly used.<sup>46</sup> The defense was first successfully invoked by an alleged copyright infringer to escape liability in 1990 in the case of *Lasercomb America, Inc. v Reynolds*.<sup>47</sup> In *Lasercomb*, the Fourth Circuit held that the plaintiff (the company that licenced the software) had misused a software copyright when it included in its standard licensing agreement a term that barred the licensee from creating a competing product. The court held that inclusion of such a term in the licence agreement was however, not an antitrust violation, yet it was a public policy violation. Thus, the copyright of plaintiff was rendered unenforceable.

The defence of copyright misuse however, comes with riders, and cannot always be successfully used. It was rejected by the Ninth Circuit in *Apple, Inc. v Psystar Corporation*<sup>48</sup> in the context of software license agreements. Psystar manufactured personal computers and sold them after installing Apple's Mac OS X Operating System on them. Apple brought an action of copyright infringement, *inter alia* against Psystar. Psystar argued copyright misuse by Apple contending that it required the users/licensees of its Mac OS X Operating System to use only on Apple computers. The Court rejected this argument holding that since users of Mac were only licensees thereof and not owners, and hence the 'first sale doctrine' was not applicable thereto.<sup>49</sup> Thus, the restriction of Apple in its end-user licence agreement was not an unjustified expansion of copyright. Further, the said term also did not bear any adverse effect on competition since the Apple's licence did not restrict a competitor from developing and marketing its own software. It is this distinction of sales and licences that does not permit the use of the defense of copyright misuse.

The doctrine typically involves the limited question that whether the copyright holder has exercised its limited monopoly to leverage, by way of imposing terms (on the user) in the agreement, to use the copyrighted work only upon the acceptance of specific conditions. The defense was upheld where it restricted competition by including a condition in the license agreement that completely prevented the licensee from using any other competing product.<sup>50</sup> Some authors argue that that any attempt by a copyright holder to expand the scope of his copyright

to gain control over an idea or to deter fair use should constitute misuse.<sup>51</sup> The copyright misuse doctrine has till now however, not been successfully used in India.

### Contract Law and Copyright

Copyright protection can be implemented and expanded through terms of a contract since the contract law gives the parties freedom to agree on the terms they shall be governed by in their dealings with each other. The most appropriate example to analyse the defense of copyright policy overriding the contractual terms, is the case of *ProCD, Inc. v Zeidenberg*.<sup>52</sup> The Court vide this judgement have validity to 'shrink-wrap licence agreements' while even observing that the terms therein shall be binding even if the user/licensee had not read such terms. Thus, terms of license that restricted an end-user to only use the product and not resell, relicense or rent it were binding. This precedent was later on used for 'click-wrap' contracts as well.<sup>53</sup> Thus, copyright owners can successfully enforce incorporated terms in their 'click-wrap' or 'browse-wrap' licenses that not only call for enforcement of rights granted under copyright law but go a step ahead in filling the gaps in exclusive rights granted under copyright, thereby prohibiting the licensee from engaging in fair use or even copying public domain elements of a copyrighted work, and further holding the licensee contractually liable for infringing uses of the work.<sup>54</sup> Such contracts are now enforceable, and thus, attract the public policy considerations of copyright law.

It is difficult to understand that a contract, which is merely an aggregation of agreed terms by two parties, can override the public policy element in copyright. However, challenge to such a contract on the basis of it having not been entered into with free consent has been silenced by the US Courts' decisions. Likelihood is that the same approach will be followed in India, especially after the 2012 Amendment to the Copyright Act. This approach of expanding or achieving what is not expressly granted under a statute through the backdoor of contract law, is not only a public policy violation, but in some aspects also hits at the right to freedom of speech as guaranteed under Article 19 (1) (a) of the Constitution of India. Such approach, as some authors indicate, can imbue expansion of copyright protection with legitimacy or normative content.<sup>55</sup>

Another instance of copyright expansion in cases of digital copies of copyrighted work was the remote deletion of e-copies of a particular version of George

Orwell's novel (1984) by Amazon Kindle in 2009. Kindle users who had purchased and downloaded this e-book discovered that it had been remotely deleted from their device. Section 106 of Title 17 of the United States Code (Copyright Law of the United States of America and Related Laws) grants exclusive rights to copyrighted works, including right to prepare derivative works, distributing and reproducing copies.<sup>56</sup> Remote deletion,<sup>57</sup> functionally expands the reach of copyright beyond these rights as granted under Section 106 to a right to control the use and possession of *all* distributed copies. This would constitute a significant disruption of the balance of rights established by the first sale doctrine.<sup>58</sup>

### Competition Policies and Copyright

The Competition Act, 2002 was introduced in India with a view, *inter alia*, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade in Indian markets.<sup>59</sup> The Act expressly prohibits anti-competitive agreements<sup>60</sup> in case these agreements lead to an appreciable adverse effect on competition. Such agreements are void.<sup>61</sup> The Competition Act also further prohibits abuse of its dominant position<sup>62</sup> by an enterprise or a group. Imposing, either directly or indirectly, unfair or discriminatory conditions or price for sale or purchase of goods or services constitutes an abuse of dominant position under the Act. Further, if an enterprise or group limits or restricts: (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers, it shall be deemed an abuse of its dominant position.<sup>63</sup> Other actions specifically termed to be an abuse of dominant position by an enterprise or a group under the Act include, indulgence in practice(s) resulting in denial of market access; making conclusion of contracts subject to acceptance by other party of supplementary obligations, unconnected with the subject of contracts; or use of its dominant position in one relevant market to enter into, or protect, other relevant market.<sup>64</sup>

Drawing an exception for intellectual property rights, Section 3(5) of the Competition Act provides, "Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose *reasonable conditions*, as may be necessary for protecting any of his rights which have been or may be conferred upon him under— (a) the Copyright Act, 1957 (14 of 1957)" (Emphasis

supplied). Thus, but for this exclusionary proviso, a copyright holder would not have been legally able to impose conditions of use over the copyrighted work expanding his copyright protection. This provision also limits, to a great extent, the defense available to users of copyrighted works in arguing that terms of a certain copyrighted work are in conflict with competition law and policies of the country. Anti-circumvention provisions, by their very nature, encourage abuse of dominant position of any enterprise.

Interestingly, even TRIPS Agreement<sup>65</sup> takes care of such a conflicting position under its Article 40 of Section 8, whereby it is provided, *inter alia*, that:

'1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.'

The Indian Law makes absolutely no use of such a provision that clearly provides for a solution to maintain the fair balance between competing rights that Copyright Law otherwise seeks to achieve.

The provisions of Digital Rights Management, as introduced *via* the 2012 Amendment in India, can reasonably be expected to have an appreciable bearing on competition among the Indian markets. In this regard, Section 1201 of Title 17, Chapter 12 (Copyright Protection and Management Systems) of the US Code is relevant. This provision expressly prohibits creation of various devices and technologies that might be used to facilitate copying by circumventing copyright management devices.<sup>66</sup> Such a provision is nothing but a draconian intrusion upon right to speech.

India too, by virtue of Section 65A, which was inserted *vide* the 2012 Amendment, curtails this circumvention and makes circumvention of an effective technological measure by any person a criminal offence.

### Public Policy, Unconscionability and Copyright Expansion

The copyright pre-emption doctrine is a concept under which private contracts can be found to be

contrary to the purpose or function of the Copyright Act and thus can be pre-empted. Section 23 of the Indian Contract Act, 1872 (ICA) gives the right to avoid the contract in case it violates public policy. The same was reiterated fervently by the Supreme Court of India in *Central Inland Water Transport Corporation Ltd. v Brojo Nath Ganguly*.<sup>67</sup> The Supreme Court took the view that unconscionable contracts may be void being contrary to public policy under Section 23 of the ICA. This interpretation was a breakthrough for contract law, since the people with inequitable bargaining capacity were now able to negotiate contracts with a sense of security. The Copyright Act, however, fails to take into account such public policy aspect of copyright protection. It is true that compulsory licensing has been provided for under the Act, but its application is to a limited extent.<sup>68</sup> However, unequal bargaining capacity is not taken into account while granting copyright protection. Thus, in the garb of freedom to contract, copyright protection is expanded and such unconscionable contracts are not likely to be struck down by courts in light of the 2012 Amendment.

### Competing Claims of Copyright Holders and Consumers

In *Wiley Eastern Ltd. & Ors. v Indian Institute of Management*,<sup>69</sup> the Court traced the purpose of defence of fair dealing to Indian Constitution, "The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India- so that research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what is infringement".<sup>69</sup>

The legitimate user of the internet seeks to express himself and through this global means and further seeks to share the knowledge in his possession with the wide world. He has, under the Indian Constitution, a guaranteed fundamental right under Article 19(1)(a), which encompasses the right to information. In *R.P. Limited v Indian Express Newspapers*<sup>70</sup> the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. Sure, this right to know and right to information can be curtailed with reasonable restrictions. However, when restrictions are such that they only tend to protect the author in garb of his exclusive rights thereby depriving the genuine consumer even the basic right to enjoy the work, they cannot be called 'reasonable'. The irony is

that the foremost function of the work is public enjoyment, for in the absence of the same the economic rights of the author may not be realized to full owing to lack of sales. On the other hand, if the use of a copyrighted work is such that it does not deprive the author of her moral rights and significantly adds value or praise or fame to the copyrighted work, the user/consumer must be allowed to do so.

In today's world, technology is such that it can "break down the barriers between an artist and his audience; it could transform the passive experience of the listener into active engagement with the music."<sup>71</sup> This is most prominently experienced in the music industry. The democratic aspect of technology has taken on a new meaning, as artists rely increasingly on direct connections with their public, through technology, to publicize their work.<sup>72</sup> Services, such as, YouTube are quite popular in this regard.

In the recent case of *Sagarika Music Pvt. Ltd. & Ors. v Dishnet Wireless Ltd. & Ors.*<sup>73</sup> before the Calcutta High Court, Indian music industry bodies Phonographic Performance Ltd. (PPL) and Indian Music Industry (IMI), and music label Sagarika Music Pvt. Ltd. contended that the website songs.pk was playing and posting Hindi movies songs without any copyright or license. An *ex parte* application was filed on the apprehension that serving of notice of application would lead to shifting of website content to a different one. The High Court passed interim directions in the matter blocking the website<sup>74</sup> by an injunction order banning the website by directing all ISPs to block access to the website through methods such as DNS name blocking, IP address blocking via routers, and DPI based URL blocking. Barely forty days had passed and the website was re-launched with the name songspk.pk by the same domain name owner.<sup>75</sup> This is not the lone case on the subject of online copyright infringement or as the Delhi High Court put it, 'internet piracy'. In 2006 for the first time, the Delhi High Court in *Microsoft Corporation v Deepak Raval*<sup>76</sup> granted punitive damages for various forms of software piracy and also gave an explanation to the expression 'internet piracy'. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and "deter a wrong doer and like-minded from indulging in such unlawful activities."<sup>77</sup>

It is not that copyright infringement at such a scale as described above should be encouraged; it is to be



condemned. However, what needs to be understood is that the website was being visited by thousands of people leading to a considerable loss of profit for the music industry. Piracy happens. There is no denying that. It happens more so for music and songs. In such a scenario, can the consumer be held guilty only because the copyright holder is denied of his profit? Can there not be a balance between consumers' needs and copyright holders' greed considering the fact that the foremost aim of intellectual property rights protection is to achieve a balance among competing claims in the public interest?

Online distribution of digital content, particularly digital music, differs principally in many aspects from distribution in the physical environment, and thus, has major consequences for the protection and enforcement of copyright of such content.<sup>78</sup> First, the online distribution of digital content is far more vulnerable to unauthorized use than analogue distribution of digital content. Second, there is no distinction between the carrier or the medium of information and the content itself as is in the physical world, for example, the book (carrier) and its content.<sup>79</sup> Further, the digital environment provides an opportunity to the copyright owners to open separate markets for the same content. Thus, the manner of handling the digital content must also be different. The cyberspace is far more sensitive and powerful than it is understood to be. It can be either condemned completely by the copyright holders by bringing up infringement issues or can be used as a positive opportunity to grow and expand in markets and among audiences that may not be reached in the physical space. The latter may prove to be more beneficial in economic terms for the copyright holder.

### **Approach of Indian Law to DRM: A Critique**

A study on Copyright Piracy in India conducted in 1999<sup>80</sup> when India was trying to make its IP legislations compliant with TRIPS, observed as under in its conclusion:

#### **What Needs to be Done?**

A massive publicity campaign regarding the ills of copyright violation mentioning its being criminal offence, consequences, etc. could be launched. This is however, a gigantic task. Everybody involved in this, like the Government, local authorities, right-holders, associations, copyright societies, law enforcing authorities, etc have to join hands together. Education campaign can also be launched at the school and

college levels since students are the major consumers of the goods produced by copyright industry. However, piracy is not a phenomenon that can be tackled through any short cut in the short term. This should be a long term effort to educate students of schools and colleges. The associations (NASSCOM, Indian Music Industry) alongwith copyright office have to necessarily take very active part in this direction in order to reduce the extent of piracy if not eliminate it. The police personnel including the constables have to be properly trained. In turn the heads of the crime branches/copyright cells in the respective states/UTs may educate their colleagues. If needed persons/associations like NASSCOM, IMI, IPRS, etc could be invited to address such workshops. Anti-Piracy hot line in the line of NASSCOM can be installed at the respective associations, copyright societies and with the crime branch in respective states.

It is thus, indisputably clear that the Indian approach has always been one favouring the copyright holders, and continues to be so, as is amply reflected by the 2012 Amendment to the Copyright Act, 1957. It needs to be understood that neither legal sanctions nor social norms have deterred the unauthorized reproduction and distribution of copyrighted works *via* the Internet.<sup>55</sup>

On one level, it is possible to argue that while anti-circumvention provisions introduced in the Indian Copyright Regime *vide* the 2012 Amendment, the approach of the Legislature was to include safeguard in the form of "intention" as an essential requirement to convict anybody therein. Secondly, it is also possible to argue that since the Amendment allows circumvention for all purposes that are not expressly prohibited by the Copyright Act, 1957, it must only be fair or balanced to keep the anti-circumvention provisions. This approach however, ignores two important factors. First, the copyright owner who takes extra effort and incurs cost to employ technological measures to prevent its work from use or abuse is almost always backed by a strong economic standing as against the ordinary user who may simply be keen to listen to a new song. Second, the measures employed may be such that cannot be circumvented without incurring a huge expense so as to simply access the work. Thus, if a disability organisation decides to adapt a new Hindi movie for the deaf and dumb by including subtitles therein, all fails if such organisation has no money or technical expertise to circumvent the TPM in the video disc of

the movie.<sup>81</sup> Thus, while the statute gives the right of compulsory license to such organization, this right is substantially abridged by the failure of the Legislature to take into account the cost that may be involved to exercise such right. Thus, by legitimizing the protection of DRM measures within copyright law, the legislature has in effect added transaction costs for the users who want to exercise their legitimate rights.<sup>81</sup>

One of the most important steps that any legislature must undertake before engaging in a legislative process is to conduct a proper economic analysis of the need as well as the impact of the proposed legislation in society.<sup>82</sup> While economic analysis of law has not in general received its due attention in the Indian law making scenario, subjects like copyright law certainly deserve a rigorous analysis, considering their far reaching implications in the society.<sup>78</sup> The DRM provisions were introduced in India with a strong desire to be in consonance with the WIPO Copyright Treaties and their introduction expresses the firm belief that adherence to those two treaties is necessary for protecting the copyrighted material in India over digital networks like Internet.<sup>83</sup> However, until a thorough economic analysis of the effects of these provisions on Indian markets is done, DRM provisions shall continue to pose problems for consumers.

Yet another aspect ignored by the Legislature is the possible misuse of DRM provisions. This is especially necessary in contemporary Indian scenario since various High Courts / trial courts have started passing *John Doe* or *Ashok Thakur* orders in favour of the right holders. These broad injunctions may be rigorously used to enforce the strict provisions of Sections 65A and 65B of the Act in order to *circumvent* the fair dealing provisions. More so, the Indian market, which also consists of an unorganized market running in every street and corner of Indian cities, is not ready for such severe DRM provisions. When strictly adhered to, DRM provisions make almost every user of computer a criminal!<sup>84</sup>

### Conclusion

While copyright may be justified by a *quid pro quo* approach where it is mandatory to grant the creator certain incentives in the form of rights to encourage future creation, yet the public interest element of copyright must not be forgotten. India has numerous examples to offer where public policy concerns have been given overriding effect against

private rights. However, by including Digital Rights Management provisions in the Copyright Act, 1957, India has indirectly succumbed to international pressure that too without signing the WIPO Copyright Treaties.

The provisions of Digital Rights Management as introduced in the Copyright Act, 1957 vide the 2012 Amendment are definitely an encroachment of the fundamental right to speech and expression as guaranteed by the Constitution of India under Article 19(1)(a). Further, by not backing these provisions with a thorough study of the Indian market in respect of digital piracy, the Legislature has opened the door for challenging these provisions in the court of law. The DRM provisions completely ignore the public policy aspect of copyright and instead of achieving a balance between competing claims, these provisions are biased towards the copyright owners. Considering that the lobby of copyright owners seems united in its stand and economically much more viable than ordinary Indian users of digital versions of copyrighted works, it is likely that the Amendment may not be challenged. In such a scenario, there must at least be an attempt to initiate a post-Amendment analysis of the effectiveness of the DRM provisions. Copyright law generally speaking, aims to balance the interests of creators of content with those of the users of content by providing the latter access to such content subject to certain limitations and restrictions. However, when the same law that should aim for a balance curtails fundamental freedom of speech and expression, it needs to be relooked.

### References

- 1 Szde Y, Digital piracy and stealing: A comparison on criminal propensity, *International Journal of Criminal Justice Sciences*, 5(2) (2010) 239-250.
- 2 'TPMs' is abbreviation for 'Technological Protection Measures'.
- 3 The Copyright (Amendment) Act, 2012 (No. 27 of 2012) received the assent of the President on 07.06.2012, and came into force on 21.06.2012 after being notified in the Official Gazette by the Central Government.
- 4 Dent C, Copyright as (decentred) regulation: Digital piracy as a case study, *Monash University Law Review*, 35 (2009) 348-375.
- 5 Originally, such a right extended only to literary, dramatic and musical works, however, the Copyright (Amendment) Act, 2012 has extended this right to artistic works, cinematograph films and sound recording. Computer programmes, however, have not been extended this right.
- 6 Section 5 of the Copyright (Amendment) Act, 2012.
- 7 This right is also called the right of paternity.
- 8 This right is also called the right of integrity.

- 9 Sections 63, 63A and 63B of the Act provide for punishment for copyright infringement in the form of imprisonment that may extend to three years accompanied with fine upto rupees three lakhs.
- 10 It is noteworthy that in relation to the challenges the Indian film-making industry faces today, writer and director Anurag Basu in his interview to the WIPO Magazine once said, "It has to be as easy to get an original DVD as it is to get a pirated one. That is the only way we are going to fight piracy."; "100 years of Indian Cinema: An Interview with Bollywood's Anurag Basu" 1/2012 *WIPO Magazine* (February, 2013).
- 11 "Given the political and cultural framework of a particular society and the economic resources at its disposal, the public interest is the aggregate of the fundamental goals that the society seeks to achieve for all of its members- not for a majority of its members or for any larger or powerful group, but for all of the people within the society. Considered separately, a society's goals are often in conflict with one another, and in that case there must be a balancing. The art of government consists of achieving a harmonious rather than a destructive balance among conflicting goals." - Ringer B, Authors' rights in the electronic age: Beyond the Copyright Act of 1976, *Loyola Entertainment Law Journal*, 1(1981) 1-7, as quoted in Gillian D, *Copyright and Public Interest* (Sweet and Maxwell Publications, London, 2<sup>nd</sup> edn.), 2002, 353.
- 12 Benkler Y, Through the looking glass: Alice and the constitutional foundations of the public domain, *Law and Contemporary Problems*, 66(No.1/2) (Winter-Spring, 2003) 173-224.
- 13 This object is also reflected in the provisions regarding compulsory licences in the Copyright Act, 1957.
- 14 Gillian D, *Copyright and Public Interest* (Sweet and Maxwell Publications, London, 2<sup>nd</sup>edn.), 2002, 354.
- 15 Article 27, UDHR, "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
- 16 ICCPR and ICESCR stand for the International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Political Rights, respectively. These covenants were adopted by the UN General Assembly Resolution 2200A (XXI) of 16.12.1966. Together, the UDHR, ICCPR and the ICESCR are also referred to as the International Bill of Human Rights. The two covenants came into force in 1976, after a sufficient number of countries had ratified them. Article 19(2), ICCPR provides that, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." This right is however, limited by Clause 3 which provides, "the exercise of the rights provided for in Paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for (a) respect of the rights or reputations of others; and (b) the protection of national security or of public order, or of public health or morals." Article 15, ICESCR recognises the right of every human being to take part in cultural life and to enjoy the benefits of scientific progress and its application, and further to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This right is immediately balanced under the Covenant by providing conditions for the enactment of laws granting such right by State Parties under clause 3 where the Covenant mandates the State Parties to also take steps necessary for the conservation, development and diffusion of science and culture.
- 17 Article 51A (h) of the Constitution of India.
- 18 Article 51A (j) of the Constitution of India.
- 19 Article 19 (2) of the Constitution of India provides, "Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".
- 20 The right to receive information under Article 19(1)(a) was recognized in India in as early as 1958 by the Supreme Court of India in *Express Newspapers (Pvt.) Ltd. & Anr. v Union of India & Ors.*, decided on 8 January 1958. Even though the mediums of imparting information have changed, the law remains applicable as such.
- 21 Shih Ray Ku R, The creative destruction of copyright: Napster and the new economics of digital technology, *The University of Chicago Law Review*, 69(1) (Winter, 2002) 263-324.
- 22 As an illustration: If a publisher collected all cookbooks published in the nineteenth century in the US and wrote a new introduction to each, and then wrapped the product in a digital envelope, the resulting product, considered as a whole, would be subject to copyright protection; Nimmer D, A riff on fair use in the Digital Millennium Copyright Act, *University of Pennsylvania Law Review* 148(3) (January, 2000) 673-742.
- 23 Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1072.
- 24 As DRM prevents unauthorized use of digital works, it is sometimes also referred to as 'Content Management Systems' (CMS) or 'Content/Copy Protection for Removable Media' (CPRM).
- 25 Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1080.
- 26 Shih Ray Ku R, The creative destruction of copyright: Napster and the new economics of digital technology, *The University of Chicago Law Review*, 69(1) (Winter, 2002) 263-324, at 275. Specifically, RealAudio gives content providers the ability to stream audio or video files to users, preventing them from making permanent copies of the file, or to allow users to download permanent copies; In the US, RIAA had started the Secure Digital Music Initiative or SDMI in order to combat online music piracy in 1998. The Initiative, as RIAA's website informs, 'brings together the worldwide recording industry and technology companies to

- develop an open, interoperable architecture and specification for digital music security.’ Though SDMI has been inactive for many years, yet the method adopted or proposed to be adopted by it is worrying. It promised to require manufacturers of consumer electronics to adopt trusted systems technology so as to prevent playing, storing and distributing of digital content. In other words, the RIAA in association with the music giants would enjoy complete monopoly, for huge financial benefits, over music in the United States.
- 27 Such data can be released only to a particular combination of software and hardware.
- 28 Weinberg J, Hardware-Based ID, rights management, and trusted systems in symposium: Cyberspace and privacy: A new legal paradigm?, *Stanford Law Review*, 52(5) (May, 2000) 1251-1283.
- 29 Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1084.
- 30 Watermarking involves digital identifications inserted into each digital copy of a work at the time it is manufactured; Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1085. “Watermarks” are data added to the digital file that make a small change, usually unnoticed by the user.
- 31 Fingerprinting involves digital identifications inserted into unwatermarked content of digital copies after their manufacture; Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1085, Fingerprinting converts unwatermarked works into unique digital identification marks.
- 32 P2P networks can be a particularly efficient means of disseminating content. Having the advantage of being distributed as opposed to centralized online dissemination models such as MusicNet, P2P networks are less vulnerable to bandwidth constraints and the crash of a central server or servers. Second, P2P file sharing is inherently responsive to content demands. The fact that consumers are also suppliers means that if a large number of people want to download latest songs, a large number of people are likely to make that song available for upload too, because uploaders by definition provide only the music they themselves download from others or rip from a CD. The questions as to which songs are in demand are answered on their own in a P2P network. Most significantly, P2P networks harness volunteers providing or rather, donating their computing resources to the cause of music distribution; Lemley Mark A & Anthony Reese R, Reducing digital copyright infringement without restricting innovation, *Stanford Law Review*, 56 (6) (May, 2004) 1345-1434, at 1382.
- 33 Benoliel D, Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology, *California Law Review*, 92(4) (July, 2004) 1069-1116, at 1084 (accessed on July, 2004).
- 34 Averkiou M, “Digital Watermarking”, <https://www.cl.cam.ac.uk/teaching/0910/R08/work/essay-ma485-watermarking.pdf> (accessed on 20 November, 2016).
- 35 Rajawat K S *et. al.*, Watermarking text and image with encryption, *International Journal of Scientific & Engineering Research*, 5(5) (accessed on May, 2014) 170-176.
- 36 Encryption is the process by which messages or information are encoded so that only authorized parties can read it. Encryption does not prevent hacking but it reduces the likelihood that the hacker will be able to read the data that is encrypted.
- 37 Shih Ray Ku R, The creative destruction of copyright: Napster and the new economics of digital technology, *The University of Chicago Law Review*, 69(1) (Winter, 2002) 263-324, at 275-276, The CSS technology in the US has also met with severe criticism with some programmers having developed DeCSS, a circumvention device that circumvented the CSS technology and enabled a user to view and copy the digital content. Injunctions were sought against the website that posted this program and also the links to other websites that made the DeCSS program available for free download. *Universal City Studios, Inc. v Corley*, 273 F.3d 429 (2d Cir. N.Y. 2001). Eric Corley, the defendant had raised the First Amendment Right as to free speech in order to defend the creation and distribution of DeCSS. However, the argument was rejected. Relying on the precedent set in *Hill v Colorado* that a law that only incidentally restricts speech for reasons that are ‘justified without reference to the content of regulated speech’ and is not unconstitutional, the Court of Appeals held that even though DeCSS was a form of speech, it was constitutional to limit it since the limitations were related to the functionality of DeCSS, and not the content of the speech. A law, however, that prohibits the existence of circumvention devices, even those usable to reach public domain materials, is a law that excludes these materials from the public domain, or indefinitely extends the term of protection, and is thus in violation of the stricts of Article I of the US Constitution and also the First Amendment rights; Benkler Y., Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, *Law and Contemporary Problems*, 66 No.1/2 (Winter-Spring, 2003) 173-224, at p.212.
- 38 Section 52 of the Copyright Act, 1957.
- 39 Section 52(aa) of the Copyright Act, 1957.
- 40 Section 52(ab) of the Copyright Act, 1957.
- 41 Section 52(ac) of the Copyright Act, 1957.
- 42 Fair dealing in its statutory context relates to the true purpose (that is the good faith, intention and the genuineness) of the allegedly infringing work. It is not fair dealing for a rival in the trade to take copyright material and use it for own benefit. The fairness in dealing has to be judged by the objective standard of whether a fair minded and honest person would have dealt with the copyrighted work in the manner as the alleged infringer did; *Hawkers & Son (London) Limited v Paramount Film Services Limited*, [1934] 1 Ch. 593 (C.A.), as quoted in Narayanan P., *Law of Copyright and Industrial Designs* (Eastern Law House, Delhi, 3<sup>rd</sup>edn), 2002, 201.
- 43 James T C, Indian Copyright Law and Digital Technologies, *Journal of Intellectual Property Rights*, 7 (2002) 423-435, at p.433.
- 44 Aplin T, *Copyright in the Digital Society: Challenges of Multimedia*, 19 (Hart Publishing, Portland, 2005).
- 45 2008 (38) PTC 385 (Del).
- 46 The defense of copyright infringement claim is based upon the doctrine of ‘unclean hands’. In the US, to raise a successful copyright misuse defense, an individual or

- business does not have to be directly affected by the copyright holder's inequitable conduct. Rather, the individual or business only must show that the copyright is being used in a way contrary to the policies behind copyright ownership.
- Scher D, The viability of the copyright misuse defence, *Fordham Urban Law Journal*, 20(1) (1992) 89-107.
- Frischmann B & Moylan D, The evolving common law doctrine of copyright misuse: A unified theory and its application to software, *Berkeley Technology Law Journal*, 15(3) (2000) 865-931.
- 47 911 F.2d 970 (4th Cir. 1990).
- 48 Decided on 28 September 2011.
- 49 Section 109 of Title 17 of the United States Code (Copyright Law of the United States of America and Related Laws) expressly states that where a copy of a copyrighted work is transferred through "rental, lease, loan or otherwise", the first sale doctrine is not applicable. For further discussion, *Vernor v Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).
- 50 *Practice Management Info. Corp. v American Medical Association* (9th Cir. 1997) 121 F.3d 516.
- 51 Judge K, Rethinking copyright misuse, *Stanford Law Review*, 57(3) (December, 2004) 901-952.
- 52 86 F.3d 1447 (7<sup>th</sup> Cir. 1996).
- 53 However, Federal Courts in the US have sometimes refused to enforce license terms that would interfere with federal intellectual property purposes and policies; *Vault Corp. v Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) where it was held that contractual restrictions on back-up copying and reverse-engineering were unenforceable since they interfered with federal copyright policy. Samuels P, Intellectual property and Contract Law for the information age, *California Law Review*, 87(1) (January 1999) 1-16.
- 54 Jensen C, The more things change, the more they stay the same: Copyright, digital technology, and social norms, *Stanford Law Review*, 56 (2) (November, 2003) 545.
- 55 Jensen C, The more things change, the more they stay the same: Copyright, digital technology, and social norms, *Stanford Law Review*, 56 (2) (November, 2003) 546.
- 56 The corresponding provision under the Indian Law in respect of computer programmes is Section 14(b)(ii) of the Copyright Act, 1957 which grants exclusive right to sell or offer for sale, or give or offer to give on *commercial* rental any copy of the computer programme (emphasis supplied). An exception is carved out in the proviso to this clause where by commercial rental is not applicable in cases where the computer programme is itself not the essential object of the rental. It may be noted that this clause was added to the Copyright Act *vide* the 1999 Amendment thereto.
- 57 Remote deletion is the deletion of an e-record from the electronic database of a user without such user's consent, authorization or knowledge. In order for remote deletion to be permissible, and not an improper conversion of another's property, the license agreement must be deemed to be a true license and not a transfer of ownership. Joseph E Van Tassel, Remote deletion technology, license agreements, and the distribution of copyrighted works, *Virginia Law Review*, 97(5) (September, 2011)1223-1261, at 1225.
- 58 Joseph E Van Tassel, Remote deletion technology, license agreements, and the distribution of copyrighted works, *Virginia Law Review*, 97(5) (September, 2011)1223-1261, at 1252. This is true all for browse-wrap agreements since these contracts are standard forms of contracts giving absolutely no choice to the users to agree or disagree to keep certain terms, as opposed to the traditional negotiated contracts.
- 59 Preamble to the Competition Act, 2002.
- 60 Section 3 of the Competition Act, 2002. Briefly, anti-competitive agreements include tie-in arrangements, bid-rigging, cartelisation, exclusive supply or exclusive distribution arrangements, refusal to deal, resale price maintenance etc.
- 61 Section 3(2) of the Competition Act, 2002.
- 62 Section 4 of the Competition Act, 2002. Briefly, a dominant position is a position of strength enjoyed by an enterprise in the relevant market in India, if it the enterprise to, (a) operate independently of competitive forces prevailing in the relevant market, or (b) impact its competitors, consumers, and relevant market in its favour.
- 63 Section 4 (2) (b) of the Competition Act, 2002.
- 64 Sections 4 (2) (c), (d), (e) of the Competition Act, 2002.
- 65 TRIPS or Trade-Related Aspects of Intellectual Property Rights is an agreement between WTO nations that sets down minimum standards for protection and regulation of intellectual property.
- 66 The DMCA prohibits distribution of technologies that circumvent copyright management devices. Also, the DMCA protects copyright management devices from circumvention even if these devices are employed deliberately to prevent people from using copyrighted materials in ways completely consistent with fair use. In providing this, the DMCA, alters the traditional contours of copyright protection in two respects. First, it creates a new property right that allows copyright owners to do an end run around fair use, effectively shrinking the public domain. Second, it extends that property right to prohibit the use and dissemination of technologies that would protect fair use and vindicate fair use rights. Congress has exceeded the traditional boundaries of copyright protection, superimposing a new form of intellectual property protection that undermines the "built-in free speech safeguards" crucial to the holding in *Eldred*. Hence, under the logic of *Eldred*, the DMCA is constitutionally suspect; Balkin J (Prof., Yale Univ. of Law), *Is the Digital Millennium Copyright Act Unconstitutional under Eldred v Ashcroft?*, [http://balkin.blogspot.in/2003\\_01\\_12\\_archive.html](http://balkin.blogspot.in/2003_01_12_archive.html) (Last updated on 17 January 2003).
- 67 AIR 1986 SC 1571.
- 68 Section 31 of the Copyright Act, 1957 mandates compulsory licence publish a work that is withheld from the public. After the 2012 Amendment, it reads as:
31. Compulsory licence in works withheld from public.—
- (1) If at any time during the term of copyright in any work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work—
- a) has refused to re-publish or allow the re-publication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or
- b) has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable,

- the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to such person or persons who in the opinion of the Copyright Board, is or are qualified to do so in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed.
- 69 1996 (61) DLT 281.
- 70 AIR 1989 SC 190.
- 71 Sundara R M T, *Moral Rights: Principles, Practice & New Technology* (Oxford University Press, New Delhi), 2011, 323.
- 72 Sundara R M T, *Moral Rights: Principles, Practice & New Technology* (Oxford University Press, New Delhi), 2011, 325.
- 73 GA No. 187 of 2012 in CS No. 23 of 2012.
- 74 Songs.pk banned by Calcutta High Court: Report, <http://www.medianama.com/2012/02/223-songs-pk-banned/> (accessed on 19 November 2016).
- 75 Songs.pk re-launches as Songpk.pk after Calcutta HC ban, <http://www.radioandmusic.com/content/editorial/news/songs-pk-re-launches-songs-pk-after-calcutta-hc-ban> (accessed on 19 November 2016).
- 76 (2006) 33 PTC 122.
- 77 (2006) 33 PTC 122, 139.
- 78 Verma S K & Mittal R (ed.), *Intellectual Property Rights: A Global Vision* (Indian Law Institute, New Delhi), 2004, 263.
- 79 Nair N K *et. al.*, Study on Copyright Piracy in India, sponsored by Ministry of Human Resource Development, Govt. of India (National Productivity Council, New Delhi, 1999).
- 80 Fair use exception under Section 52 (1) (zb) of the Act.
- 81 Scaria A G, Does India need Digital Rights Management provisions or better digital business management strategies?, *Journal of Intellectual Property Rights*, 17 (September, 2012) 463-477 at 464.
- 82 Scaria A G, Does India need Digital Rights Management provisions or better digital business management strategies?, *Journal of Intellectual Property Rights*, 17 (September, 2012) 463-477 at 467.
- 83 Sibal K, "Statement of Objects and Reasons- Copyright (Amendment) Bill 2012" 14-15, <http://164.100.24.219/BillsTexts/RSBillTexts/asintroduced/copyright.pdf>.
- 84 Every mobile phone or computer user in India may probably have downloaded at least one song or ringtone illegally available on the internet.