



Private Ordering in Copyright Law: The Impact on Fair Use Activities on the Internet

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Private ordering tools such as contracts have always been used in the context of copyright law in order to monetize the rights of the copyright holders. However, the use of networked information technologies like the Internet has brought in a deeper layer of engagement. The higher configurability of such technologies, affords points of regulatory leverage to private parties, allowing them to exercise more pervasive control. Prior to the digital era, it was not practical for (say) a publisher to track down every buyer and bargain with them. In contrast, the cyberspace facilitates such a regime to a much greater degree, since it allows copyright holders easier access to the end-users of their products, thus making the conclusion of a bargain much more feasible. Furthermore, the technology also allows the rights holders to deploy technological protection measures built into the medium of the information (e.g., the e-book), restricting certain actions *via* code. While this provides the rights holders with an assurance of the protection of their rights, it runs the danger of trespassing on liberties users would generally enjoy under the copyright law framework. The objective of this study is to consider the rising influence of private ordering mechanisms such as contracts and technological protection measures in the copyright framework and the impact it has on the rights and privileges provided by the public ordering framework of copyright. The methodology undertaken for this study is doctrinal in nature.

Keywords: Private Ordering, Contracts, Technological Protection Measures, Fair Use Provisions, Digital Copyright

Technological innovations and developments have always had an intricate relationship with society and political economy. History shows that technological innovations such as the printing press, radio and television transformed social structures, the nature of civil-societal institutions, economy, the production and dissemination of knowledge. Their impact on legal norms and the resultant law-making endeavors is also well documented. The next significant milestone in the ongoing processes of technological innovations seems to be the networked information technologies, such as the Internet. Despite being around for more than a few decades, the impact of the internet and digital technologies have not been fully comprehended and the extent to which these networked technologies have changed every aspect of our social, legal political economy is yet to be fully realized.

For instance, while we do understand that the internet-enabled digital publishing has undermined to some extent the monopoly of the traditional publishing industry and the authority of the copyright laws by opening up new avenues for many writers to easily publish their work online for free or at a low

cost, and thereby, proven that it has the potential to further democratize the production and dissemination of knowledge; what is yet to be studied in more detail, especially in the Indian context, is the interplay of various private ordering mechanisms such as technological protection measures and contracts with the public ordering framework of copyright law and contract law.

The digital age has made private ordering mechanisms a much more prevalent tool in the hands of the copyright holders. Prior to the digital era, it was not practical for example, for a publisher to track down every buyer and bargain with them. In contrast, the cyberspace facilitates such a regime to a much greater degree, since it allows copyright holders easier access to the end-users of their products, thus making the conclusion of a bargain much more feasible. Furthermore, the technology also allows the rights holders to deploy technological protection measures built into the medium of the information (e.g., the e-book), restricting certain actions *via* code (such as say making copies), making the breach of such agreements harder to realize. While this provides the rights holders with an assurance of the protection of their rights, it runs the danger of trespassing on

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liberties users would generally enjoy under the copyright law framework.

Idea and Justification of Private Ordering on the Internet

Idea of Private Ordering

Private ordering involves a norm making process wherein private parties come up with rules and norms which will govern their interactions with each other in a given context.¹ Although certain private ordering (such as contracts) have always been around, cyberspace encourages such a regime to a much larger extent by taking away many of the hurdles faced by private ordering tools in the physical world. Furthermore, cyberspace also allows information providers to wield technological means to regulate and restrict access to a more pervasive degree. The two tools work together to create a system wherein the users are made to accept the restrictions posed by technological means through a licensing agreement with standards terms of use.² As Niva Elkin Koren observes:

“Such contracts are often automatically enforced by the code that facilitates access to the works so that only uses that are licensed by providers become technically available to users.”²

Justifications for Private Ordering

A number of justifications are often presented for the private ordering of the intellectual property system on the Internet. Proponents of private ordering argue that this system is superior to the public ordering system because it is formulated by the users themselves who are able to take into account their needs and thus construct a system best suited to them.¹

Furthermore, it is also argued that the private ordering system is more efficient and it better serves the interests of the stakeholders and better promotes overall public welfare.¹ This argument stems from the belief that market rather than the State is better suited to determining the optimal level of protection for the rights of the information provider. It is also argued that the market can assess the needs of the users and owners in real time and adjust the level of protection accordingly, while this process is much more time consuming and arduous when undertaken by the legislature.³ Thus, the private ordering system reduces transaction and enforcement costs and gives rise to efficiency in the system.⁴ The opponents of private ordering challenge the underlying assumption of these arguments.⁵

It must be remembered that although the tools wielded in the private ordering regime are mainly controlled by private parties and individuals, this system does not operate in a vacuum.¹ The state is instrumental in the success and smooth working of the private ordering system, since it administers the contracts through contract law and governs the technological protection measures through anti-circumvention laws. It is understood by the private parties that a public regime of enforcement and a baseline of background rights is in operation.⁶ As Niva Elkin Koren observes,

“The prospect of governing the Internet via decentralized, emergent decision-making does not imply that the use of force by governments would be irrelevant, but only that it would be deployed in the service of rules made predominantly by private actors.”²

The complex relationship of private ordering and public ordering mechanisms will be discussed in Section V.

Tools of Private Ordering

Technological Protection Measures

TPMs can be said to “promote the authorized use of digital works by controlling ‘access’ to such works or various ‘uses’ of such works, including copying, distribution, performance and display.”⁷ Some authors like E. Mackay have used the term ‘virtual or digital fences’ to describe TPMs since these technologies allow the rights holders the ability to control the access and use of their works in a way similar to how barbed wire fences were used to breed cattle in real world situation, thereby changing the face of land use economics.⁸

TPMs can be classified based on a number of criteria. They can be classified based on the type of legal rights which accrue on the protected content such as the TPMs which protect copyrighted content versus TPMs that protect even non copyrightable material.⁹ Another classification could be according to the “type of activity” controlled such as *Access control and Copy control measures*⁹, although some TPMs could have both features as well. Yet another way of classifying these technologies could be based on the “type of technology” used by the rights holders, such as encryption, watermarking etc.⁹ In the present paper, the examples are given based on the second classification- i.e., access control and copy control

measures. Following are illustrations of some of the forms that these technologies can take:

Access Control TPMs- Access TPMs Devices and Players

Many of the technologies used to control access or use of TPMs are based on Cryptography. Cryptography is the “science of encryption and decryption which allows the communication of information in a manner that is disguised so as to keep its content hidden from unintended or unauthorized recipients.”⁷ Therefore through the use of cryptography any given information is encoded so that if it falls into the wrong hands, the recipient wouldn’t be able to read what the message is. Only the parties which possess the decryption key would be able to decode the message and read it. In the digital world, through cryptography, digital files are connected with digital devices, such that any encrypted file can only be decrypted by the use of the specified digital device, which has the decryption facility embedded in either it’s software or hardware or a combination of both.⁷ Some technologies which use this method of encryption and decryption are:

- (i) Digital envelope or Digital container
- (ii) Trusted player

Digital envelope or Digital container is a technology which uses cryptography to “insert a work into a digital envelope containing the information relating to the product and the conditions of use of the product.”¹⁰ The only way to receive access to the product thus protected, is if the user meets the conditions required therein, which may include the payment of a fee or the use of a password provided for that purpose.¹⁰

Trusted player connects the digital file with the device. For instance, “some e-book reader systems look for the key embedded with the content and the reader will only enable the content to be viewed if the key is present, and here the key is unique to a particular make and version of the reader.”⁷

Use Control or Copy Control TPMs:

- (i) Serial Copy Management System (SCMS)
- (ii) Macro vision

Serial Copy Management System (SCMS) is a technology which uses watermarks to regulate and control copying of a product. It “prevents the illegal production of multiple generations of digital copies from a copyrighted protected original.”⁷ Such watermarks are embedded into the digital work and are used to “authenticate or otherwise trace copies, or

to assist in the implementation of copy control function.”⁷ This technology can be programmed in different ways such that it controls copying to a minute degree. With the use of SCMS the rights holders can dictate whether “a CD may be copied without restriction, copied once (for personal use), or not at all.”⁷

Macro vision “is a signal within an analog video signal that disrupts the ability of consumer VCRs from recording.”¹¹

These are some of the ways in which TPMs are used by information providers to protect their works on the Internet. However, due to the rapidly changing nature of these technologies, new technologies which could circumvent these technological protection measures are also developed, almost simultaneously. One example of such circumvention technologies is software which allows the use of content on unauthorized devices and regions.¹² In order to ensure the continued efficacy of their private ordering tool of TPMs, information providers and copyright holders have turned to the public ordering system. They have made their case for the inclusion of legal measures which makes circumvention of TPMs illegal and punishable. This shows the reliance of the private ordering mechanisms on the public ordering framework and challenges the notion of private ordering being an endeavor solely taken by private parties.

Any analysis of the interaction between TPMs and fair use activities will have to be undertaken at two levels. At one level the enquiry should cover how exactly, TPMs obstructs fair use activities and on the other hand, we should look at the anti circumvention laws, which make such obstructions legal and acceptable. At the first level of enquiry where we look at how exactly TPMs can have an impact on fair use activities, it is important to highlight the distinction between access control and copy control TPMs. While the copy control TPMs are closer in scope and intention to the copyright rules, the access control measures by controlling and restricting the very access to a copyrighted work goes beyond the boundaries envisaged by copyright law and in fact gives rise to a new right in the rights holders arsenal-access right.

As Gwen Hinze observes:

“Since access control TPMs control all access to a copyrighted work, including access for lawful, non-copyright infringing purposes, a legal ban on circumventing access control TPMs would give rights

holders a new right of controlling access to copyrighted works, separate from and potentially unconnected to, the enumerated copyright rights granted to authors under the Berne Convention, the WCT and the WPPT. Thus, a legal prohibition on circumventing access control TPMs would effectively override the traditional boundaries of copyright law."¹³

This issue becomes even more important due to the fact that the WIPO Internet treaties are silent about this issue. Although the relevant sections talk about "effective technological measures", the treaty has not defined what these may be. Furthermore, there is no mention of the distinction between access control and copy control measures. Therefore, the choice of which type of technological measures should be protected has been left to the discretion of the States. In this regard, many authors have spoken about the rise of a para-copyright regime due to the use of access control TPMs.¹⁴ These technologies disregard many of the in-built fail-safes- which were put in place in copyright regimes to prevent the rights holders rights from becoming absolute and impenetrable. By disturbing this delicate balance through TPMs, the rights holders are bringing features of copyrighted material under protection which was never meant to be protected.

Therefore, due consideration needs to be taken by the States while implementing the obligations under the WIPO Internet treaties to determine the types of TPMs which should be protected, considering the adverse impact they could have on fair use activities.

Contracts

While networked digital technologies have brought information providers and users from different parts of the world closer, the use of automated systems of responses and predetermined terms of use has also created a distance in the relationship of the contracting parties. There are many different ways of defining the contracting relations of users and information providers on the internet- standard form contracts like browse-wrap or click-wrap agreements, smart contract¹⁵, software contracts¹⁶ to name a few. Although all these forms of contracting differ from each other in a number of ways, the one thing they have in common is the unilateral formation of the terms and conditions laid down therein and the take-it-or leave it manner in which they are presented to the other party.

This manner of contract-building is often referred to as self-help approach. The concept of self-help is not a new one. Individuals have been using this method for a very long time, before approaching the formal legal system.¹⁷

As Margaret Radin observes,

*"They are more like building high fences than relying on nuisance law; more like moving out the tenant's furniture and changing the lock than relying on landlord-tenant law; and more like sending over a committee of one's friends to intimidate a storekeeper into paying a debt than relying on legal enforcement of contract."*¹⁶

A Standard form contract is "a uniform set of conditions fixed in advance by a party to an agreement."¹⁸ The Law Commission of India called these types of contracts pretended contracts.¹⁹ These types of contracts have been in use in commercial relationships such as marine shipping, banking and insurance for many years.²⁰ In more recent times they have also been brought in the realm of digital environment to be used between parties taking part in an electronic contracting process. Most common examples of such contracts are browse-wrap and click-wrap agreements.

In one's interaction with networked information technologies today, it is inevitable that one comes across a website or a software wherein one is asked to accept a predetermined set of terms and conditions, delineating the rights and obligations of the user *before* one is allowed to access to use a given information product. In click-wrap agreement, the user is prompted to click on an icon along the lines of "I agree", while in a browse-wrap agreement, the website may have its "terms of use".²¹ Some websites may also employ both of these options. For example, if one tries to download an article from JSTOR, a dialog box prompts up which states "your use of JSTOR indicates your acceptance of the terms and conditions of Use." The options available to the user are either to 'accept and download' or to 'cancel' the action. This acceptance is sought by the website before one can proceed to downloading the paper. The terms and conditions of use of JSTOR include information regarding who can use JSTOR, the permissible and prohibited uses of the content within the JSTOR library as well as which intellectual property rights apply to name a few.²² This is a good example to showcase how browse-wrap and click-wrap agreements play out in real life interactions.

Having given a brief description of the private ordering tools, the next section will look at their limitations.

Limitations of Private Ordering Mechanisms

One of the most significant limitations of TPMs is the fact that it is not democratically authored. The terms and conditions which are to govern any given user are already unilaterally decided by one of the parties. Furthermore, the technical nature of the TPM rules out disobedience in a material sense.²³ It is most often than not, beyond the skill-set and capacity of an end-user to disobey the commands of the TPM and avail access. TPMs also present a slippery slope since it is very easy to progress away from merely protecting the copyrighted content to bringing within its content which doesn't fall within the purview of copyright law, or to restrict usage which is generally allowed under limitations and exceptions of the copyright legislation. As Barooah observes with respect to TPMs,

*"...They are extremely risky because they need to be extremely well designed to ensure that they do not overstep the rights granted by copyright law, and the burden of ensuring that they do not overstep these rights, lies on the makers of these TPMs, who happen to be (or hired by) copyright holders which shows there is a conflict of interest."*²⁴

Additionally, the constitution and operation of such technologies is largely invisible and beyond the reach of critical value judgment by courts.²³

Standard form contracts (SFCs) have also been criticized by scholars for their take-it-or leave it approach. It has been argued that they are not contracts in the traditional sense since they do not reflect the conscious informed consent of the end users.²⁵ It is disingenuous to talk about mass-license transactions as contracts when they are often opaque and consumers hardly ever read them, let alone understand the significance of all that they are agreeing to.²⁵

Another problem with SFCs is the unequal bargaining power in most cases. The party drafting the contract is in a position of strength and is thus able to dictate to the other party terms which are more favorable to the powerful party. On the other hand, the other party, oftentimes the users and consumers in a browse-wrap or click wrap agreement possess no effective freedom or strength to negotiate or object to the terms.¹⁸ This characteristic of SFCs goes against one of the fundamental principles of contract law

which is the idea of freedom of contract and free consent. Supreme Court of India while highlighting the importance of this principle in *LIC of India v Consumer Education & Research Centre* observed, "freedom of contract must be founded only on the equality of bargaining power between the contracting parties."²⁶ The Court also referred to the take-it-or-leave it nature of the SFC and pointed out that freedom of equal bargaining power in such cases is largely an illusion. The Law Commission of India while talking about the true nature of SFCs opined thus,

*"The pen of the individual signing on the dotted line does not really represent his substantial agreement with the terms in it, but creates a fiction that he has agreed to such terms. The characteristics usually and traditionally associated with a contract such as freedom of contract and consensus, are absent from these so-called contracts."*¹⁹

The next section will look into the legality and enforceability of such contracts in more detail.

Complex Relationship of Private Ordering Tools with the Public Ordering Mechanisms

Given the interrelated relationship of the public ordering and private ordering norm making, it is important to look at the protection provided to technological protection measures and standard form contracts under the public ordering framework of copyright law and contract law respectively.

Legal Protection of Digital Rights Management Technologies

National policy makers are informed to some extent in their policy choices, by the international framework of treaties which respond to the calls of changes in the legal framework to keep pace with the networked information technologies.²⁷

At the international level, the World Intellectual Property Organization's (WIPO) Copyright Treaty and Performance and Phonogram Treaty (together known as WIPO Internet treaties) were being considered. The WIPO Internet treaties were under negotiation at the 1996 Diplomatic Conference in Geneva, and were adopted on December 20, 1996.²⁸ They are special agreements within the meaning of Article 20 of the Berne Convention.²⁹ The protection for TPMs is laid down under Article 11 and Article 18 of the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram treaty (WPPT) respectively. The wording of both articles is the same except for the fact that one talks about the rights of

the author and the other about performers or producers of phonograms. Article 11 of WCT states:

*“Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”*³⁰

The “adequate legal protection” and “effective legal remedies” prescribed by the treaty has been interpreted differently by different contracting parties. The legal protection of “effective technological measures” was made available under the Copyright Act, 1957 through the 2012 Amendment. The Statement of Objects and reasons of the Copyright (Amendment) Act, 2012 stated the reason for the inclusion of these measures. It observed that such changes were proposed to bring the Indian law in harmony with the provisions of World Intellectual Property Organization’s (WIPO) Internet treaties (to which India was not yet party at the time).³¹ This protection is laid down under Section 65 A and Section 65B of the Copyright Act, 1957. For instance, Section 65A, which lays down the provision regarding the protection of TPMs, states thus:

“65A (1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

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

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:

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

(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

(c) conducting any lawful investigation; or

(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or

(e) Operator; or

(f) Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

*(g) Taking measures necessary in the interest of national security.”*³²

Analysis of the anti-circumvention measures in Indian Copyright Act has been undertaken at two levels. On one level, scholars have questioned the very need for introduction of anti-circumvention measures in the Indian context³³, while on another level scholars have critically analyzed the wording of the provisions and speculated upon its possible implications.

With respect to the wording of the provision, it has been observed that the Act does not define “circumvention” or “effective technological measures” which may lead to ambiguity. It is not clear through the wording alone whether the Act protects access control measures, copy control measures or both.³⁴ In light of the exceptions laid down under Clause 2, it has been surmised that the Section 65A doesn’t cover access control measures.³⁵ Due to the inclusion of the word “effective” in the provision, some scholars have observed that it implies that there are certain technologies measures which are not effective and therefore circumvention of these non-effective technological measures wouldn’t attract liability.³⁵ However, the means through which one can differentiate between effective and non-effective measures has not been specified by the Act. In this respect, Barooah has argued that the ‘effective’ should be interpreted with respect to the effect it has on the ordinary or average citizen (although it may raise a different problem as to who can be said to be the average citizen).²⁴ Furthermore, due to the rapidly changing nature of technology, the TPMs could become obsolete very quickly, requiring that the definition of average citizen changes at the same pace, or be calculated at the time when the anti-circumvention laws are being violated.²⁴ The manner in which these provisions play out in practice and are interpreted by the courts may provide the much-needed clarity on the issue.

Apart from the commentary on the text of the provision, it is also important to note some significant

ways in which the Indian provision differs from its American or European counter-parts. For instance, the United States enacted The Digital Millennium Copyright Act, 1998 (DMCA) to fulfill its obligations under the WIPO Internet Treaties. Title 17, Section 1201 of the DMCA lays down the provisions regarding “circumvention of copyright protection systems.” And the European Union implemented the provisions of WIPO Internet treaties through the EU Copyright Directive of 2001 (2001/29/EC) or the InfoSoc Directive. Article 6 of this Directive gives force to the anti-circumvention provisions.

Section 1201 (a) (1) (A) recognizes a distinction between two types of technological measures- one that prevents unauthorized access to a copyrighted work and another which prevents unauthorized copying of a copyrighted work.³⁶ Section 1201 protects access control TPMs and prevents their circumvention. The distinction between access control and copy control measures was recognized to ensure that the public continued to have the ability to engage in fair use activities on the Internet. However, it has been argued that this distinction loses its relevance in those cases where a TPM contains both access control and copy control functions.³⁷ Similarly, Article 6.1 of the InfoSoc Directive requires the member states to provide “adequate legal protection against the circumvention of any effective technological measures.”³⁸ For this purpose, the Directive deems a technological measure to be ‘effective’ “where the use of a protected work or other subject-matter is controlled by the rights 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.”³⁹ This provision shows that the EU Directive covers both access control and copy control mechanisms within its definition of TPMs.

Comparatively, as mentioned above, Section 65A under the Indian Copyright Act, doesn’t specify the type of technological protection measures that are protected by the provision unlike Section 1201 or Article 6.1. However, this may also allow Courts greater flexibility to determine which technologies should be protected depending on the circumstances of the case. Furthermore, scholars have written extensively about the broad nature of S. 1201 and the fact that it “it went beyond what was required to comply with the WIPO Treaty obligations.”³⁷

Additionally, Section 1201(a) (2) prevents the “manufacture, import, offer to the public, or trafficking of technology”⁴⁰ which facilitates anti-circumvention. In a similar vein, Article 6.2 of the InfoSoc Directive bids the members states to provide, “adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which... are primarily designed or produced for the purpose of enabling or facilitating the circumvention of any effective TPMs, or has only a limited commercial significant purpose.”⁴¹ Therefore, both these provisions do not allow for assistance from third party in circumventing a TPM.

This is different from Section 65A, which allows for third party assistance in circumvention if certain conditions are met.¹² Furthermore, Section 65A protects speaks about the ‘intention to infringe’ thereby placing a high bar of burden of proof.

Lastly, with respect to limitations and exceptions, Section 1201 (a) (1) (B) provides thus,

*“The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works under this title, as determined under subparagraph (C).”*⁴²

Although this section does provide some recourse to users, in reality, this process does not play out in an efficient or desirable manner. The triennial rulemaking process which lays out the acts which are allowed to circumvent these anti-circumvention provisions are known to be a very cumbersome and tedious process causing significant expenditure of time and money on the part of the proponents of those fair dealing activities.⁴³

Every three years, proponents of the exemptions of Section 1201 have to expend significant amounts of time and money merely to ensure that “individuals can successfully access copyrighted works for a narrow subset of otherwise non-infringing purposes such as fair use.”⁴³ Additionally, the current *de novo standard or review* places a heavy burden on the proponents who must provide “extensive evidence to prove anew that the class of work should be exempted every successive triennial review, with the burden of proof never shifting to the opponents.”⁴³

Article 6.4 of the Directive sheds light on the plight of the limitations and exceptions in the InfoSoc Directive. It states,

*“notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rights holders, including agreements between rights holders and other parties concerned, Member States shall take appropriate measures to ensure that rights holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5 (2)(a), (2) (c), (2) (d), (2) (e), (3) (a), (3) (b) or (3) (e) the means of benefitting from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.”*⁴⁴

As is evident from the provision, it places the duty first and foremost on the rights holders to ensure that users who wish to make use of limitations and exceptions specified therein are able to do so.⁴⁵ However, the rights holders are given the freedom to determine the way in which such use could be made available. It seems highly unlikely that those rights holders who are driven by their profit motives would make concerted efforts to ensure that the users have recourse to limitations and exceptions. Furthermore, because the State’s interference to ensure the same has been made secondary to the rights holder’s obligations, it is possible that the rights holders are able to get away with shirking their duty by showing some token efforts which may not be of any real use to the consumers. In fact, this issue has been highlighted by Marcella Favale who observes,

*“.... The European legislator does not seem willing to take concrete action to force right holders to comply with copyright exceptions. As a result of the vagueness of its wording, the indications of Recital 51 have almost entirely been ignored by the implementations of Member States.... With the only exception of Lithuania, no Member State enjoins right holders to modify their TPMs to respect copyright exceptions...”*⁴⁶

On the other hand, Section 65A (2) (a) clearly provides that, “Nothing in sub-section (1) shall prevent any person from- doing anything referred to therein for a purpose not expressly prohibited by this Act”.¹²

Given all these differences, it can be argued that the Indian law does a much better job of balancing the rights and interests of the copyright holders and users, than the American legislation (Digital Millennium Copyright Act) or the E.U. InfoSoc Directive.

However, at the same time, the ambiguity surrounding the significant phrases in the provision also calls for well thought out context specific interpretation by Indian courts which takes into account the needs of the Indian society and doesn’t get swayed by the manner in which these laws are being operationalized in other countries. These undefined phrases are giving the courts an opportunity to formulate a law which looks at the realities and needs of Indian people and operates accordingly.

Legal Protection and Recognition of Standard Form Contracts

The Indian Contract Act, 1872 does not contain any explicit provisions which talk about standard form contracts or e-contracts like browse-wrap or click-wrap agreements. Section 10A of the Information Technology Act, 2000 talks about the “validity of contracts formed through electronic means”. It states,

*“Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.”*⁴⁷

However, the section does not stipulate anything specifically about browse-wrap or click-wrap agreements. The jurisprudence around standard form contracts on the Internet is also sparse. The Law Commission of India in its 103rd Report looked at the nature of SFCs and the problems associated with it. In light of their analysis, the Commission recommended the insertion of a new Section 67A. The provision stated:

“(1) where the court on terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

*(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from- (a) the liability for willful breach of the contract, or (b) the consequences of negligence.”*¹⁹

This suggestion by the Law Commission has not been accepted as of now. Meanwhile courts have tried to interpret the SFCs mostly in the analog world.

While interpreting any contract, the courts generally look at the intention of the parties depending upon the text of the contract. Courts have adopted the same principle while looking at the validity of standard form contracts as well. But, considering the unique nature of SFCs the courts have also applied special rules to interpret them. Some of the rules applied to SFCs in the analog world mostly in cases of insurance claims are:

Verbachartarum Fortius Accipiuntur Contra proferentem which translates to “the words of an instrument shall be taken most strongly against the party employing them.”⁴⁸ As per this maxim, in case there is any ambiguity in a contract, it shall be interpreted against the party which drafted it. This rule becomes even more important in case of standard form contract wherein one party has formulated the terms of the contract and the other party has been forced to accept them without having any say in it.¹⁸ In fact, the primary objective of this rule is said to in checking the “misuse of higher bargaining power among the parties to the contract”¹⁸ Along the same lines the Supreme Court in *Gurshinder Singh v Shriram General Insurance Co. Ltd*, observed thus,

“There is no gainsaying that in a contract, the bargaining power is usually at equal footing. In this regard, the joint intention of the parties is taken into consideration for interpretation of a contract. However, in most standard form contracts, that is not so. In this regard, the Court in such circumstances would consider the application of the Rule of *contra proferentem*, when ambiguity exists and an interpretation of the contract is preferred which favors the party with lesser bargaining power.”⁴⁹

Ex Abundanti Cautela which translates to “out of abundant caution” in case of interpretation of exemption clauses. Exemption clauses has been defined by M P Ram Mohan as “beneficial contractual arrangement made by either of the parties to a contract in anticipation of future contingencies that might hinder or prevent performance with a primary aim to accommodate consequences arising out of non-performance, part performance or negligent performance of a contract.”⁵⁰ Such clauses tend to be very wide and biased in favor of the stronger contracting party. The Supreme Court of India while looking at exclusion clauses in *Skandia Insurance Co. Ltd v Kokilaben Chandra vaadan* observed that the ‘main purpose rule’ is used to limit the application of wide exclusion clauses and they are

“read down to the extent to which they are inconsistent with the main purpose, or object of the contract.”⁵¹

Furthermore, the Law Commission of India in its 199th report looked at Unfair (Procedural and Substantive) Terms in Contract. In this report, the Commission also looked at standard form contracts and exemption clauses. It opined that if the general rules of interpretation are followed in these instances, it may give effect to clauses which are unreasonable or unconscionable. In such cases, the “freedom of equal bargaining power is largely an illusion.”⁵²

These interpretation rules show that the courts acknowledge the unequal bargaining power and power imbalance between the parties in a SFC and thus have taken steps to minimize the adverse effects of such contracts on the weaker party and to uphold the public interest.

The Courts have not looked into the legality of browse-wrap or click-wrap agreements specifically in the Indian context as of now. So, it remains to be seen how such contracts will be received. But, considering the treatment of SFCs in the analog world it can be argued that the courts will employ stricter rules of interpretation while looking at browse-wrap and click-wrap agreements in the electronic context as well.

Impact of Private Ordering Tools on Fair Use

The present system of copyright law in operation in majority of jurisdictions around the world is based on granting limited monopoly rights to authors over their works. Such monopoly rights are granted for the benefit and protection of the author as well as for the benefit of the society at large. Therefore, the fundamental objective of copyright law has always included “serving the society’s interests by bestowing upon it the creative results of the author.”⁵³ This quest to provide access to creative works to the public while balancing the rights of the authors was supposed to be the driving force for the operation of these laws.

Therefore, in order to ensure this balance, certain limitations and exceptions were introduced within the copyright law framework.⁵⁴ These provisions were put in place to ensure that the exclusive rights of authors do not adversely impinge upon the interests of the public. One of the objectives of these limitations and exceptions was to “mitigate the effects of an expansion of rights to authors.”⁵⁵ Although the umbrella of limitations and exceptions under copyright law covers various different provisions, one

of the most prominent of these exceptions, which is of relevance for the present discussion is fair use or fair dealing (depending on the jurisdiction).

Within the copyright law framework, fair use is one of the primary ways by which access to copyrighted works is provided for without price or permission barriers. As V. K. Ahuja observes, “the doctrine of fair dealing allows some copying of a copyright work without deeming the copier an infringer, even though the copyright holder has not authorized the copying.”⁵⁶ Section 52 of the Indian Copyright Act, 1957 provides the fair dealing provisions in the Indian context. It allows for instance, “the reproduction for the purposes of research and private study...”⁵⁷ or the “reproduction of any work- by a teacher or pupil in the course of instruction.”⁵⁸ If the works that are to be used for these purposes are digital files, through the use of TPMs such as trusted player or the Serial Copy Management Systems, it is possible for the rights holders to prohibit or restrict the abovementioned fair uses.

Furthermore, the analysis in Part III shows, there are TPMs which allow the rights holders the ability and control to restrict the very access to a copyrighted work. If the users do not have access to a given work, how will they be able to derive any use out of the same? In addition, although the situation is not clear in India, the anticircumvention laws in the United States and the European Union offer protection to such access control TPMs. This legal and technological landscape has led to the rise of a new right in the arsenal of the rights holders- the access right.¹⁴

In the non-digital age, the access to a copyrighted material was assumed (if the work has been published) and therefore the focus was only placed on the use of the copyrighted work and whether or not it was undertaken with the prior authority of the rights holder or whether it fell under fair use. However, with the rise of network technologies, the question of access to copyrighted works is rising forth as a separate issue which has far-reaching implications for the use of any copyrighted work. In this context, it is important to note that even though fair use is a legal fiction which excuses certain unauthorized actions undertaken by the user, whether or not a particular action would qualify for fair use is only decided after the fact. As Jenny Lyn Sheridan observes,

“...the problem with exceptions such as fair use is that, there is no ex-ante certainty for the user. Each

case is decided on its particular facts, so a great deal of litigation is necessary to rely on this doctrine. [Furthermore] Digital locks are placed on the content and the users cannot break these locks even for purposes of fair use doctrine...”⁵⁹

Having considered the nature and inherent limitations of the private ordering tools, one can safely argue that they pose considerable risk to the exercise of fair use privileges in a networked digital environment. Therefore, the question becomes how does fair use fare in a legal environment controlled and informed by TPMs and SFCs. Does the right of fair use survive? Can technological measures be used to restrict fair use? Can a contract be used to waive off the right to fair use on the internet?

If one solely focuses on the working of the private ordering tools as shown above, it can be argued that it is definitely possible and more than a little probable for fair use rights to be restricted if not completely denied with the help of TPMs and SFCs. The undemocratic, unilateral nature of these tools, make disobedience of their directives and conditions extremely difficult if not impossible. In case of TPMs, if a certain type of use has been blocked by code, unless a user takes assistance from a circumvention software (which have been made illegal in many jurisdictions), it is extremely difficult to obtain access. Furthermore, the legitimization of anti-circumvention provisions could also lead to a chilling effect for legitimate actions such as fair dealing activities because the user is uncertain or unable to access the protected content. Similarly, SFCs also have the tendency to introduce terms favorable to the contracting party formulating it and thus can very easily deny fair use rights to the users instead looking to maximize their profits.

However, as mentioned above, one must also look at the public ordering framework which is working simultaneously. While the public ordering framework does at times, work in assistance to the private ordering framework, it also takes into account public interest and social welfare in its decision-making and is not informed solely by individual interests of the powerful. The State has to maintain a balance between the rights of the copyright holders and the users. This balancing act is reflected within the public ordering regulation of private ordering tools as well.

With respect to the TPMs, Section 65A (2) provides that “nothing in sub-section (1) shall prevent any person from... doing anything referred to therein for a purpose not expressly prohibited by this Act;”.

The phrase “not expressly prohibited by this Act” can be said to include the provisions laid down under Section 52 which delineate the fair use activities. Apart from the generally available fair use privileges, the section goes on to provide for additional exceptions such as for conducting lawful investigation⁶⁰, conducting encryption research etc.⁶¹ Whether or not these provisions work for the protection of fair use in reality would be discovered when the provisions are tested to a greater degree before courts.

The discussion in India regarding the waiver of fair use through contract, is at its nascent stages. Minimal literature exists on the exploration of this question. Section 52 of the Copyright Act, 1957 which talks about “certain acts not to be infringement of copyright” is silent on the issue. Rahul Matthan & Nikhil Narendran have argued that while it is possible for an individual to “waive a private right by contract, a contract waiving the right to fair dealing may be viewed as being contrary to Indian public policy.”⁶² The concept of waiver of a contractual right was looked at in *All India Power Engineer Federation v Sasan Power Ltd.* Herein the Supreme Court observed:

“...it is [also] clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest.”⁶³

Furthermore, recent discussions surrounding fair use has started leaning towards the user rights rhetoric and the same has not been missed in India either.⁶⁴ As per this rhetoric, fair use options are seen as user rights and not mere exceptions narrowly carved out from the rights of the copyright holder. User rights as a conception and a way of looking at limitations and exceptions has sprung up “as a reaction and a necessary counterbalance to the growing asymmetry between widespread control of right holders over copyright protected works and the ambiguous restricted scope of copyright users’ freedoms.”⁶⁵ What this narrative does is that it brings the users and information providers onto a more equal footing and takes away the image of users as “parasites that benefit- unjustly- from limits on the just rewards of authors.”⁶⁵ Additionally with respect to the issue at hand, as Anupriya Dhonchak notes,

“...demystifying the said exceptions with user rights status traces their origin to fundamental rights and public policy derived thereof, making their

*waiver contractually unenforceable and opening the possibility of enjoining copyright holders with an affirmative obligation to ensure that their copyrights are not at loggerheads with the exercise of user rights.”*⁶⁶

Additionally, as we have seen in the previous section, the courts have been sensitive to the plight of the weaker party in the cases of SFCs and tried to go for an interpretation which upholds larger public interest. In light of this, it can be safely argued that any contract which tries to waive off fair use options of a user run afoul of the public interest and can be said to be unreasonable and unconscionable.

Conclusion

The analysis undertaken through this article has tried to show the overlapping and intricately woven working of private ordering and public ordering tools in the times of networked digital environments. It has tried to shed light on the nature and working of private ordering tools such as technological protection measures and standard form contracts. It also shows the challenges both these tools pose to the exercise of fair use rights by the users on the Internet and the ways courts have interpreted such encroachment on the interests of users and the general public welfare. Although this conversation is at its nascent stages in the Indian jurisprudence, given the rapidly evolving nature of technologies and their repercussions on the legal, social and cultural landscape, it is important to bring about a livelier discourse on these topics. After all, as the analysis undertaken above shows, unless we read the fine print, we would be unable to decide whether to take it or leave it.

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