The Copyright (Amendment) Bill, 2010: A Step Towards Digital Rights Management in India

MS. PURNIMA JOSHI

Librarian, K. C. Law College
123, Dinsha Waccha Road,
Churchgate, Mumbai – 400 020
E-mail:purnima229@gmail.com

Abstract

This paper tries to study and critically review the provisions regarding Digital Rights Management in the Indian Copyright (Amendment) Bill, 2010. This bill was approved by the Union Cabinet on December 24, 2009, and was introduced in the Rajya Sabha on April 19, 2010. In the statement of purpose of the bill, it is stated that "the Bill seeks to modernise copyright law in view of the challenges raised by the new digital environment and the Internet". Therefore, some of the provisions of this bill are compared to the Digital Millennium Copyright Act of the USA that has incorporated the provisions of the WIPO Copyright Treaty into the US Law way back in 1998.

Keywords: Copyright (Amendment) Bill, 2010; DRM; Digital Rights; Copyright law

Introduction:

The digital revolution that has swept the world today has allowed copyright owners to develop a new and efficient system of commercially exploiting their works. But though the digital media provide commercial advantages to the copyright owner, they have become extremely vulnerable to unauthorized copying and distribution due to

technological developments. This has increased plagiarism and control of infringement has become very difficult. The global reach and widespread use of Internet have added to the problems in combating infringement acts in this digital era. The rights possessed by copyright owner on digital media are called digital rights. Digital Rights Management in its simplest form means technologies that restrict the use of digital files in order to protect the interests of copyright holders. It can prevent or restrict a computer from altering, sharing, copying, printing or saving protected digital files. In essence, it provides owners of copyrighted works a strong control over the way in which their works are viewed, duplicated, listened to or installed. Digital rights are similar to the traditional rights possessed by a copyright owner. To understand the management of digital rights, it is important to look at the origins of and developments in the traditional copyright law.

Origins of copyright law in India:

The first copyright law in India was the 1847 Act that was enacted during the regime of the East India Company and was based on the UK Literary Copyright Act of 1842. The Indian Copyright Act, 1914 was the first modern copyright legislation in India. This act was also a mere extension of the British Copyright Act, 1911. The first post-independence copyright legislation was the Copyright Act, 1957 that came into effect from January 1958. But even this act was extensively based on the UK Copyright Act of 1956. Thus, we can conclude that the Indian copyright law is given by the UK law. This might be the reason that India did not see debates on the philosophy of copyright as witnessed in England and continental Europe.

The Union Government is empowered to enact laws relating to copyright, patents and trademarks by the Entry 49 of Schedule VII of the Indian Constitution. However, neither the Constitution of India nor the Copyright Act is clear about the purpose/objective of Indian copyright law[1]. This also might be as a result of Indian Copyright Act being a mere extension of the UK Act.

Objective and Purpose of Copyright law:

The basic purpose of the copyright law is to protect the fruits of a man's work or skill from being taken away by other people. Copyright applies to “original works of authorship” fixed in tangible medium of expression. There is no copyright in an idea. Rather copyright protects the various expressions of an idea into different material forms.

Objective of Copyright law is to encourage authors, composers and artists to create original works by rewarding their creativity with an exclusive right over their works for a limited period of time. This prevents persons from unfairly availing themselves of the work of others, whether that work may be scientific, literary or artistic. Economic and social development of a society is dependent on the creativity of its members. So creativity has to be encouraged for the progress of a society. The protection provided by copyright to the writers, artists, designers, architects, computer software producers, etc. creates an atmosphere conducive to creativity. It motivates them and also others to create original works.

Copyright does not protect the following:

- Works not fixed in a tangible form
- Ideas, procedures, methods, processes, systems, principles, discoveries, etc.

- Works with no transformative value

Nature and Scope of Copyright law:

Copyright is a negative right by nature since it prevents others from copying or reproducing the work in other formats. The owner may exploit the work himself or license others to exploit it in a particular way. Copyright becomes applicable as soon as a work is fixed in a tangible form. In case of published works. The act of publication with a copyright notice is enough to claim copyright. Formal registration is not required. But in case of any dispute, it is always better to have the work registered in the Copyright Office. In case of unpublished works, registration is a must as it establishes date of authorship.

Fair Dealing:

Copyright law was designed to provide a balance between incentives to authors of original works on one hand and ensuring free flow of information on the other. But if copyright law is applied rigidly, it can obstruct the free flow of information and can affect economic and cultural progress of the society. The exceptions to copyright law were created so as to maintain an appropriate balance between the rights of copyright owners and the interests of the society as a whole. Some of these exceptions are the uses of the copyrighted work for:

- Research and private study;
- Criticism or review;
- News reporting;
- Judicial proceedings; and
- Performance by an amateur club to a non-paying audience.

These exceptions are listed in detail in Section 52 of the Indian Copyright Act. Here such uses are termed as 'Fair dealing'. UK Act of 1988- ss 29and 30 deal with fair dealing. It specifically mentions the implications of copying by librarians. American Copyright law includes the Doctrine of Fair Use. The US Copyright Act of 1976 gives four factors that determine fair use as:

1) the purpose and character of the use;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work.

Provisions of fair dealing allow copying in specific circumstances and can also be used to defend copyright infringement.

Need for DRM:

Traditional copyright law was efficient in handling infringement acts until the advent of digital media. But in this networked digital age, digital content can be copied and distributed instantaneously at virtually no cost. Internet offers a great opportunity for new content business models, but threatens the content creators by making rampant piracy possible. Majority of the public and private entities are going digital and doing business online. Information is increasingly being retrieved through computer networks by customers, employees etc. Thus, there is a need for a technology that enables the secure creation, management, distribution and promotion of digital content on the Internet. In order to prevent copyright infringement and to track the proliferation of

copyrighted works, Digital Rights Management (DRM) systems have evolved in this digital age.

Few **examples of the DRM technologies** are:

1. Encryption,
2. Persistent association (watermarking, digital signature),
3. Genuine certificate verification (Softwares licenses),
4. Trial use of a software for a limited period of time,
5. Online registration to activate the software,
6. Access control and copy control devices.

Rather than tracking illegal uses after they occur, the latest DRM technologies seek to prevent them from occurring in the first place. These controls are normally embedded in the work and accompany it when it is distributed to the consumer. DRM systems are intended to operate after a user has obtained access to the work. For example, new technologies like the Windows Media Rights Manager (WMRM) protect digital audio and video content not only until files are transferred to the user but also after they are transferred. DRM poses serious issues for libraries and users due to this “downstream” control over the use of legally acquired works.

Facets of DRM:

DRM has two main aspects / facets / perspectives / functions:

1. Management of digital rights pertaining to the works and rights of the persons or entities involved in their creation and administration; and
2. Digital management of owners’ rights by enforcement of usage restriction.

Laws governing DRM:

Digital rights of the copyright owners can be protected with the help of 'Anti-circumvention laws' which prohibit the manufacture and sale or dissemination of any technology that can be used to break or circumvent the technologies adopted for DRM. Such laws that make the circumvention of protection technologies illegal have been enacted in various nations. The USA has enacted the Digital Millenium Copyright Act in 1998, that has incorporated the anti-circumvention provisions of the WIPO Copyright Treaty into the US Law.

Anti-circumvention laws provide strong protection to the copyright owners but they deprive the public of the rights they have over the copyrighted works. As circumvention is illegal, any measures to make fair use of the work would also be illegal. This will result in depriving the public of their right to free use. Thus, the anti-circumvention laws give rise to a conflict in this modern era. Under the anti-circumvention law of United States, the Digital Millennium Copyright Act (DMCA), a person can be prosecuted for publishing the paper containing the details of a circumvention software. The anti-circumvention technologies even restrict the limited usage permitted by the local laws of the users. For e.g. Indian copyright law recognizes certain exceptions for the disabled over the use of copyrighted works, like exporting them via Braille terminal. But a software made in U.S. might restrict such an action[2].

Indian scenario:

In the proposed Copyright (Amendment) Bill 2010, there are two proposed DRM provisions: one that defines the rights management information for digital contents and second to prevent circumvention of DRM technologies.

The newly added **Section 2 (xa)** defines Rights Management Information that is to be included with digital content as:

a) *the title or other information identifying the work or performance;*

b) *the name of the author or performer;*

c) *the name and address of the owner of rights;*

d) *terms and conditions regarding the use of the rights; and*

e) *any matter or code that represents the information referred to in Sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.*

It is important to note that within the definition of RMI the provision **specifically excludes any device or procedure intended to identify the user from the definition**.

For introduction of anti circumvention provisions in India, Section 65A and B have been added to the proposed bill[3]. Section 65A is reproduced as follows:

65A. Protection of Technological Measures

(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 authorisation 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

A person can be prosecuted for circumvention of a technological measure only when he had an "intention" to do so. While some opine that this might create loopholes for hackers, Harsh Gagrani[4] personally thinks that this will rightly prevent companies from prosecuting 'innovators' with bona-fide intentions, and might also help the same companies from fixing the vulnerabilities exposed by such innovators. Sub-section (2), which is the exception clause, is also broadly worded, so as to tilt the balance in favour of users of copyrighted material. He also states that, comparing the situation with the United States where the DMCA is very stringently worded and highly favours the manufacturers, if the draft bill is passed without making any substantial changes, it will be the duty of the Courts to interpret the section in light of the intention of the Parliament, which seems to be to favour the consumers.

According to this sub-section 2, breaking DRM is not prohibited as long as it is encryption research using a lawfully obtained encrypted copy; or conducting any lawful investigation; or testing the security of a computer system or network, surveillance or identification of a user or for "national security".

The Indian bill does does not distinguish between technological measures which prevent unauthorised access to a copyrighted work and measures that prevent unauthorised copying of a copyrighted work. The DMCA of the USA incorporated the "anti-circumvention provisions" into U.S. law in 1998. It only prohibits the circumvention of the access control measures and not the copy control measures because copying of a work may be fair use under appropriate circumstances.

Technologies such as digital rights management technologies were developed to be used by hardware manufacturers, publishers, copyright holders and individuals to control the mode of use of certain digital devices and contents. DRM technologies pose a privacy threat, because in their ability to monitor what is happening to a copyrighted work, they are also able to collect personal information and send it back to a host without knowledge of the user. The host is then able to use that data for marketing or commercial purposes[5]. In order to protect the users' privacy, it is important that individuals have the ability to know if and when their information is being collected. To do this an individual can discover the technological principles of a device, object, or system through a process known as reverse engineering. Currently reverse engineering is permitted under provision 52 (ac). It is further supported by provision 65A (2) (f). The exclusion of computer program in the proposed bill makes it unclear under what circumstances reverse engineering would be allowed.

The **current Provision 52 (ac)** states, "*Certain acts not to be in infringement of copyright include: the observation, study or test of functioning of the computer programs in order to determine the ideas and principles which underlie any elements of the program while performing such acts necessary for the functions for which the computer program was supplied*".

The proposed amendment states that:

52 (1) The following acts shall not constitute an infringement of copyrights, namely:

(i) (a) a fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of:

(ii) private use, including research

(iii) Criticism or review, whether of that work or of any other work.

The newly added Section 65B is a penal clause that defines the punishment for removing or altering any rights management information without authority or knowingly disseminates copies of any works that have been so altered. Here again the users of the information seem to be favoured because they can be punished only if they disseminate any work **with the knowledge** that the rights management information has been removed or altered. This section has been reproduced below.

Section 65B: ***Protection of Rights Management Information –***

Any person who knowingly

i) removes or alters any rights management information without authority, or

ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management has been removed or altered without authority,

shall be by punishable with imprisonment which may extend to two years and shall also be liable to fine.

The DMCA Provides for a civil right of action, in addition to criminal remedies. Therefore, any person injured by the circumvention of the technological measures intended to protect his rights can seek monetary damages against the offender in the U.S. Federal Court. The Indian Bill, however, fails to give copyright holders a right of action and provides only for criminal remedies.

Conclusion:

The Copyright (Amendment) Bill, 2010 is the first step towards bringing in DRM provisions in India. The positive aspect from user's point of view is that only those who intentionally circumvent the DRM technologies will be liable for punishment. This clause will be very helpful to scholars and researchers and will help promote research and development.

But while developing more sophisticated methods of encrypting digital media content, care should be taken that the right of fair use given by the Copyright Act is not taken away. The person who places the technological measures to stop circumvention must also provide the circumvention tools in cases where the purpose for use of the work is stated and it comes within the permissible uses under the Copyright Act.

References:

1. Prasad Krishna. 2009. "Right to knowledge for persons with print impairment: a proposal to amend the Indian copyright regime". Accessed October 19, 2011. http://www.cis-india.org/accessibility/publications/uploads/Case%20for%20Amendment%20of%20Copyright%20Regime%20in%20India%20November%2022-%202009.pdf

2. Gagrani, Harsh. 2010. "DRM and Anti-Circumvention in India- Good, Bad or Ugly?". Accessed October 13, 2011. http://www.mightylaws.in/145/drm-anti-circumvention-india-good-bad-or-ugly

3. Government of India, Ministry of Human Resources Development. 2010. "Copyright Amendment Bill, 2010: a bill further to amend the Copyright Act, 1957". Accessed October 19, 2011. http://www.prsindia.org/uploads/media/Copyright%20Act/Copyright%20Bill%202010.pdf

4. Gagrani, *op. cit.*

5. Prasad Krishna. 2010. "Privacy and the Indian Copyright Act, 1857 as amended in 2010". Accessed October 18, 2011. http://www.cis-india.org/internet-governance/blog/privacy/privacy-copyright-act