

Legal Issues in ‘IP Theft & Criminal Copyright Infringement ’

Issue: Whether Section 65A of the Copyright Act, 1957 provides an exception for Fair Dealing?

What are Anti-Circumvention Provisions?

❖ What is the need of Anti-circumvention provisions?

With the digitization of world, the production of proprietary works has become faster and inexpensive. Large amounts of data can be stored and transmitted to any corner of the world in a matter of a few seconds. This development of technology, has also led to exponential increase in the number of instances involving the unauthorized use of copyrighted works.

To counter unauthorized use of copyrighted works, digital technologies were simultaneously developed to curb digital piracy and ensure continued enjoyment of exclusive rights by copyright holders. Such technologies are commonly called **Digital Rights Management ('DRM')**, and the two most widely used forms of DRMs are *Technological Protection Measures ('TPMs')* and *Rights Management Information ('RMIs')*. (Emphasis supplied)

- ❖ *Technological Protection Measures ('TPMs')* – are technological measures that, in order to safeguard the interests of copyright-holders, restrict what can be done with a file by the user. TPMs are used in order to restrict access or reproduction of the underlying protected copyrighted material through passwords, digital watermarks, digital locks, cryptography, etc.

What are Anti-Circumvention Provisions? (Contd.)

- ❖ ***Rights Management Information ('RMIs')*** - are used primarily in order to communicate, record and transmit data with respect to licensing, payment and authenticity.

However, with technological developments these technological measures can be circumvented through the process of reverse engineering or subsequent advancement in technology. Hence, the need of introducing Anti-circumvention provisions, as they make it illegal to tamper with, alter, or otherwise work around the technical implementation of TPMs.

Evolution of Anti-Circumvention Laws

Technological measures were incorporated in the WIPO Copyright Treaty (WCT) as well as the WIPO Performances and Phonogram Treaty (WPPT) in 1996.

- ❖ **Article 11 of WCT** - *“Obligations concerning technological measures: Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”*
- ❖ **Article 18 of WPPT** - *“Obligations concerning technological measures: Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.”*

Relevant Provisions of the Copyright Act, 1957

- ❖ The 1994 Amendment to the Copyright Act, 1957 introduced the term ‘plate’ to protect anti-circumvention technology. Section 2(t), plates were defined to include “*any stereotype, negative, duplicating equipment or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which sound recording for the acoustic presentation of the work are or are intended to be made.*” (Emphasis supplied)
- ❖ It is important to note here that, plates include devices that aid the reproduction (or duplication) of existing copyrighted works. However, technology, the purpose of which is not to make copies but to prevent unauthorized access to the copyright-protected work, does not fall within the ambit of ‘plates’ as all the devices that come within its purview are capable of making copies.
- ❖ Copyright Amendment Act, 2012 introduced -

Section 65A: Protection of technological measures.-- (1) Any person who circumvents an effective technological measures 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. (Emphasis supplied)

Relevant Provisions of the Copyright Act, 1957 (Contd.)

❖ (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**: (Emphasis supplied)*

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;...

Relevant Case Laws

❖ *Sony Computer Entertainment Europe Ltd. v. Harmeet Singh and Ors.*, CS(OS) 1725/2012

Facts: The defendants were selling Sony home entertainment systems by unlocking the TPM and modifying the original Sony equipment so that it could work with pirated software supplied by them. This was done using software known as ‘Jailbreak’ that circumvented encrypted codes and facilitated the use of Sony machines for uploading pirated games sold by the defendants.

Ruling: *“This act of overriding the encrypted code by introducing the Jailbreak software amounts to circumvention of Technological Protection measures which in turn violates the copyright of the plaintiff in software of its operating system...The effect of this illegal act of the defendant is primarily two folds: firstly the original machines of the plaintiff are being modified without their consent; and secondly the defendants are infringing the copyright of the plaintiff by introducing pirated games which are without the licence and consent of the plaintiff...The act of the defendants is in clear violation of the Trade-mark Act and Copy Right Act.”* (Emphasis supplied)

Section 65A of the Copyright (Amendment) Act, 2012 and Fair Dealing

- ❖ Section 65A was primarily enacted to curb the piracy of protected works in the digital environment. The provision provides criminal liability for any person, who intentionally circumvents an effective technological measure. It is also clear from the wording of the provision that, the application is restricted to rights expressly granted under the Indian Copyright Act, 1957.
- ❖ Thereby, the practical implication of adopting the Indian approach is that circumvention of the technological measure is not *per se* illegal if the content that is protected by the TPM is not protected by copyright law, thus ensuring that all the limitations and fair dealing provisions applicable to works in which copyright subsists shall continue even when TPMs are used.
- ❖ ***Comparison to provision for Anti-circumvention Law in the United States:***

The United States, in 17 U.S.C. Section 1201, prohibits circumvention of technological access controls that protect a copyrighted work. Further, it also prohibits trafficking in devices to circumvent technological controls that protect access to a copyrighted work.

Anti-circumvention provision of US is often criticized as promoting digital lockup and ultimately, a pay-per-use society. Further, it is criticized that such law also prohibits and eliminates fair use and hinder specific scientific research and restrict competition.

Section 65A of the Copyright (Amendment) Act, 2012 and Fair Dealing (Contd.)

❖ Observations:

- Section 65A makes it explicit that technological measures are protected only when circumvention would result in infringement as per Section 51 of the Copyright Act, 1957 which specifically lists the activities that are expressly prohibited by the Indian Copyright framework.
- Indian anti-circumvention provisions take into consideration the intention of the copyright infringer, unlike the US, which is not at all concerned with the intention of the infringer.
- Thereby, acts which qualifies as exceptions to infringement of copyright and fair dealing in Section 52 of the Copyright Act, 1957, are not considered to be infringing upon the right of the owners of copyright and hence are permissible under Section 65A of the Copyright (Amendment) Act, 2012.

Conclusion

- ❖ The practical implication of adopting the Indian approach is that circumvention of the technological measure is not per se illegal if the content that is protected by the TPM is not protected by copyright law, thus ensuring that all the limitations and fair dealing provisions applicable to works in which copyright subsists shall continue even when TPMs are used.
- ❖ In addition to that, the Indian law prohibits the circumvention of an *effective technological measure and imposes liability on the person “who circumvents”*, thus takes facilitation of circumvention out of the scope of Section 65A. Therefore, the act of circumvention is prohibited but not the tools per se, although liability for abetting infringement can still be imposed on such persons. (Emphasis supplied)

THANK YOU!

Questions?

Siddharth Varshney, Associate

© ALG India Law Offices LLP, 2021.

Disclaimer: Views, opinions, and interpretations are solely those of the presenters, not of the firm (ALG India Law Offices LLP) nor reflective thereof.

This presentation hosted at: https://www.algindia.com/wp-content/uploads/2021/07/LIS-33_Siddharth-Varshney_Whether-Section-65A-of-the-Copyright-Act-1957-provides-an-exception-for-Fair-Dealing.pdf