Technological Protection Measures in Copyright: A Critical Analysis of Virtual Piracy

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Introduction
The world has witnessed the advent of digitization. We can hardly think any activity without using technological gadgets. The advent of technology has made our lives king size. Technology and digitization has provided easy accessibility of everything has made the web of connectivity of among individual. Connectivity and accessibility provided by digital world has led to very positive impacts on our lives.

Nothing comes without any cost; with widespread knowledge sharing the possibility of unauthorized use of works of individual has become rampant. Consent to use work of an author which is cornerstone of copyright law will fade away because digital accessories make it easily accessible to all. Therefore, in an age where things, thoughts and ideas travel faster there was need to protect right of copyright-holders. All around world, authors started protecting their works through technological protection measures. But this was not enough because circumvention of the same was easy done by users. So there was need to have legal framework to prevent circumvention of technological protection. A lot of effort and lobbying by authors led to various international treaties recognizing that circumvention of protected copyrighted work is not allowed.

WIPO Copyright treaty was the result of such lobbying by the authors. This treaty along with WIPO Performances and Phonography Treaty set basic minimal standards for countries to adopt protection of technological measures. The first part of the paper will be dedicated in understanding basics of above mentioned treaties. Compliance of these treaties by different countries like United States, Australia, England, and India will also be discussed.

So let’s begin with understanding the cyberspace which has make authors work quite vulnerable to unauthorised use. The world of cyberspace has connected everyone. Knowledge sharing is much more easy and faster. But till what extent use of others work should be allowed and who will be regulated the unauthorised use of works. The digital world has impacted the copyright law because the traditional conceptions of printed books, articles etc. are replaced by digital copies. From book to films, everything can be downloaded or circulated easily on internet. The one who will be losing in this sharing process will be the authors because in seconds their work can be circulated snatching them their basic rights of consent over reproduction.

The Impact of Digitization on the Work Format
As already discussed, earlier work were created and distributed in material forms such as books or paintings. “The copyright works as embedded in material form were protected by the Law of copyright.” The expression of idea in the work is protected under copyright not the idea itself. Fixation is very much important for applying copyright protection in different countries like England, US. Therefore, it became a usual norm to reduce your expression of ideas to material form. That material form is changed by technological advancement. Now, the material form is made of digital format so to keep up the pace with modern technology. For e.g. – novels wrote on MS doc. Look around yourself, you will find mostly all people create their work on computers. The reason for the same is that it is
faster, easier, and inexpensive which can be easily transferred. So now work exists either in analogue and digital format or both. We see a shift from traditional material form to digital format and now the way work can be created had revolutionized. Not only the way the work is created but also the way it can be used. For e.g.- most of articles and newsletters are circulated over internet and are read online. The circulation part of the work has been revolutionized by the cyberspace. Traditional material form used in fixation had perhaps physical limitation on multiple copying which inherently restricts unauthorised copying. But digital copies can be made in multiple copies which and each copy will be exact replica of the previous one. This created tremendous havoc among writers, painters, producers because large-scale unauthorized copying can be easily done.

Moreover, the digital format can be easily modified in case of error without degrading the quality of work. But at same time unauthorized use of digital copies will be easily done which led to copyright infringements. To stop infringements, authors started using technological measures (hereinafter referred as TMPs) to protect their work on cyberspace. But circumvention of the same started happening. Therefore, WIPO Internet treaties came into being to stop circumvention. Before discussing the treaties in detail we will first understand what TMPs is and why it should be accorded protection?

Technological Protection Measures

What are TPMS?

TPMs are generally an access control technology. Authors of copyrights work use it to protect their works from unauthorized use. The word “access” implies that consent of the author is pre-mandate to enter the domain of the work. Also, control words signifies that exclusive right to view the work belongs with the author and he can restrict other from using its intellectual property. This was a simple understanding about TMPs. There are many types of TPMs. A distinction is drawn between “TPMs that control access to works and those that control the use of works.” The former restrict access to data and latter allows access but doesn’t give privilege to use without author’s permission. One common way is encrypting the work and in this case user can get the data but to use the work he would be required to do additional procedure which may various according to author’s discretion. Another form of access control is a procedure that allows access to source only through authorization by the author i.e. through password protection.

Why it should be protected?

TPMs are vulnerable in this digital world because TPMs like any other software can be hacked. TPMs can be circumvented. It means breaking the lock of protected work by various means that might be deployed by the users. TPMs are highly vulnerable from circumventing devices and other software. The need to protect them arises from the fact that if such protections are not accorded it will discourage innovation and creativity. A sense of security will fade away among copyright owners because their work will be unsecured over cyberspace. It is naïve to believe that such insecurity is baseless. Have you ever thought why internet is called Web? The reason is that connects each other all across the world. So imagine in such a situation any breakage of TPMs will lead to unauthorized circulation of copyrighted works which will not only lead to huge economic loss to the authors but also their name and image might get destroyed by misappropriation of their work. Therefore, it was felt that effective and adequate legal protection must be provided through legal framework. This need of authors and to protect economy from misappropriations gave born to WIPO Internet Treaties.

“WIPO Internet Treaties”

We have briefly discussed that there was huge lobby by the authors to get a legal framework of protection under which they can they
protect their work. This led to creation copyright law in digital world. “WIPO introduced Copyright Treaty (Hereinafter WCT) and the WIPO, WPPT (collectively, known as the WIPO Internet Treaties) opened for signature in 1996 and entered into force in 2002.” The main purpose of this treaty was to acknowledge the fact that accessibility of copyright works through information technology and communication has profound effect on the creation and use of literary and artistic works, and on the production and use of performances and phonograms. Therefore, there was need to recognize them so that they can come under legal framework. We will discuss in details about WIPO Copyright treaty. (Note: WPPT is applicable to performances and phonographs. The provisions of copyright treaty and WPPT are similar only the subjects of applications are different.)

“WIPO Copyright Treaty”

“The WCT is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment.” The main two subjects on which this treaty focused is extending copyright protection:

(i) “computer programs, whatever the mode or form of their expression (Article 4)”; This means that any computer made programs will come under literary work and all rights of copyright there shall follow.

(ii) Compilations of data or other material (“databases”), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. This protection extends to compilation done on computer works but at the same time any compilation which itself infringes any of the copyright of another user will not be protected.

As already mentioned that all right given to copyright holder under Berne convention will be applicable. These rights include “right to reproductions”, “right to translate”, “right to make adaptations and arrangements”, “right to perform in public” etc.

- the right of distribution is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership. This means that only owner has right to transfer ownership for sale and promotion of his work. The term Available to public means that for commercial

- the right to communication deal with interaction with the public by wire or wireless means which includes making available to the public the work through internet which can be accessible any time depending upon individual preferences to see the work of the author. Communication through internet was introduced through this treaty which was done to ensure to keep up the laws with respect to development in field of technology.

Above mentioned rights were some good improvements in providing better protection to copyright works. Though these were remarkable rights for safeguarding rights of authors but the main achievement of this treaty was to accord protection to technological measures applied by authors to their work. We always get trapped on the debate of Technology is boon or curse. There can be no particular side because both advantages and disadvantages exist on this matter. We agree that digitization help in using creating works but at the same time it led to unauthorised use of works. Then we read that authors use technological measures to prevent unauthorised use but then again technology helps users circumvents the measures of protection. This vicious cycle never ends so protection on circumvention was felt necessary to provide sense of confidence among authors that their work have dual protection, Firstly by their own technological measure and Secondly, if such measure is circumvented it will be punishable. Therefore, this treaty had huge role in setting standards
for protection for Technological Protection measures (Hereinafter referred as TPMs). All contracting parties shall provide adequate and effective legal remedies so that TPMs are well protected (Article 11 of WCT). The term used in the article is “shall” which signifies that this provision has been given mandatory status in the treaty. So contracting parties will implementing the same will give it mandatory status.

At the same time limitations and exceptions (i.e. Three-step test) have been made that are identical to that of Berne conventions. These exceptions are made to balance user and author right over his work. The treaty leaves it opens for states to make exceptions and limitations provided the conditions of the “three-step” test are met. The term of protection must be at least 50 years for any kind of work. The treaty obliges the contracting parties to provide effective legal remedies with respect to circumvention of TPMs and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights. Like any other treaty, the rules of treaty are to oblige each contracting parties to implement all necessary protections to TPMs to ensure the application of treaty. WPPT is similar to WCT so we will jump into discussion of amendments made in India according to WCT. Our aim is to understand how TPMs are accorded protection in India.

Protection of TPMs – In India

We discussed that transition to digital world is natural phenomena which across the world. Our country has also developed on fronts of technology. But widespread use of technology has led to problems of copyrights infringement over cyberspace in India too. The biggest hit by such infringements effect the entertainment industry of India which is the major contributor in India. So economy was in need to provide protections to relevant sectors which were being affected by unauthorized copying. The earlier amendments in 1994 made to copyright law has no specific provisions about TPMs. After pressure from domestic and international quarters, government of India introduced various amendments via Copyright (amendment) Act. The main amendment which shaped India digital technology was adoption of protection for TPMs. We will be discussing in details provisions on TPMs and remedies for infringement in India.

The Copyright (Amendment) Act 2012

“The Copyright (Amendment) Act 2012, (Hereinafter referred as The Act) explicitly recognized legal protection for TPMs”. The relevant section for the same is section 65A and section 65 B of the Act. Section 65 is solely dedicated to TPMs with respect to circumvention. Section 65 B deals with rights of management. On a plain reading of the section reflects that it has been made in accordance with WCT. Let’s discuss the section 65 in detail-

Section 65 - (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.”

The first part deals with circumvention of TPMs. The section covers the act of circumventing as well as intention to infringe the rights of copyright holder. However, the word used “effective” is left undefined. What amounts to effective TPMs is question yet to be answered. There are no criteria to check that which TPMs falls under effective and ineffective. Therefore, this might possess problem while proving claim for infringement because the first barrier will be to prove effectiveness of your own TPMs. We already mentioned that the section is derived from provision of WCT and WPPT. But the corresponding sections in these treaties has left the word “effective” has been left undefined. It has been
left to countries to decide according to their domestic digital environment prevailing.

We see that US definition of effective is also unclear and normal dictionary interpretation of the word might help in deciding the matter. EU on this matter sounds better than other countries because it has given slight better definition by stating some examples that what might account to effective. Indian legislation is completely silent on this aspect of definition. So we can say onus to prove this lies on the author itself. It depends upon courts to interpret it liberally or strictly. The second problem in this section is that intention is hard to prove in many cases. Criteria to determine intention can be done by reading Section 65 in light of Section 52(fair dealing). “To prove intention, the way the work has been used will be helpful. For e.g.- a person cannot be held liable if he has used the work for personal use which is one of the exception in Section 52”. Therefore, intention can be proved by stating the use of work was for commercial purpose to infringe the right of copyright owner.

The Act prohibits importation of infringing goods within Indian territories under section 53, the concept of acts preparatory to circumvention cannot be equated to importation of circumventing goods alone and a wider definition, it seems, has been avoided. The reason for the same is that rigidity has been avoided.

The last part of this clause gives infringement a status criminal offence which is done to ensure deterrence with respect to copyright infringement. “The penalty includes a term of two years imprisonment along with a fine.” At the same time flexibility has been adopted by use of word “may” in the text. “By providing a range of exceptions in § 65A (2), the Indian provision has been careful to ensure that, in terms of violations and penalties, the Act only punishes when there is both circumvention as well as infringement of copyrighted content.” This has been done on the principle that rigid laws related to copyright cannot be enforced because there must be balance between user and author monopoly right.

Now, let’s move to second part of the section 65 A–

“(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: ...”.

“This part of the section ensures that all the restrictions and limitations to copyright law continue to operate when TPMs are used” .This is further supported by the phrase in the main provision - that TPMs must be for the “purpose of protecting” rights conferred by the Copyright Act. Thus the provision makes it quite clear that TPMs can be protected by legal sanction only when they are for the purposes of protecting rights conferred by the Copyright Act. This is done to ensure that TPMs aim should be only to protect rights of the author as reiterated in the copyright law. For e.g.- to protect reproduction right an author can seek protection for TPMs.

Now we will briefly discuss about Section 65- B which states that any person who tries to remove or alter without consent of the author or distributes, imports for distribution or communicates to the public, he/she shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. This section is quite equipped with reference to Section 65-B clause (ii) because it mostly covers the way copyrighted work might be used without authorization.

These are the relevant sections which respect to TPMs in India. From the above we can infer, that position in India is that there is explicit recognition with respect to actual circumvention but preparatory for circumvention is not present for flexibility in India. However, courts might feel problem while accessing intentions and people involved in transaction. The amendment to make circumvention to criminal status given to infringement is good way to deter people from circumventing the...
TPMs and unauthorised use of copyrighted content.

India has entered in the digital work and legislations for protecting works are a very good for the starters but a continuous assessment of the same is required by legislators. For e.g.- the word used is in section 65-A of the act is “effective TPM” so to determine what is effective TPMs relevant circumstances and changing digital technologies should be kept in mind by the courts in TPMs circumvention cases.

We can say that with development of technology in era of globalization, Indian copyright law has changed its shape to provide more rights to the author’s at the same time balancing it with user rights as well.