Collective Administration of Copyright: Recent Issues and Solution

* Eakramuddin, ** Mohd. Zeeshan Chand

* Asstt. Prof. (Faculty of law) University of Delhi, India
** Researcher Jamia Millia Islamia, Delhi, India
Author mail: ekrammalik@gmail.com Ph. 09758756032

ABSTRACT: Creativity is one of the significant assets of human kind. It is said to be an inner engine of innovation. Human creativity is a never ending process & the emergence of copyright law has been largely in the form of response to this creativity phenomena. In other words copyright laws follow the technological development. For example as newer modes of copying emerged we had to evolve new rights. Right to print & reprint changed into right of reproduction. In a similar fashion newly evolved "Digital Copying" raises a lot of concerns as computers can generate unlimited replicas of the copyrighted works economically without losing its quality while in case of analog media quality get reduced with subsequent copying.[1] In response to this growing threat and to make best use of opportunities provided by the digital world, the DRM technologies evolved. Further, in the arena of IP laws administration of right is as important as the evolution of right. Evolving new rights of no use or futile unless there is a sound mechanism of administration of those rights. States are, at national or international level, attempting to evolve rights relating to expressions of folklore. There are several options regarding administration of newly evolved rights. CS is being considered as one of the best option to administer the rights relating to expressions of folklore. [Eakramuddin, Mohd. Zeeshan Chand. **Collective Administration of Copyright: Recent Issues and Solution.** *Researcher* 2014;6(8):92-98]. (ISSN: 1553-9865). http://www.sciencepub.net/researcher. 16

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DIGITAL RIGHT MANAGEMENT

Meaning of Digital Right Management (DRM)

DRM is a technology that creates certain conditions about how some digital products can be used and shared. It is a system created or designed to protect the unauthorized duplication and illegal distribution of copyrighted digital product. Actually, DRM is an umbrella term which includes every technology used by a copyright owner to restrict or allow, access to works protected by copyright which are embodied in media such as CD's or communicated to public by digital means.[2] In its generic sense DRM refers to a system which is used to control access to copyrighted works through technological means.[3]

Unfortunately, there is not a commonly agreed definition for DRM. The term, according to the World Wide Web Consortium, covers the description, recognition, protection, control, commerce, monitoring and tracking of all the possible usage types concerning digital content- including the relationship management between the digital object's owners.

According to Katzenbeisser & Petitcoals[4], DRM is a term that is used to describe a range of techniques which collect information for rights and right holders, so as to mange copyrighted material; and the conditions under which these materials will be distributed to the users.

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1 The easier and cheaper reproductivity of digital content, perfect substitutability of the digitized copies, enhanced compression and storage capacities for the content, easier extraction of digital content from storage media, and equally inexpensive dissemination of digitized products have all made copying, authorized or un- authorized, a more frequent activity.

2 DRM and other Implications of the Copyright (Amendment) Bill . Available online at www.copyright.lawmatters.in/2010/06/drm (accessed on 26.08.2012)

3 *Ibid*

4 Katzenbeisser, and Petitcoals,F. (ed.), Information Hiding Techniques for Steganography and Digital Watermarking. (Atrech House Inc, 2002) cited in Barbara and Dimitrios, 'Overview of collective licensing models and of DRM systems and technologies used for IPR protection and management'. p. 4.
Available online at http://www.amazon.com/Information-Techniques-Steganography-Digital Watermarking/dp/1580530354 (accessed on 12.12.2012)

DRM refers to the production of the intellectual property of digital content by controlling the actions of the authorized end user to the digital content. It gives the digital object's owner the ability to securely distribute valuable content such as books, photos, videos, magazines; at the same time helps the owner manage the content, avoiding unauthorized usage or copying.

Technological Protection Measures (TPM) are part of DRM that manages access to content and Right Management Information (RMI) is also a part of the DRM and helps identify digital content in terms of its ownership and conditions that owners seek to impose on consumers. Thus RMI 'expresses the rights owners' intent and TPMs ensures that this is honoured'.[5] Some of commonly encountered DRM applications in our daily digital life include requests for user authentications to enter a database, prevention of copying contents of a CD/ document, and locking the use of a digital product to a particular device or region. Some of the commonly used tools that enable such DRM applications include encryption and watermarks. But like most other technologies, DRM technologies are also not fool-proof and many of the DRM technologies have been subject to circumvention.[6]

Essentials of Digital Right Management (DRM)

The beauty of DRM consists in the combination of conditional access and control of use plus its self-*e*nforcing feature. *Access:* this is the digital lock feature, whereby access is made conditional on compliance with certain conditions such as prior payment, regional area restrictions and the like. *Use:* users are allowed to use the content in the prescribed manner only. Users are not free to use content as they wish; other uses are technologically restricted or disabled. *Self-enforcing features:* if the initial and continuing conditions are not met, DRM supplies the functional equivalent to a court injunction: the delinquent user (or machine) is just cut off. i.e., the digital copy is automatically disabled without the need for a judge to grant injunction.

[5] Digital Right Management: Report of an inquiry by the All Party Internet Group, June 2006, p.5.

[6] Samuelson Pamela and Suzanne Scotchmer, "The Law and Economics of Reverse Engineering", *Yale Law Journal,* 111 (7) (2002) 1631-1633. Cited in A.G.Scaria, "Does India need Digital Rights Management Provisions or Better Digital Business Management Strategies?", *JIPR*, Vol 17(3)(2012) pp 463-477

Digital Agenda of WIPO Internet Treaties

The World Intellectual Property (WIPO) brought forward two Internet treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), in the year 1996[7] representing the concern of the international community to this emerging digital challenge. These two Internet treaties provide for the digital agenda of WIPO which includes, (a) Communication through internet, (b) Effective Technological Measures, and (c) Right Management Information. WCT and WPPT thus incorporated specific provisions for protecting the digital technological measures (DRM); which can be applied by the owner to protect his copyrighted work.

Article 11 of WCT and Article 18 of WPPT incorporated "Effective Technological Measures" (ETM) (also known as anti-circumvention measures.). These two provisions obligate the contracting parties to take 'adequate' legal measures and 'effective' legal remedies against the circumvention of ETM used by right holders. Similarly, Article 12 of WCT and Article 19 of WPPT incorporated remedies against unauthorized tampering of "Right Management Information". These two provisions obligate the contracting parties to take adequate and effective legal measures against unauthorized tampering of right management information and certain dealings with works or copies of works with the knowledge that the electronic right management information in those works has been tampered without authority. Both the treaties, therefore, obligate the member states to provide for laws prohibiting circumvention of digital rights management systems. They also obligate to provide for laws to prevent trafficking in tools meant for circumvention activities.

Inclusion of Digital Agenda in Indian Law

India did not have any anti-circumvention laws to protect DRM technologies earlier to the Copyright (Amendment) Act, 2012. This amends the copyright law in India in order to implement the anti-circumvention provisions enshrined under the WCT and WPPT and to include the digital agenda of WIPO in Copyright Act, 1957. The amendment has introduced three important provisions namely, 2 (xa), 65A and 65B and substituted one existing provision 2 (ff).

While section 65 A deals with protection against circumvention of technological measures as provided under Article 11 of WCT and Article 18 of WPPT, section 65 B deals with protection of right

[7] These two treaties although adopted in 1996 however they came into force only in 2002.

management information as provided under Article 12 of WCT and Article 19 of WPPT.

According to section 65A, if any person circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred under the Copyright Act, with the intention of infringing such rights, shall be punished with imprisonment which may extend to two years and shall also be liable to fine. On the other hand, Section 65A (2) provides for some exceptions. This sub-section explicitly mentions that the provision shall not prevent any person from doing anything referred to therein for a purpose not expressly prohibited by the Copyright Act. This section further exempts any person, who facilitates circumvention, provided he maintains a complete record of the details of the person and the purpose for which circumvention was facilitated. In addition to above, this section goes on further to provide other exception by exempting circumvention of technological measures for purpose of certain activities like encryption research, lawful investigation, security testing of a computer system or a computer network with the authorization of its owner or operator, protection of privacy, and measures necessary in the interest of national security.[8]

After going through the above provision, it may be concluded that anti-circumvention provisions have been limited to a greater extent by inbuilt exceptions provided in second part of the section; consequently it is of little use now. In addition, it is fairly difficult to prove intentional infringement. The drafting of sub-section (2) of section 65A is defective to the limit that under provision of clause (a) legislature allows circumvention with the help of third party, provided certain procedural conditions are met, which is not particularly possible. Further, the use of term 'operator' in clause (e) of this section is very confusing, which does not clear the intention of the legislature. Thus these two clauses of sub-section (2) need to be redrafted.

According to Section 65B, any person, who knowingly (i) removes or alter any RMI 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 information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. In addition civil remedies are also available.

Section 2 (ff) was substituted and the expression 'whether simultaneously or at places and times chosen individually…' has been added. The resultant effect of this addition is that now 'communication to public' includes the right to upload the work in the internet.

Collective Right Management (CRM)* v. *Digital Right Management (DRM)

The conditions of creation & exploitation of protected works have gone through significant changes with the advance of digital technologies; & this will, no doubt, also affect the future of CRM. The advent of new digital technologies may, on the one hand, give rise to new forms of exercising rights. It is argued that technological protection measures and digital rights management information devices allow for licensing practices on an almost entirely individual basis through the Internet and, as such, rendering collective management irrelevant.

Keeping in mind the above apprehension, a question arises; as to why DRM is said to be more efficient than CRM. In this connection, Marco Ricolfi[9]referred three expressions which capture three novel features of the digital age which have the greatest impact on the role of CSs. They are as follows:

Anywhere, While radio and TV could reach only a limited slice of the earth, which usually had some loose correspondence with geopolitical borders, the net is everywhere and nowhere in particular. To have access, on demand or otherwise, it does not matter where the receiving end or the transmitting end may happen to be located. It means the world market is accessible in every remotest corner of the globe with all the goodies available through it around the clock.

Anytime, In the past, the architecture of networks was point-to-mass: from one transmitting end to innumerable receiving ends, intended for simultaneous reception by each and all members of the audience at the same time. Today, because of internet, architecture has become point-to-point. In present setting[10], it is the end-user who decides at which time he/she will access the relevant digital content. This, correspondingly, is accessible on demand, any time.

[8] Sections 65A (2) (b) to (g) of the Copyright Act, 1957

[9] Ricolfi, Marco., "Individual and Collective management of Copyright in a digital environment", (ed.) Torremans, Paul., *Copyright Laws- A Handbook of Contemporary Research,* (UK, USA: Edward Elgar, 2007) p.283-314

[10] In point-to-point architecture works are available online; they reside all the time on the servers of the provider and access to them is activated at the receiving end, on demand from the user.

Perfect, Digital copies, unlike analogue copies, are perfect. Any digital copy is good as the original. Yes, of course digital copies also tend to be infinite and costless, but what is more important for present purposes: they are perfect.

In this sense, DRM may be visualized as a device for replacing collective management through individual management.

Demerits of DRM system

Like most other technologies, DRM technologies are also not fool-proof. And many of the DRM technologies have been subject to circumvention. Followings are the potential flaws of DRM technologies:

(1) The adoption of DRM system is not easy; they are costly, complex and not fully secure. The success of DRM systems is based on a number of other factors, including the balance between protection of intellectual rights and privacy. DRM is inevitably one of the greatest challenges for content communities.

(2) DRM enables content owners to retain perpetual control over the content by controlling access to the content itself.

(3) DRM allows right holders to prevent copying and online distribution & sharing, in some cases overprotection may lead to consumer/user dissatisfaction &, paradoxically, lower revenues.

(4) System of DRM goes against the very rationale of having copyright protection. The objection here is that copyright protection is granted on the basis of a constitutionally mandated balancing act between the prerogatives of holders on the one hand and claims to access by the public, on the other. Also fair uses and other exceptions and limitations have similar constitutional dimension. It is strongly argued that this area of freedom would be severely curtailed, if permissible uses were to be unilaterally determined by right holders on the basis of technology, rather than by the choices of the relevant legal systems[11].

(5) One basis observation by economists about technological change is that its timing and consequences are often not anticipated correctly by stakeholders.

(6) The most significant complaint against DRM technology is that it attempts enforce IP rights beyond their scope. However, what may be considered an overextension of IP is not in itself very clear.[12]

(7) DRM undermines the principle of 'first sale doctrine'.

(8) DRM is used to prevent the entrance of direct competitors by imposing exit restraints, i.e. making consumers enter into deals that exclude or greatly disfavor the possibility of switching to the products or services offered by other suppliers.[13]

(9) One of the abuses of DRM is that, to prevent competition in secondary markets, content owners offer package dealings and try to enforce the tie-ins by making their primary products or services incompatible with the ones offered by competitors in such markets.[14]

(10) One of the most prominent criticisms against the DRM provisions in general is that they are in effect creating a new para-copyright regime.

After having analysed various aspects of DRM, now it may be concluded that DRM is complementary and not substitute to CRM. In the online world, however, the economic rationale for CS may well be questioned. As to the first argument on saving transaction costs, the internet considerably facilitates direct transactions between rightholders and users. Large internet music platforms may replace the functions of CS. As to the second argument; it is of course true that online exploitation also requires a system of monitoring and enforcement.

Further, it may be concluded that, firstly, in practice, DRM Systems are not yet quite perfect and will need further standardization. Secondly, the day they will become effective, probably only some very successful authors or performers and some very large companies will take the trouble of managing their rights themselves. It is very probable that most rightholders will continue to use collective administration methods for practical reasons.

[11] Torremans, Paul., (ed.) *Copyright Laws- A Handbook of Contemporaray Research,* (UK, USA: Edward Elgar, 2007) p.300

[12] Nicolo Zingales, "Digital Copyright, "Fair Access" And The Problem of DRM Misuse", *Boston College Intellectual Property & Technology Forum*, p. 6. Available online at http://www.bciptf.org (accessed on 23.11.2012)

[13] *Supra* note 11 at p.8

[14] *Id* p.9

Following table captures the basic attributes of both the system:

	CRM	DRM
(1)	Collective	Individual
(2)	Cost-effective	Comparatively expensive
(3)	In the interest of both rightholders & users.	Basically in the interest of rightholders.
(4)	A healthy system of monitoring & enforcement.	Still rudimentary.
(5)	Effective litigation.	Litigation for each case.
(6)	Effective bargaining power	Less-effective.
(7)	More beneficial for users.(system of blanket licensing & extended licensing is there.)	Less beneficial.
(8)	Government supervision is there.	Least supervision.
(9)	Also for small users.	Only for big companies & intermediary firms.
(10)	Respects copyright limitation & exceptions.	Does not respect 'fair use' provisions of copyright laws.

EXPRESSION OF FOLKLORE

The current international system for protecting intellectual property was fashioned during the age of industrialization in the West and developed subsequently in line with the perceived needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge systems. Traditional Knowledge (TK) is essentially culturally oriented or culturally based, and it is integral to the cultural identity of the social group in which it operates and is preserved. The definition of traditional knowledge used by the World Intellectual Property Office (WIPO) includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork.

Meaning of 'Expressions of Folklore'

Expressions of Folklore are a kind of traditional knowledge. It may also be called as expression of culture etc. Literally 'folk' means people and 'lore' is defined in the Oxford English Dictionary as "a body of traditions and knowledge on a subject or held by a particular group". It is, generally, referred that 'folklore is manifested traditional knowledge'.

Model Law 2002[15] attempted to define the term 'expressions of folklore' in a very lucid manner. In other words, "folklore is the totality of tradition-based creations of a cultural community, expressed by a group of individuals and recognised as reflecting its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts"[16]. Folklore thus understood is tradition based, collectively held, is orally transmitted, and a source of cultural identity.

[15] According to Section 4 of the Model Law 2002 (MODEL LAW FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE) 'expressions of culture' (folklore) mean "any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the words, includes:

(a) names, stories, chants, riddles, histories and songs in oral narratives; and
(b) art and craft, musical instruments, painting, carving, pottery, terra-cotta mosaic, woodwork, metaware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; and
(c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and
(d) the delineated forms, perts and details of designs and visual compositions; and
(e) architectural forms.

[16] Definition provided in the Recommendations on the Safeguarding of Traditional Culture and Folklore, which were adopted by the organisation's (UNESCO) members in 1989.

Administration of rights relating to expressions of folklore

The next step is to consider how rights in expression of folklore will be administered. Under copyright law, this would involve consideration of whether the rights holder will exercise the rights, or assign or licence their use, or confide their administration to another[17].

At this juncture, a very complex question requires to be answered; as to whom should prospective users have to apply to use expressions of folklore? Interestingly, we have four options to answer. They are as follows:

(i) the relevant traditional community; or
(ii) a state body (whether existing or specially created); or
(iii) both a state body and the relevant traditional community; or
(iv) a collective management organization.

Administration of rights through 'Collective Management Organisation'

CSs are the best option for the administration of rights relating to expressions of folklore because of its exhaustive functioning structure. They administer the right from beginning to end i.e., assignment of right by right holders, licensing the right to the users, collecting fees from users, distributing royalties among right holders, and also imposing penalty for infringement of right they administer etc. Further, CSs have a team of experts, who are often the members of it, to monitor the use and abuse of rights. They are best at right enforcement mechanism than any other available options. The best part of these organizations is that their members are none other than the owners or authors of rights which they administer. Furthermore, they work under the supervision of government concerned, which eliminates the apprehension of misuse of monopoly position against the interest of rightholders.

Therefore, CSs are advocated as potentially the most practical means of administering rights in expression of folklore. Systems of collective administration and management of IP rights have well developed for copyright and certain related rights. Increasingly, the exercise of rights is being confided to collecting societies that have the resources and expertise to act effectively for the right holders.[18] Typically, the organization is registered as a legal entity (company,etc.) under the relevant law. Because of its inherent benefits, CS will be the best option for the administration of rights relating to expressions of folklore.

Initially collective management organizations developed out of necessity because it was not possible for the right owners to maintain direct relationship with users and exercise of rights by individual assignment and licencing proved to be a difficult task. Various forms and kinds of collective management discussed in the foregoing chapters indicate the concern for such necessity. Some interesting modes of acquisition of rights such as mandatory administration expands the scope of collective administration, but it may also be argued that the collective management should be imposed only in cases where individual exercise of the rights concerned is impossible or would lead to chaotic results. In other cases, it is unnecessary to impose collective management, although it makes sense to encourage and help Collective Management Organizations "sell" their services and the advantages of collective management to both rightsholders and users. The justification largely depends on the success of the model adopted in any country.

Finally it is may be suggested that section 65A (1) should be amended either to remove or describe the phrase 'with the intention of infringing such rights…', because in practical circumstances it is fairly difficult to prove intentional infringement. The drafting of sub-section (2) of section 65A is defective to the limit that under provision of clause (a) legislature allows circumvention with the help of third party, provided certain procedural conditions are met, which is not particularly possible. In this context, it may be suggested that legislature should redraft this section. Further, the use of term 'operator' in clause (e) of this section is very confusing. It may be suggested that the term 'operator' should be defined in the definition clause of the Act. DRM and other similar technical measure should be applied to prevent copyright infringement and to facilitate the administration and clearance of intellectual property rights.

[17] J A L Sterling, *WORLD COPYRIGHT LAW*, London: Sweet & Maxwell, 1998.p.389

[18] *Id.* p. 393

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