

The future of copyright in India

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Abstract

The copyright laws in India are set to change as new amendments propose to introduce the anti-circumvention and Rights Management Information provisions in India although India is under no obligation to introduce these changes as it is not signatory to WCT or WPPT. The main purpose of these provisions and measures is to prevent piracy, a menace which hits the Indian movie and music industry heavily. India has amended its copyright legislation over the years to accommodate the technological changes and prevent piracy; however, the problem has only escalated over the years. Technological measures impose restrictions on the access to content and impose other restrictions on the use of the same. But piracy has also an effect of creating markets for works and in a way indirectly promotes the work in unknown territories. The Indian movie industry, popularly known as "Bollywood"¹ has been influential in shaping the copyright legislation to a great extent and the latest proposal to change the legislation to accommodate anti-circumvention provisions is a result of the same influence to tackle piracy, which has been the contentious issue to amend the legislation previously as well.

On a broader note, technology does change human habits but do they change the human instincts. Can the fundamental instinct of free ride which lies beneath the cause of piracy be tackled by technological means? Technology on one hand is promoting creativity but on the other is destroying the same as well. Can the technology and the laws to protect technology actually prevent copyright piracy?

The critical concern of this paper will be to understand whether these provisions have been actually successful in preventing piracy in other jurisdictions or whether the same have unnecessarily affected the societal value of the copyrights by locking them technically from the society and preventing the society to derive the benefits which the copyright system is meant to provide. Taking Bollywood and Hollywood as the one of the case studies which influences the technological and copyright protection of works, the paper would try to outline how such industries actually affect the law making.

Drawing upon these experiences, the paper will consider what steps India should take in considering the flexibilities of the Berne Convention and the TRIPs agreement which enable access to knowledge and information, and prevent similar monopolisation of information and knowledge, and ensure easy access to copyrighted materials in respect of educational, private or general use, particularly given the socio-economic condition of India where digital technology can play a vital role in the coming years.

¹ Bollywood has attained widespread popularity throughout in the world, not only in other third world countries, middle-east and south-east but also in countries like UK and US. Further, it is establishing itself as a trans-border cultural institution exporting Indian culture to the world, a phenomenon which has been the hallmark of Hollywood over the years. Indian producers receive 25-30% of their total receipts from over seas market wherein US and UK are major destinations; the increase in export is by 17% from 4.5 Billion Rupees in 2000 to 5.25 Billion rupees in 2001: UK Film Council Report, 2002 by Parminder Vir, John Woodward, Neil Watson, The Indian Media and Entertainment Industry, p.2 [hereinafter 'Council Report']

Introduction

In 2006, Copyright office in India posted proposals to amend the Copyright Act, 1957² on its website. One of the proposed amendments seeks to introduce the Digital Rights Management (DRM) in the Indian copyright law.³ The purpose for such introduction in the Indian copyright laws has been to “keep pace with national and international developments and advance in technologies,”⁴ a purpose which is over simplified and undermines the complex debate which surrounds the introduction of these measures in the most developed countries. A technological measure which is not only still in the evolutionary stages but the policy itself is being reviewed by various countries, particularly USA, which spearheaded the introduction of such rights in the realm of international law⁵. The proposed introduction of such provisions in the Indian copyright in spite of the fact that India not being a signatory to the World Copyright treaties, is not under any obligation to introduce such changes, particularly, at this stage of Indian socio-economic development when digital technology can play a vital role in the developmental process. The rationale behind the introduction of these provisions in Indian law is rather obscure but if it intends to tackle the escalating problem of piracy then such introduction requires a better analysis in the light of the manner in which these provisions came into existence in the realm of international as well as other national legislations and what has been the consequent development following adoption of such provisions.

Digital Piracy

Piracy of copyrighted materials and demand for a stronger intellectual property rights is not a new phenomenon and comes to light every time technology comes up with methods of better reproductions, starting from printing machine to VCRs. At all times, the copyists have made efforts to free-ride on the labour of others and policy makers have come up with solutions to curb this practice by providing stricter measures to curb copyright infringement and provide incentive to create.

The most important aspect of digital content is that *access to the content* is synonymous with *control of the content* which added with the low cost of content reproduction and dissemination causes virtual loss of ownership in terms of the content's economic value. This is a major problem for the content owners.

Digitization has affected the copyright material in several ways-simplification of reproducibility, reduction in costs of reproduction, easier substitutability of the digitized copies and equally inexpensive dissemination of digitized products.⁶ Digital reproducibility has enhanced the compression and storage of digital content, easier extraction of digital content from such storage media⁷ and easier communication of such digital content over internet. The obvious fall out has been that copyright material has come under threat of unauthorised copying which tends to

² The proposed amendments are available at <<http://copyright.gov.in/View%20Comments.pdf>>

³ Proposed Section 2 (xa) defines “Rights Management Information” and proposed sections 65B Protection of Rights Management Information and section 65A introduces the anti-circumvention measures.

⁴ Indian Copyright Office website: “In order to keep pace with the developments at national and international level, particularly with the rapid advance of technology, it has become necessary to consider amendments to the Act once again. The Government of India has received several representations from various individuals, stakeholders, experts and industries suggesting some further amendments in the Copyright Act, to make it more effective.” <http://copyright.gov.in/Logon.aspx>

⁵ Pamela Samuelson , The U.S. Digital agenda at the WIPO, Virginia Journal of International Law 37, no. 2 (Winter 1997), p.1

⁶ Tobias Bauchage, Digital Rights Management: Economic Aspects, The Basic Economic Theory of Copying, Digital Rights Management, Technological, Economic, Legal and Political Aspects, Springer Berlin / Heidelberg, p. 234-249, at 239

⁷ Development of Ripping technology: WIPO Standing Committee Report on Copyright and related Rights, 2004, SCCR/10/2/Rev.[hereinafter WIPO-SCCR]

deprive the author and copyright owner of the economic returns on their investment of labour and capital which in turn is a disincentive for such production.⁸ This in a way also affects the developmental theory of copyright because if unauthorised digital copying affects creative production it also affects the development based on such copyright industries.⁹ Copyright industries, particularly the audio-visual industries (AVI) are the worst hit by such piracy because the digital technologies have mostly been adopted by these industries over the years. AVI players sought to contain this threat by 'regulating technologies that aid infringement'.¹⁰

International legislation

The WIPO Internet treaties,¹¹ among other provisions, provided the stakeholders, the copyright industries, mostly the AVI and mostly from U.S.¹², with a legal basis to protect the content by technological means, a move supported by EU, that required contracting parties to adopt 'adequate and effective legal measures to regulate devices and services intended for technology-defeating purposes',¹³ known as the anti-circumvention provisions.¹⁴ The treaty did not define the 'technological protection measures' which the legal provisions were supposed to protect expect that such technological measures were not inhibiting the normal function of the equipment or services, the use of which they intended to apply and control.¹⁵ The treaty left it open for the contracting parties to define the technological measures in their domestic legislations and only covered those measures which are used to exercise the rights.¹⁶ The term 'adequate protection' intended to avoid any 'circumvention only' approach that national legislators may take and was included to provide the right holders with protection against such preparatory acts concerning the manufacture or distribution of circumventing devices and services which aids circumvention.¹⁷

The treaties also introduced the provision to protect the copyright management information (CMI) 'from deprecations by would-be pirates who would strip the CMI from distributed copies of digital content, falsify, or otherwise tamper with CMI in aid of infringing activities'¹⁸. The definition of the copyright or rights management information provided that –"information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a

⁸ Based on the fact that one of the theories supporting copyright is the incentive theory. Earl R. Brubaker, "Free Ride, Free Revelation, or Golden Rule?," *Journal of Law & Economics* 18, no. 1 (April 1975): 147-161; William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18, no. 2 (June 1989) also cited in Peter K. Yu, *Digital Piracy and the Copyright Response* at <http://www.peteryu.com/piracy.pdf>.

⁹ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (London: Commission on Intellectual Property Rights, 2003)

¹⁰ Samuelson, p.28. U.S. by this time already had a stint with the use of copyright to prevent technological development that aided infringement in the *Betamax case of Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 340 (1984) (motion picture copyright owners held not entitled to control sale of videotape recording machines because of substantial non-infringing uses); *Vault v. Quaid* 847 F.2d 255 (1988) (permitting the sale of software that bypassed technical protection because it enabled consumers to make backup copies, which meant it had a substantial non-infringing use). Later in 1992 came the Audio Home Recording Act which required which prohibited the circumvention of any device, program or circuit that implemented a particular kind of technological measure-the Serial Copy Management System- which was used to protect digital music in digital recording and digital interface devices.

¹¹ The WIPO Copyright Treaty, 1996 ("WCT") and WIPO Performances and Phonograms Treaty, 1996 ("WPPT")

¹² WIPO-SCCR, p. 9

¹³ Samuelson, p.29

¹⁴ Article 11 of WCT and Article 18 of WPPT.

¹⁵ Jorg Reinbothe and Silke von Lewinski, *The WIPO treaties, 1996*, Butterworths Lexis Nexis, London, 2002, p.141 [hereinafter 'Jorg &Lewinski']

¹⁶ *id.*, p.145

¹⁷ *id.*, p. 146

¹⁸ Samuelson, p.32; Article 12 of WCT and Article 19 of WPPT

work or appear in connection with the communication of a work to the public”¹⁹ and the provision for ‘information about the terms and conditions of use of the work’ was introduced later from the proposal by U.S.²⁰ Unlike the TPMs, RMIs did not create any separate right for authors but merely sought to remedy any acts in relation to RMIs which will induce, facilitate or conceal an infringement of author’s right.²¹ However, in a way these provisions are closely linked with the provision for TPM because the RMIs that were to be provided in a digital work were themselves in a way TPMs. The technologies providing the RMIs in the digital works are called Digital Rights Management Systems (DRM). This provision was unprecedented in the legislation of any country and was reactionary to future developments in the digital world.²²

The treaties in order to maintain a balance between the rights of the copyright authors and owners on one hand and larger public interest particularly education, research and access to information,²³ on the other hand, introduced the limitations and exceptions provision²⁴ in which is embedded the three-step-test provision of Berne Convention.²⁵ The limitations and exceptions are allowed in the national legislations so long as these limitations and exceptions are for certain special cases, does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the authors under the treaties.

Indian law-Adoption of WIPO treaties in Indian Copyright Act

Section 65A adopts the anti-circumvention provision of Article 11 of the WCT and Article 65B adopts Article 12 of the WCT. On a closer analysis of the proposed amendments in the Copyright Act, 1957, it is observed that the provisions introducing anti-circumvention measures and DRMs have been closely guarded to include several exceptions and limitations that concerns India.

The proposed amendments have not dealt with the ‘preparatory acts’ concept of the internet treaties and has only provided for ‘anti-circumvention only’ provision under section 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.” Although the act prohibits importation of infringing goods within Indian territories under section 53 but the concept of preparatory acts for circumvention cannot be equated to importation of circumventing goods alone and wider definition it seems has been avoided.

The proposed sub-section (2) to section 65A provides:

“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

¹⁹ id. at 59.

²⁰ Jorg & Lewinski, p.151

²¹ id. 153

²² Jorg & Lewinski, p.151 The proposal was from US based on its draft National Information Infrastructure Copyright Protection Act, 1995 based on the NII White Paper 1995.

²³ Paragraph 5th of the Preamble of WCT

²⁴ Article 10 of WCT

²⁵ Jorg & Lewinski, p.

- (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 operator; or
- (e) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or
- (f) taking measures necessary in the interest of national security.”

Section 52 of the Copyright Act, 1957 includes in itself the principle of limitation and exception as envisaged under Article 10 of WCT. The *acts expressly allowed* under Indian law include fair dealing with a literary, dramatic, musical or artistic work (not including a computer programme) for the purposes of private and personal use including research, criticism or review,²⁶ the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy-

(i) in order to utilise the computer programme for the purposes for which it was supplied; or (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.

The amendment of 1999 introduced the following provisions:

“Section 52(1) (ab) allows ‘the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available.’

(ac) the “*for the purpose of observing, studying or testing*”²⁷ of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied;

(ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use;”

The other acts allowed under the section 52 includes a fair dealing of works for the purpose of news reporting or cinema, for judicial proceedings, for legislative purposes, for educational and instructional purposes, for non-profit and private consumption of sound recordings (but not cinematographic works), reproduction of any work for disabled persons including their lawful importations.

These exceptions deal with most of the concerns that anti-circumvention provisions raised at the time when they were adopted in the U.S. under the Digital Millennium Copyright Act (DMCA), 1998 such as ‘access control’ measures under section 1201(a)(1) which is absent in the proposals, the anti-trafficking provisions²⁸ which were considered to be in breach of free speech under the First Amendment of the U.S. constitution²⁹ is also absent in the Indian provisions.

The ‘fair use’ doctrine, which was provided as a blanket provision under DMCA³⁰ and which was eventually found to be missing under the act upon interpretation of the anti-circumvention provision in *Universal City Studios, Inc. v. Corley*,³¹ is provided under section 52 of the Act. However, the reach and extent of the provision is very limited and the term ‘any circumvention’ used in section 65A read with ‘with the intention of infringing such rights’ may be interpreted to

²⁶ Alongwith an Explanation: “The storing of any work in any electronic medium for the above purposes, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.”

²⁷ Amendment proposed.

²⁸ section 1201(a)(2) of DMCA

²⁹ The concerns raised in *USA v. Elcom Ltd. Et al* as cited in Mathias Lejeune, DRM, Protection under US Copyright Law, p. 373

³⁰ section 1201(c)(1)

³¹ 273F.3d 429(2dCir.2001)

include almost any act barring those specified under section 52 to fall under the requirement of anti-circumvention.

The proposed exceptions under the Indian law are wide enough for a more a liberal interpretations provided the legislators clarify the objective behind the introduction of the TPMs and anti-circumvention provisions in the legislative history rather than merely putting it as ‘to keep pace with.....the rapid advance of technology’.

The provision for RMIs under the proposed section 65B is an absolute reflection of the provisions for the internet treaties in this regard and the definition for the RMI is provided in the definition clause under section 2(xa) with a proviso for privacy rights by excluding ‘any device or procedure intended to identify the user’ from the definition. The utility of this provision in the Indian context, as discussed later, is questionable when these technologies are still in various developmental stages.

The rule making power under the Indian Copyright Act vests with the central government³² acting through Registrar of copyrights and the Copyright Board. The provision similar to the rule making powers under the DMCA³³ entrusted to Librarian of Congress which would revise the classes of works to which the act of circumventing technological measures by certain person is permitted, may be provided to the Registrar of Copyrights under the Indian law.

The discussion has so far concentrated on the legislative provisions already adopted in US and intended to be adopted in India without providing any value judgment as to their utility or effects in India. The most important aspect is to analyse what effects the TPMs and DRMs may have in the Indian society for which it is important to understand who are the stakeholders in this legislative process initiated in India and whether these measures would in any manner effect the larger societal value of copyrights.

The Stakeholders

In India, one may presume like copyright industries in U.S.³⁴ of which Hollywood is an important segment³⁵, Bollywood³⁶ is a significant copyright industry, a presumption which is relevant only since 1998 when it was given an industry status in terms of production.³⁷ In terms of the numbers of productions, the Bollywood is the biggest industry producing over 1000 films a year.³⁸ There are no concrete figures as to what is the total contribution of the copyright industries in the Indian economy except that the Executive Summary of FICCI, 2006³⁹ reports that Indian Entertainment

³² Section 78 of the Indian Copyright Act

³³ Section 1201(a)(1)(c) of DMCA

³⁴ By 2005, U.S. GDP (in current dollars) had risen to \$12.5 trillion. In the same years, the “value- added” to U.S. GDP by the “core” copyright industries reached \$760.49 billion or 6.48% of the U.S. economy in 2004 and an estimated \$819.06 billion or 6.56% in 2005. In 2004, the value added to U.S. GDP by the “total” copyright industries was \$1,300.77 billion (\$1.30 trillion) or 11.09% of U.S. GDP. In 2005, the estimated value added for the total copyright industries rose to \$1,388.13 billion (\$1.38 trillion) or 11.12% of U.S. GDP: IIPA report of 2006 on the Copyright Industries in U.S. www.iipa.com/pdf/2006_siwek_full.pdf

³⁵ The net export of Motion picture Industry was \$18.45 billion and Music Industry accounted for \$8.26 billion in the year 2005: id.,

³⁶ The term *Bollywood* which has now entered the Oxford English dictionary was first coined by Fanzines in the 1970s to describe the commercial Hindi film industry, an amalgamation of Hollywood and Bombay (now Mumbai): Michael H. Hoffheimer, Commercial Hindi Films with Legal Themes, Library Law Journal, Vol.98, p.62

³⁷ The granting of film industry as an approved entity status in 1998 under the law followed by the granting of the industry status to the film business in 2001 has made financing of the films more transparent and regulated: Dodona research, 2006 at <http://www.dodona.co.uk/cinemagoingindia.htm> [hereinafter ‘Dodona research’]

³⁸ Council Report, p.3

³⁹ FICCI, 2006, The Indian Entertainment and Media Industry, Unraveling the Potential at: <http://www.pwc.com/extweb/pwcpublishations.nsf/docid/BE7E56C3FF8E90A6CA257185006A3275>

and Media industry is worth 353 billion INR⁴⁰ which is expected to grow 19% over next five years; the motion picture industry is about 19% of the total E&M market and 42% is TV.

The market is big and attractive enough⁴¹ for foreign capital and the government has allowed up to 100% Foreign Direct Investment equity in film production, exhibition and distribution.⁴² Motion Pictures Association of America has earned about \$44 million in 2006.⁴³ This has also attracted some of the Hollywood industries such as Sony, Universal and Fox Corporations in Indian market.

The market for film exports and overseas rights for Bollywood films has grown to INR 10 billion by 2006.⁴⁴ Notably it is not only the Indian Diaspora which constitute the customers in the overseas markets but it is also people of other Asian descent, Arabian descent and even African descent who are big consumers of these movies. Notably, the industry has gained popularity in certain European countries other than UK such as Germany⁴⁵, Denmark, Holland, and even China⁴⁶. Most often, the dubbed version of these movies are screened in TV as well as theatres. UK, of all the overseas market, is the biggest market, largely due to greatest number of British Asian population and also the number of screens showing the movies. This apart, USA, Canada, Middle East countries such as UAE, Bahrain, Qatar, also constitute for a significant consumer base of the Bollywood movies added with African countries and other former British colonies with people of Indian and Asian origin also account for this consumption.

The above figures would prompt one to believe that Bollywood, like Hollywood, forms a strong lobby in shaping the copyright laws in India and is therefore a stakeholder in initiating the proposed amendments. However, unlike Hollywood, the studio system, barring few prominent production houses, is almost non-existent in Bollywood since post-1950s⁴⁷ which explains the absence of any Hollywood style oligopolistic corporation with vertical integrations in production-distribution-exhibition in the Indian motion picture business.⁴⁸ This aspect of Bollywood also explains the lack of initiative for lobbying for copyright reforms in India by the members of this unintegrated sector. The trend has changed in recent years particularly after government has announced industry status for film production⁴⁹ and a few of the production houses such as Yashraj Film Corporation, Rajshri Productions Ltd., Adlabs films, UTV and Times Group have engaged themselves in the debate surrounding copyright reforms. However, a very large number of production houses still remain indifferent to these measures.

A study was conducted by National Productivity Council (NPC) sponsored by Department of Education, Ministry of Human Resource Development, Government of India to study the issue of piracy in India.⁵⁰ The study shows that the piracy in India is worth £ 41 million (USD 82 million) consisting of 23% of total sales of recorded copyright products which is about 4% of world trade

⁴⁰ Value of Indian Rupees: 1£=Rs.85; 1\$=Rs.45

⁴¹ The Gross box office collection for 2006 was around Rs.95 billion. Compared to this the 2001 figures were Rs. 72 billion of which overseas rights constituted more than Rs. 5 billion and music rights 1.5 billion. One of the major markets are overseas markets which account for about 25-30% of the proceeds and was estimated to about 10 Billion in 2006.

⁴² The Automatic Route of 100% equity for FDI is allowed in the Films sector⁴², in terms of Item 16 of Annexure B of Schedule 1 under 5(1) of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulation, 2000.

⁴³ Dodona research, p.23.

⁴⁴ Dodona Research, p. 21; also see Council Report, p. 4 : Export earnings have increased from Rs 4 billion (US\$91.8 million) in 1999 to Rs 12 billion (US\$275.4 million) in 2003, which makes for an estimated compounded annual growth rate of 30 per cent.

⁴⁵ Bollywood and Beyond, a special annual Bollywood film festival in Germany in Stuttgart.

<http://www.ndtv.com/morenews/showmorestory.asp?id=96763&frmsrch=1&txtsrch=bollywood>

⁴⁷ Manjunath Pendakur, Indian Popular Cinema, Hampton Press Inc., New Jersey, 2003, p.15.[hereinafter 'Pendakur']

⁴⁸ id. p.35

⁴⁹ supra, fn 38

⁵⁰ See <http://copyright.gov.in/mainact.asp>

and these products include books, movies, soundtracks, computer programmes, internet, cable television and illegal copying.

India has been under a constant diplomatic pressure, particularly from U.S. to improve its IP regime⁵¹ and continues to be so as U.S. copyright industries suffered loss of \$496 million in India due to piracy.⁵² India is strongly recommended 'to adopt amendments to the copyright law that correct deficiencies and properly implement all the obligations of the WIPO Internet Treaties (WCT and WPPT), including protection for temporary copies; adequate and effective protection against the circumvention of technological protection measures.'

Therefore, the actual stakeholders who are lobbying to change the copyright legislation in India is not Bollywood but the same monopolistic Hollywood entertainment studios who lobbied to shape the WIPO internet treaties and succeeded in tilting the balance in favour of copyright owners.⁵³ The entry of the Hollywood studios may have repercussions beyond the copyright laws and may eventually spell the doom for Bollywood.

In Indian context, the other important stakeholders in the proposed amendments are IT/ ITeS companies, both Indian and foreign who constitute a major block to which the proposed DRM changes would matter. The DRM technologies themselves are owned by a few non-Indian and mostly U.S. or European companies, of which Sony, Philips, Microsoft and Panasonic are a few⁵⁴ which have considerable market presence in India. However, the DRMs are themselves inhibitory against the IT companies engaged in software research. These technologies once acquired by the studios and music companies, may be enforced against the IT companies to prevent any circumvention for the research purposes⁵⁵. The proposed provisions prevent anti-circumvention activities, however, they make an exception for research in encryption technologies and this is perhaps would be beneficial for the Indian IT/ITeS companies particularly when unlike DMCA provisions, they do not prevent access to content.

However, it would be important to take into account the caution by the U.K.-based Commission on Intellectual Property Rights:

"For developing countries, where Internet connectivity is limited and subscriptions to on-line resources unaffordable, [anti-circumvention legislation] may exclude access to these materials altogether and impose a heavy burden that will delay the participation of those countries in the global knowledge-based society.... [W]e consider that, if anything, the costs of getting the IP system "wrong" in a developing country are likely to be far higher than in developed countries. Most developed countries have sophisticated systems of competition regulation to ensure that abuses of any monopoly rights cannot unduly affect the public interest. In the US and the EU, for example, these regimes are particularly strong and well-established. In most developing countries this is far from being case. This

⁵¹ The U.S. Omnibus Trade and Competitiveness Act of 1988 empowered U.S. Trade Representative (USTR) to initiate "special 301" investigation against countries with dismal trade and IP policies for trade sanctions and India was put on the "Priority Foreign Country List" and in 1994 India amended its Copyright laws to include computer software and satellite broadcasting for copyright protection. : U.S. Trade Representative, National Trade Estimate Report on Foreign Trade Barriers 178-179 at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2_0_0_2_/2_0_0_2_NTE_Report/asset_upload_file830_6410.pdf (2002) also cited by Rachna Desai, Copyright Infringement in the Indian Film Industry, 7 Vand. J. Ent. L & Prac. 259

⁵² IIPA, 2007 report at <http://www.iipa.com/rbc/2007/2007SPEC301INDIA.pdf>

⁵³ Fiona MacMillan, The Cruel C: Copyright and Film, E.I.P.R 2002, 24(10), 483-492, p. 484 [hereinafter 'Fiona']

⁵⁴ Joan Van Tassel, Digital Rights Management, NAB Executive Technology Briefings, p.224 [hereinafter 'Joan']

⁵⁵ id. p.22

makes such countries particularly vulnerable to inappropriate intellectual property systems.”⁵⁶

The Cultural factor

Bollywood has evolved independent of the Hollywood style studio-system and has prospered in an environment infested with piracy and has yet over a period of time, established itself as a trans-national cultural institution and as a ‘public culture’⁵⁷ catering to the taste of a multi-cultural pluralistic society.⁵⁸ The capacity of Bollywood to meet the demand of this multi-lingual society has in way shielded off any influence of Hollywood in the indigenous market.⁵⁹ A phenomena which Hollywood studios sought to break after its success of Jurassic Park dubbed in Hindi in 1994 which earned \$6 million but later the formula of dubbing Hollywood movies in regional languages met with only partial successes.⁶⁰

It might be true that an unorganized and star based film sector like Bollywood, has not used the copyright law to achieve absolute commodification of its cultural products unlike Hollywood studios which have justified such commodification and copyright protection to encourage investment in the copyright works.⁶¹

Bollywood also lacks the synergy factor which enables Hollywood studios and other media giants to maximize their ownership over copyright materials and integrate vertically on all the lines of related business, production-distribution-exhibition to maximize the commercialization of cultural property.⁶²

Copyright piracy is often blamed for the destruction of copyright owner’s market and its prevention is justified to maximization of the profits of the copyright industries and help copyright production, accumulation and commodification. The market for Bollywood in the developing countries such as Afganistan, African countries, Indonesia, Thailand and the Gulf countries has not always been based on viewership of people from Indian Diaspora but also local populations and not always on the basis of copyrighted works.

The entry of Hollywood studios has its positive effects as it brings investment, creates jobs, disciplines film production, prevents entry of underworld in the film financing and helps Bollywood a more profitable entity.

But there may be one long lasting effect that may dilute the very concept of Bollywood and that is homogenization of culture in the content created by Hollywood studios.⁶³ The control over the film distribution and exhibition through cinema chains would leave the studios with the ultimate power to decide the content and would consequently reduce independent film making.⁶⁴ As already witnessed, Hollywood through its capital power and technological expertise is making inroads into

⁵⁶ IPR Commission Report, 4; see Keith E. Maskus, Intellectual Property Rights in the Global Economy (Washington, D.C.: Institute of International Economics, 2000), 237 as cited in Peter K. Yu, Digital piracy and Copyright response at <http://www.peteryu.com/piracy.pdf>

⁵⁷ Rachel Dwyer & Divia Patel, Cinema India: the visual culture of Hindi film, REaltion Books Ltd., London, 2002, p. 9

⁵⁸ Although the term Bollywood may seem to denote only the Hindi film industry based in Bombay/Mumbai, the film industry in India comprises of films made in 22 languages in 2000 of which Hindi (243), Tamil(157) Telugu (143) dominate the film market whereas films made in languages or dialects such as Bhojpuri or Sindhi are as low as 1 film a year: Dodona Research, 2006 also see Pendakur, p. 26-27

⁵⁹ Pendakur, p.25

⁶⁰ Dodona research, p.23

⁶¹ Fiona, p.484

⁶² Fiona, p.485

⁶³ Fiona, 488

⁶⁴ Id.

the cultural shield that Bollywood had created through its languages and dubbing of films into not all but the major regional languages can destroy the market of the local producers.⁶⁵

On the other hand the vertical integration between production-distribution-exhibition assisted by investing in multiplexes⁶⁶ across India and controlling the distribution not only through advanced technologies like DRM but also through the copyright laws as proposed which would only help the Hollywood studios gain ever increasing concentration of monopolistic power.⁶⁷

The studios aided with deeper pockets would gain control over the existing copyright materials in which the copyright has expired and using the technological developments, in the name of better preservation, lock way these materials with TPMs reinforced by anti-circumvention provisions as proposed. This locking of common cultural property using the copyright laws would lead to depletion in the cultural commons⁶⁸ seriously undermining the social development objective of the copyright law itself.

The proposed amendments would strengthen the position of copyright owners, who are no more the traditional Bollywood producers but multinational corporations whose power to persuade the legislations in its favour at international as well national levels has been discussed earlier. The situation would be more so vulnerable for India as it is not a party to the internet treaties and this may be an advantage for the lobbyists to argue for even stricter copyright laws surrounding the DRMs and TPMs as it is under no obligation to provide for the limitations and exceptions of the treaty. The copyright owners may influence the decision making in favour of excessive copyright provisions with incentives of greater investments etc. but that cause an social inequality in an already imbalanced social order.

Conclusion

The problem that TPMs and DRMs seek to remedy is piracy but that is not guaranteed⁶⁹. On the other hand the various DRM technologies are still not standardized⁷⁰ and questions of interoperability are uncertain.⁷¹ The Indian government should be cautious before introduction of such high-end and very expensive⁷² technological solutions to protect copyright materials in its copyright regime, particularly when the legal principles surrounding these provisions are still undergoing modification in even in countries like U.S.⁷³ Moreover, unlike in past, DRMs leave the 'control over the design of international rights into the hands of private corporations which may fail to honour the interest of consumers or the society at large'.⁷⁴

⁶⁵ The Hindu Business Line Dubbed Hollywood flicks boost box office, Mumbai , May 17

⁶⁶ Sony has started investing in multiplexes apart from film productions and 20th Century Fox already owns a major movie channel called Star TV in India but has also launched into production: Dodona Research, p. 43

⁶⁷ Fiona, 489

⁶⁸ Fiona, 490

⁶⁹ Stuart Haber, bill Horne, Jo Pato, Tomas Sander, Robert Endre Tarjan, If Piracy is the problem, Is DRM the Answer?, Digital Rights Management, Technological, Economic, Legal and Political Aspects, Springer Berlin / Heidelberg, p.224

⁷⁰ WIPO-SCCR, p. 34

⁷¹ id. p.114-116

⁷² Joan, p. 212

⁷³ Registrar of Copyrights, US Copyright office under its rule making procedure under DMCA section 1201(a)(1)(c) on 17/11/2006 made recommendation to the Librarian of Congress for several exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies which included amongst others -Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

⁷⁴ Stefan Bechtold, From Copyright to Information Law-Implications of Digital Rights Management, Security and Privacy in Digital Rights Management, Springer, 2002, p.213-232 at 230

The debate between stronger intellectual property rights, innovation and investment, on one hand,⁷⁵ and the reverse that intellectual property makes information costlier and adversely affects progress,⁷⁶ is of special relevance for India particularly when Indian economy tends to get more knowledge-based. Knowledge is not only power but also source of profit in modern economy as rightly described by Peter Drucker that the basic economic resource 'is and will be knowledge'.⁷⁷ Digital technology may be helpful in closing the wide gap between haves and have-nots in India and can play a positive role particularly in the sphere of education and research.

It is important to remember the purpose of copyright which is public welfare, Enlightenment – 'the encouragement of learning'⁷⁸. Justice Hugh Laddie observed, 'The whole human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done, not necessarily as parasites but simply as the next generation. It is at the heart of what simply we know as progress.'⁷⁹

The provisions for DRM and TPM may concentrate the copyright materials with the powerful corporation, particularly the Hollywood studios and this may not only lock away various copyrighted materials from public domain whose access would be unaffordable for the population of a country whose 70% still live in rural areas (Economic Survey, 2006) but may also seriously erode the common cultural products through a systematic homogenization thereby also affecting the most prolific, colourful and culturally diverse industry, Bollywood.

⁷⁵ Keith E. Maskus, *Intellectual Property Rights in the Global Economy* x (2000), as cited in IIPA, Id.

⁷⁶ Copying and imitating is tool to be used in the process of learning and acquisition of skill. Creator of innovation also borrows ideas from others and intellectual property right will make information costlier which in turn will make borrowing difficult and progressively choke innovation. Peter Drahos & John Braitwaite, *Information Feudalism*; Earthscan Publications, London, 2002, p. 2

⁷⁷ Peter Drucker, *Post Capitalist Society*, Harper Business, New York, 1993, p.8. as cited in Peter Drahos & John Braitwaite, *Information Feudalism*; Earthscan Publications, London, 2002, p. 39.

⁷⁸ Layman Ray Patterson, *Copyright In Historical Perspective*, (1968) p.147

⁷⁹ Hugh Laddie, *Copyright : Over-strength, Over-regulated, Over-rated?* 5 E.I.P.R. 253 (1996).