

DIGITAL RIGHTS MANAGEMENT AND FAIR USE

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Abstract

Through the advent of globalization, an exponential increase in digitization has been experienced all over the world. Newer and better technologies have spurred the creation of intellectual works that are afforded legal protection. At the same time, the change in the medium of the work affects its dissemination and alters the mode of its protection. Opposing demands with regard to protection have been made by creators and users, which has led to the polarisation of the debate between rights of content creators and public interest in the created works. Concerns range from the protection of economic interests of creators and apprehension of over-appropriation of their works on one hand, and the rhetoric of dissemination of knowledge and public policy on the other. The doctrine of fair use emerged to quell the protests from both sides and envisaged an arrangement where certain uses of copyrighted works are excluded from the purview of infringement of copyrights. However, the introduction of

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digital rights management regimes enables copyright holders to restrict the right of use to an unprecedented extent, thereby reducing the scope of applicability of the doctrine of fair use. This paper seeks to examine the altered scope of the doctrine, and provides suggestions to harmonize the opposing interests of content creators and users, creating a secure digital environment that encourages innovation without compromising the right to information.

I. INTRODUCTION

The first part of this article traces the development of copyright law identifying its key features. It also provides an introduction to the doctrine of fair use explaining its applicability as a defence in copyright law.

The second part provides an introduction to the notion of digital rights management. Critically analysing the problems associated with the implementation of the doctrine of fair use in the digital world, it seeks to determine the fate of fair use in this digital era.

The third part focuses on the emerging need to create a balance between the rights of the content providers and the rights of users. The researchers look into the alternatives that exist to copyright, such as Creative Commons licenses, and analyse various statutory provisions to identify a model that would balance all conflicting interests. Finally, the conclusions of the researchers are presented.

II. BACKGROUND

Historically in India, *dharma*¹ is the basic ethos of Indian civilisation. Society and creators of intellectual works have mutual obligations and understanding. Not only the State but the people as well had a duty to look after the authors. Event of one side straying from its obligations was not considered justification enough for the other to give up his duty.²

In Europe, with the advent of Enlightenment, the idea of legal protection for the same came to develop. The thinkers of the period pleaded for the recognition of intellectual property in order to preserve for the author the fruit of his works.³ The same was pursued not just on a strictly individual basis, but also as a social ideal i.e. the dissemination of Enlightenment ideas. The author was to be encouraged to create new works and thereby contribute to the dissemination of new ideas.⁴

The honourable Supreme Court of India has held that copyright owners have the freedom to enjoy the fruits of their work, but such freedom is not absolute and should not be allowed to stifle the dissemination of information of knowledge.⁵ The Delhi High Court

¹There can be no one meaning for this Hindi word when translated. However way of life, duty, righteousness come close.

²Mira T Sundara Rajan, *Moral Rights in Developing Countries: The Example Of India – Part I*, 8 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 357, 361 (2003).

³5,24,30 Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A complex relationship (Rethinking copyright in the light of Fundamental Rights)*, THE NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW, (Fiona Macmillan ed., 2005).

⁴*Id.* at 13.

⁵Entertainment Network (India) Ltd. v. Super-Casette Industries Ltd., 2008 (9) S.C.A.L.E. 69. The court observed that, "The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. Withholding the same from public may amount to

made similar observations, explaining that the exemptions to copyright law are rooted in the need to promote creativity and to disseminate information.⁶

That is not to say copyright exists only in order to ensure dissemination of information. Copyrights ‘protect the public from itself’⁷ – an extremely liberal regime with no restrictions on communication of works that lawfully come into their position would lead to a shortage of creation of copyrighted works. We cannot allow for the rights of the content creator to be subjugated as Justice Holmes says that ‘copyright restrains the spontaneity of men where but for it there would be nothing of any kind to hinder them from doing as they saw fit’⁸ and encouraging individual effort through provision of private gains is imperative to advance public welfare through talents of authors and inventors in sciences and useful arts.⁹ In India, a copyright is granted under the Copyright Act which finds its groundings in Article 19(1)(g)¹⁰ and Article 300A¹¹ of the Constitution of India.

unfair trade practice. In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.”

⁶The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House., 2008 (106) D.R.J. 482 ¶ 23.

⁷1 Joost Smiers, *Creative Improper Property: Copyright and the Non-Western World*, NEW DIRECTIONS IN COPYRIGHT LAW 1, 6 (Fiona MacMillan ed., 2005).

⁸White Music Publishing Co. v. Apollo Co, 209 U.S. 1(1908).

⁹Mazer v. Stein, 347 U.S. 201(1954).

¹⁰Fundamental Right: Freedom to practice any profession, or carry on any occupation, trade or business. The Constitution doesn’t grant this as right absolutely, and it is subject to *reasonable* restrictions in public interest.

¹¹No person shall be deprived of his property save in accordance with law. The term property includes corporeal as well as incorporeal property.

A. *Justifications for Copyright in the Digital Media*

We feel the same is increasingly relevant in this media since the information is literally a click away.

a) *Incentive Rationale*

Bentham and Mill's utilitarian proposition¹² can be used to support the argument that as Intellectual Property Rights (IPR) provide '*the prospect of reward*', this in turn encourages creative advance by providing increased incentives to invent, invest in, and develop further new creative expressions and that without such incentives the invention inducement would be weakened.¹³ The same has relevance in a highly digitised world as well. The opportunities to profit from copyright protection have increased with the development of information and communication technology. With increased user-producer interaction enabled by digital TV, internet etc., inventors and investors are better able to invest in the creative expressions that the critical mass of consumers wants.¹⁴

¹²John Cahir, *The Moral Preference for DRM Oriented Markets in the Digitally Networked Environment*, NEW DIRECTIONS IN COPYRIGHT LAW 26-27 (Fiona MacMillan ed., 2005) (Utilitarian consideration, though not the sole animating theme of copyright jurisprudence, have continued to dominate theoretical debates.)

¹³Birgitte Andersen, *How technology changes the scope, strength and usefulness of copyright: Revisiting the 'Economic Rationales' underpinning copyright law*, 5 THE NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW, 138, 141 (Fiona Macmillan ed. 2005). Also see Tanya Aplin, COPYRIGHT LAW IN THE DIGITAL SOCIETY; THE CHALLENGES OF MULTIMEDIA 19 (2005) where the author mentions the free rider problem as a consequence of easy copying of digital works. The same would result in market price of such works being brought down due to marginal cost of copying. Thus, the author would be disincentivised from creating the work in the first place. Keeping the same in mind, not only reward but limited control over work makes sense.

¹⁴Birgitte Andersen, *How technology changes the scope, strength and usefulness of copyright: Revisiting the 'Economic Rationales' underpinning copyright law*, 5 THE

b) Social welfare

What is pertinent here is that if authors cease to produce multimedia works, overall social welfare will be harmed. Society is enriched if such works are created, as the whole in digital works is greater than the sum of its parts i.e. the value flows from diverse inputs being brought together in one work with which a user can interact.¹⁵

c) Natural Law Rationale

The same is linked to two justifications

a) Personality theory: If we are to look at Kant's personality theory, the crux is that work is not a commodity but an expression or embodiment of the author's personality. To enable the author to control his/her personality, control over his work must be enabled.¹⁶ Though it might seem that digital works would only include highly technological works and there would be no scope for the expression of one's personality, however, keeping in mind the visual layout, inputs involved – can it not be said that such a work would be an intersection of technological, economic and artistic considerations?¹⁷

b) Labour theory: According to Locke's theory of property, every person has property in their own person and therefore their own labour. Hence, a person may appropriate objects by mixing their own

NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW 138, 143 (Fiona Macmillan ed., 2005) where the author feels that globalization has increased the size of the market which in turn brings about increase in economic incentives for catering to the markets of digital TV, internet etc. and broadcasting via the same.

¹⁵TANYA APLIN, COPYRIGHT LAW IN THE DIGITAL SOCIETY; THE CHALLENGES OF MULTIMEDIA 19 (2005).

¹⁶*Id.* at 25.

¹⁷*Id.* at 28.

labour with something from the commons.¹⁸ Pertinent here is the *labour desert* theory put forward by Hughes i.e. labour is an activity which creates social value and it is this production of social value that deserves reward. Thus, people should be rewarded for how much value they add to other people's lives. Applying Locke's theory of property to intangible property, it can be said that every person has property in their intellectual labour and that whenever a person mixes their intellectual labour with something from the commons (here the same could mean ideas), they make it their own property.¹⁹

B. Fair Use

Though justified, protection of content creator's rights should not be at the cost of public interest. Thus, a balance between private rights and public interest is what is required i.e. creative work must be encouraged and rewarded but private motivation must ultimately serve the course of promoting broad public availability of literature, music, arts etc.²⁰ The same bring us to the concept of fair use.

The doctrine of fair use has been codified under Section 107 of the Copyright Act, 1976²¹ in USA. The reason for codification of this

¹⁸*Id.* at 31.

¹⁹*Id.* at 32.

²⁰*Twentieth Century Music Corp. v. Aiken* 422 US 156 (1975).

²¹Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies and phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

doctrine which till then had only been propounded by judges²² was to protect the public interest and at the same time ensure protection of the freedom of speech and expression. Exceptions and limitations to the rights of copyright holder have been provided under Section 52, Indian Copyright Act, 1957²³ in India and Article 5 of the EU Copyright Directive.²⁴

III. REQUIREMENT OF DRM

The insufficiency of the traditional forms of protection has brought about a requirement of increased protection and the same brings us to the next part of our paper. Traditionally copyright law was physically secure, however, with the advent of the internet, the physical limitations that supported implementation of copyright law have begun to wither away.²⁵ The emergence and growth of the internet

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

²²The same is made clear by a number of cases. An example in point – In *Fisher v. Dees* 794 F.2d 435 (9th Cir. 1986), the Court stated that the doctrine of fair defense was initially developed by courts as an *equitable* defense to copyright infringement.

²³(1) The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer

programme] for the purposes of-

(i) private use, including research;

(2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.

²⁴Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

²⁵James Bessen & Eric Maskin, *Intellectual Property on the Internet: What's Wrong with Conventional Wisdom?*, Research on Innovation, Working Paper, 2004, <http://researchoninnovation.org/iippap2.pdf>.

weakens²⁶ copyright law's 'one-size-fits-all' approach.²⁷ The rapid innovation in technology has threatened the economic interests of information and entertainment industries and led to the introduction of new copyright laws²⁸ that affirm this threat and aim to protect the interests of copyright holders.²⁹

Widespread digitization accompanied with piracy has been taking place worldwide and the Indian situation provides an example of this. Amendments³⁰ are being proposed to the Indian legislation to introduce DRM to protect the growth of music and film industries

²⁶Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A complex relationship (Rethinking copyright in the light of Fundamental Rights)*, 5 THE NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW 24, 34 (Fiona Macmillan ed., 2005) (If theoretically the principles of copyright could adapt quite easily, the enforcement of the right has proven difficult. As a result, right owners have turned to other means of protection, like the technical measures of cryptography or anti copy mechanisms.)

²⁷Michael Carroll, *Creative Commons as Conversational Copyright*, 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 445, 447 (Peter K. Yu ed., 2006).

²⁸WIPO Internets Treaties; The Digital Millennium Copyright Act, 1998; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (EU Copyright Directive); Even India has moved to introduce provisions that protect the interests of copyright holders against new technology in the Copyrights Bill which has recently been passed by the Indian Parliament.

²⁹John Cahir, *The Moral Preference for DRM Oriented Markets in the Digitally Networked Environment*, 1 NEW DIRECTIONS IN COPYRIGHT LAW 24, 26-27 (Fiona MacMillan ed., 2005) It must be noted that arguments against the utilitarian theory do exist. For instance, Rawls has criticised it on account of its failure to consider the distinction between persons, as long as the "common good" is maximised. Nozick disagreed with both lines of thought, arguing that individuals/groups are free to pursue their own goals, provided that they don't violate rights of others. Cahir himself opposes the utilitarian theory, basing his arguments on the libertarian theory laid down by Nozick.

³⁰Copyright Bill 2012, § 2(xa), 65A and 65B.

against the ills of piracy. The following table will help make the position clearer:³¹

Name of Industry ³²	Revenue in INR billion (2010) ³³	Growth of industry in INR billion ³⁴ (from 2006 to 2010) ³⁵	Impact of piracy ³⁶
Internet	7.7	1.6 to 7.7	-
Films ³⁷	87.5	84.5 to 87.5	US\$959 million ³⁸

³¹All figures are approximate.

³²Link to DRM becomes clearer when we understand that with the advent of computers and internet, transformation from physical to digital format i.e. ripping and vice versa is now widespread. Thus, concerns of content producers need to be understood.

³³Figures courtesy, *India Entertainment and Media Outlook, 2011*, http://www.pwc.se/sv_SE/se/media/assets/india-entertainment-and-media-outlook-2011.pdf.

³⁴*Id.*

³⁵The same is relevant keeping in mind the reach of the industries and the impact of globalization which has furthered the pace of growth. What is relevant here is the role of the internet in increased access to digitized version of films and music. The interface now being made clear, the choice of only these three industries for purpose of this paper becomes clear.

³⁶The same is relevant in order to figure out the losses suffered by these industries as a result of easy online access. The same helps make a case for DRM easier.

³⁷The film industry is witnessing advancements in areas of technology, marketing and rampant digitalization can be seen across the chain. Thus, understanding current revenue in order to prepare for wide scale digitalization and hence impact for purposes of this paper is important.

³⁸According to the 2008 report on *The effects of counterfeiting and piracy on India's entertainment industry* published by the US India business Council and Ernst & Young, figures accessed in news release – *Film industry launches coalition to protect content in India*, <http://www.usibc.com/sites/default/files/committees/files/mpaapressreleases.pdf>.

Music ³⁹	9.5	7.3 to 9.5 ⁴⁰	US\$52.7 million ⁴¹
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When it comes to television, there are approximately 37 million digital homes and new digital mediums are emerging – such as DTH, Digital Cable, IPTV. Industry reports estimate the digital market in India to be the fifth largest in the world by 2015.⁴² On the other hand, India has been ranked among the top ten countries in the world when it comes to internet piracy. Due to increased internet piracy with sites offering unauthorized copies of software for download,⁴³ the entertainment industry has been bearing the brunt of it. For example, it is felt that internet piracy in the music industry has grown and approximately 95% of all such uses are unauthorized.⁴⁴ Thus,

³⁹The ratio for digital to physical sale for film music is estimated to be 70:30 and veering towards 80:20. Courtesy – *Digital music sales up, but labels continue making CDs to publicise films*, http://articles.timesofindia.indiatimes.com/2011-11-11/chennai/30386726_1_cds-sony-music-shridhar-subramaniam.

⁴⁰On the other hand, if we are to look at solely digital music then forecasts for the same in 2014 are estimated at \$4.25 billion. Courtesy – *India Digital Music Forecast for online, mobile and subscription channels, 2010-2014*, http://www.researchandmarkets.com/reports/1368870/india_digital_music_forecast_for_online_mobile.

⁴¹*International Intellectual Property Alliance, Special 301 Report, 2007*, <http://www.iipa.com/rbc/2007/2007SPEC301INDIA.pdf>. The figures here are losses caused due to internet piracy.

⁴²*Media and Entertainment in India; Digital road ahead*, September 2011, <http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/ME%20-20Whitepaper%20for%20Assocham.pdf>.

⁴³*Is music industry losing battle against piracy?*, <http://ibnlive.in.com/news/is-music-industry-losing-battle-against-piracy/137547-45-75.html>. Popular Indian singer, Shaan, puts the position quite succinctly “It’s an easy and convenient thing for people to just download any music they like from the internet free of cost. Then obviously they don’t take the pain to buy CDs.”

⁴⁴*International Intellectual Property Alliance, Special 301 Report, 2011*, <http://www.iipa.com/rbc/2011/2011SPEC301INDIA.pdf>.

copyright protection in the form of DRM is required to compensate industries for losses caused by piracy.

IV. FAIR USE IN THE DIGITAL WORLD AND ASSOCIATED PROBLEMS

The DMCA is indicative of a sharp shift from what copyright legislations have aimed to do historically. While historically these legislations sought to regulate the use of information, the DMCA steps into the arena of information technology that is used for transmitting, storing and using such information.⁴⁵ Anti-circumvention measures were first recommended by the WIPO Copyright Treaty's requirement that effective legal remedies be provided to prevent circumvention where it interferes with the rights of the copyright owner.⁴⁶ This interest of the copyright holder was required to be balanced with the concerns of fair use and the tendency of such a ban to stifle innovation.⁴⁷

Concurrent to the advent of anti-circumvention provisions, one observes a growing acceptance of the trend to sue facilitators, rather than direct infringers.⁴⁸ While this is prompted by the cost effectiveness of suing facilitators rather than identifying infringers

⁴⁵David Nimmer, *A Riff on Fair Use*, 148(3) U. PA. L. REV. 673, 682 (2000).

⁴⁶Article 11, WIPO Copyright Treaty makes this provision, and it was incorporated in the DMCA under Section 1201.

⁴⁷Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUROPEAN INTELLECTUAL PROPERTY REVIEW 236, 236-237 (1999).

⁴⁸*A&M Records v. Napster, Inc.*, 239 F.3d 1004 (Ninth Cir. 2001) (noted that a direct facilitator may be sued for infringing the rights of the copyright holder); *In Re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) (making available software that allows file sharing infringes upon rights of the copyright holder); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 US 913 (2005) (held that P2P file sharing companies can be sued for copyright infringement.)

and suing them independently for their infringements,⁴⁹ such a move likely to stifle affect innovation by greatly deterring technological innovators.⁵⁰

With the explosion of digital technology and keeping in mind the incentives in converting to the same,⁵¹ we need to consider the applicability of the traditional fair use doctrine to an increasingly digitised world. But first we need to understand the protections in place, then only can we move on to understanding whether the defence of fair use is available for violation of the same.

The protections provided to copyright holders in the digital world can be understood through three layers. TPMs are technical means available to copyright holders in order to protect their works. Therefore, TPMs can be said to be a *second*, technical layer which protects the subject matter in addition to the *first* layer of say copyright or related rights.⁵² An example of the same would be

⁴⁹However, there are stray incidents wherever individuals are directly targeted. For instance, David Byrne, a musician, sued Charlie Crist, former Governor of Florida, for using a song sung by him in his campaign advertisement. The dispute was settled by mediation, and resulted in a public apology posted on YouTube by Crist, <http://www.youtube.com/watch?gl=US&v=s4k13LmlcUE>.

⁵⁰Mark A. Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 STANFORD LAW REV.1345 (2004) (Arguing that the liability attached to facilitators and the growing rate of successful suits against them would lead to a reduction in innovation, and that such foregone innovation would lead to a situation where the benefits of copyright law would not outweigh the costs imposed by its implementation.)

⁵¹Denis T Brogan, *Fair use no longer: How the Digital Millennium Copyright Act bars fair use of digitally stored copyrighted works*, 16 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 691,695 (2002) – massive number of copyrighted works are bound to develop since electronic storage saves cost, paper. Also, a digital copy stays true to the original whereas every subsequent physical copy deteriorates in quality. For example – A photostatted copy.

⁵²ESTELLE DERCLAYE, *THE LEGAL PROTECTION OF DATABASES; A COMPARATIVE ANALYSIS* 196 (2008).

DRM.⁵³ The *third* layer is one of legal protections and entails anti circumvention provisions. The same has been incorporated through Article 6(1)⁵⁴ of the EU Copyright Directive, Section 1201(a)(1)(A)⁵⁵ of the DMCA in the US whereas in India the same is being incorporated under Section 65A⁵⁶ of the Copyright Bill, 2012 which has recently been enacted by the Parliament.

Such protections against circumvention can be extremely broad and can even go to the extent of encompassing *any act*⁵⁷ not authorised by the right holder.⁵⁸

The problem of considering this third type of protection as a new type of violation⁵⁹ is clear. Applicability of fair use to such anti circumvention provisions⁶⁰ is felt to be greatly restricted⁶¹ and the

⁵³For example – the user could be denied the ability to copy the content.

⁵⁴Obligations as to technological measures - Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

⁵⁵“No person shall circumvent a technological measure that effectively controls access to a work protected under this title...”

⁵⁶Any 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.

⁵⁷See Article 6.3 of the Copyright Directive of Europe.

⁵⁸ESTELLE DERCLAYE, THE LEGAL PROTECTION OF DATABASES; A COMPARATIVE ANALYSIS 197 (2008).

⁵⁹In *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (SDNY 2000) the Court held that the DMCA creates a new type of violation i.e. that of anti-circumvention provisions and not of copyright. Thus, applicability of fair use is restricted to copyright and not extended to anti circumvention provisions. Further see Section 1201(c)(1), Copyright Act, 1976, Title 17 of the US Code. It can be said a distinction between copyright infringement and circumvention has been created.

⁶⁰ A threefold anti circumvention ban was introduced by Section 1201 of the DMCA:

same poses certain problems for the users, some of which shall be analysed here.⁶² Proponents of the restrictions placed by the Act consider its provisions to be wisely placed necessary restraints on the violation of copyright law, especially due to the protection afforded to fair use.⁶³ However, one line of view is that the scope of fair use has been greatly narrowed under the DMCA as non-commercial use is no longer presumed to be fair, requiring a declaration of fairness by the library.⁶⁴ Further, it is difficult to protect technologies that facilitate fair use, as they don't comply with the norm of having a 'significant commercial purpose, other than circumvention'.⁶⁵

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- i. Basic Provision: No person shall circumvent a technological measure that has been installed to effectively control the access to copyright protected work.
 - ii. Trafficking Ban: No technology shall be manufactured, imported and offered to the public to if it is primarily designed to circumvent any technology that effectively controls the access to copyright protected work.
 - iii. Additional Violation: No technology shall be manufactured, imported and offered to the public, or otherwise trafficked, to if it is primarily designed to circumvent any technology that effectively controls the access to copyright protected work.

⁶¹If we are to look at the exemptions granted under Section 1201 (d) to (j), it can be seen that fair use is not safeguarded. Fair uses such as research, teaching, criticism, review have not been listed.

⁶²ESTELLE DERCLAYE, *THE LEGAL PROTECTION OF DATABASES; A COMPARATIVE ANALYSIS* 241 (2008).

⁶³Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 JOURNAL OF LEGAL STUDIES 393 (1999), at p. 401, "(allowing self-help, restricted by fair use, may be in the interest of copyright holders. Dam supports 'self-help' as a mode of rights management as it would reduce copyright violations and increase electronic commerce.)"

⁶⁴Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUROPEAN INTELLECTUAL PROPERTY REVIEW 236, 242 (1999).

⁶⁵As required by Section 1201, DMCA.

In order to avail of exceptions to TPMs, most of the users do not possess the technical knowhow to circumvent TPMs. The problem⁶⁶ is that the manufacture and distribution of these circumventing devices has been specifically prohibited. Further, there are very few devices available that allow for circumvention for non-infringement purposes. Thus, it can be said that the user's freedom to lawfully circumvent a TPM is practically *non-existent*.⁶⁷ In other words, access of encrypted works for making fair use of the same is not available. Though under Section 1201(c)(1),⁶⁸ it would seem that fair use has not been denied as a defence, the reality is such that consumers will have neither the ability nor the need to invoke such defences as the decision about when, where and how the copies will be made rests solely on the copyright holder.⁶⁹ Further, fair use can be used as a defence in case there has been copyright infringement and as mentioned earlier, this is not the case in case there is violation of anti-circumvention provisions.⁷⁰

Thus, DRM technology cannot go through Section 107's four-factor balancing test for fair use. Any copying whatsoever is prohibited, even copying fragments of text or images that would clearly be seen as fair use. DRM also controls acts that weren't previously within the

⁶⁶In order to gain access to digitally stored works, one would require the aid of technological measures that would in turn circumvent the protections barring access.

⁶⁷ESTELLE DERCLAYE, *THE LEGAL PROTECTION OF DATABASES; A COMPARATIVE ANALYSIS* 242 (2008).

⁶⁸"Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use..."

⁶⁹Ben Fernandez, *Digital content protection and fair use: What's the use?*, 3 JOURNAL ON TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW 425, 427 (2005).

⁷⁰Wencke Baesler, *Technological Protection Measures in the United States, the European Union and Germany: How much fair use do we need in the "Digital World?"*, 8 VIRGINIA JOURNAL OF LAW AND TECHNOLOGY 1, 8 (2003).

copyright owner's control, such as private performance in the home by restricting the number of times a file can be played.⁷¹

A. Rationale for non-extension of fair use to digital world

- 1) *Best Interest*: It is felt that the whole taking of CDs and DVD movies is what led to the legal actions by some of the largest American and overseas corporations. What is relevant here is the fourth factor⁷² under fair use and apprehensions of over appropriation over the Internet. The same can be noted in *Sony Corp. of America v. Universal City Studios, Inc.*⁷³ where Universal feared the market for its movies would dry up as a result of the videocassette recorder sold by Sony. However, the trend has now reversed with the success of video stores and the home viewing market. More recently, in *UMG Recordings, Inc. v. MP3.com, Inc.*,⁷⁴ the Court denied the defense of fair use to the defendant for facilitation of CD recordings over the Internet as indefensible and one that must be denied as a matter of law.⁷⁵ But the researchers would like to put forward the point that 'best interest' is not constant and we can go so far as to say it is relative. Once the large corporations manage to derive profits from the new technology by figuring out a way for decryption of digitally stored books and movies in a manner that would not allow for mass appropriation, then it wouldn't be surprising if we

⁷¹*Fair Use since the Digital Millenium Copyright Act of 1998*
http://correctingcourse.columbia.edu/paper_tushnet.pdf.

⁷²The effect of the use upon the potential market for or value of the copyrighted work.

⁷³464 US 456 (1984).

⁷⁴92 F. Supp. 2d 349 (SDNY 2000).

⁷⁵Denis T Brogan, *Fair use no longer: How the Digital Millenium Copyright Act bars fair use of digitally stored copyrighted works*, 16 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 691,708 (2002).

indeed witness reverse lobbying of sorts.⁷⁶ Thus, looking out for the best interests of corporations and using the same as a justification for not extending fair use to DRM seems to be a short-sighted move.

- 2) *Widespread Use*: Another factor for the stringent rights granted by users of digital medium, seems to be the possibility of over appropriation or widespread use and the effect of the same on the potential market of the content creator. The case of *Princeton University Press v. Michigan Document Services, Inc.*⁷⁷ comes to mind. Though the concern is valid, the same does not take away from the facts that where, say, only a few articles for educational or research purposes need to be taken, then the fair use of the same is not possible without violation of Section 1201.⁷⁸

B. Reasons for Extension of Fair Use to the Digital World

1) *Information as public good*: Information as a value cannot be said to be appropriable as such. It belongs to everyone, say, like air and fire. Thus, it can be said to be a public good or *res communes*. Under this view, the public's right to information would be the right for everybody to use freely a piece of information and to exercise the freedom guaranteed by law. Thus, in this conception, the right is

⁷⁶*Id.* at 709.

⁷⁷99 F. 3d 1381 (6th Cir. 1996). The defendant reproduced substantial parts of copyrighted textbooks etc., bound them into course packs in order to sell them to students at a University. The Court held that the same was an exploitation of the copyrighted works and not a fair use.

⁷⁸Denis T Brogan, *Fair use no longer: How the Digital Millennium Copyright Act bars fair use of digitally stored copyrighted works*, 16 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 691,710 (2002).

closely linked to freedom of expression.⁷⁹ Article 19, Universal Declaration of Human Rights (UDHR), 1948⁸⁰ and Article 19(2), International Covenant on Civil and Political Rights (ICCPR), 1996⁸¹ reinforce the same.

Thus, the constitutional justification for fair use comes from the freedom of speech and expression. The relevant provisions would be Article 19(1)(a)⁸² under the Indian Constitution and the First Amendment⁸³ in the US. Further, the right to information is an inalienable component of the freedom of speech and expression.⁸⁴ Keeping the same in mind, it would be difficult and in fact a violation of these Constitutional provisions if rights envisaged under fair use are not extended to the digital media as well.

2) *Underlying rationale for copyright*: The same also brings us to our second constitutional justification. Firstly, if we are to look at the underlying rationale for copyright, then apart from the primarily negative approach i.e. prevention of theft, we can understand that it has a role to play in promotion of *learning* and in order to *encourage*

⁷⁹Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A complex relationship (Rethinking copyright in the light of Fundamental Rights)*, 5THE NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW 24, 25 (Fiona Macmillan ed., 2005).

⁸⁰Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

⁸¹Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁸²Protection of certain rights regarding freedom of speech, etc. – All citizens shall have the right to freedom of speech and expression.

⁸³Protecting the freedom of speech, the press.

⁸⁴Bennett Coleman v. UOI, A.I.R. 1973 SC 106, SP Gupta v. UOI A.I.R. 1982 SC 149.

writing. Clearly, fair use developed to preserve the same.⁸⁵ The spirit of the same can be seen in the Indian Constitution under Article 51A(h).⁸⁶ The same being a Fundamental Duty, it can be said that the onus lies on both the user and the creator of content. Thus, there is a duty upon the creator to not stifle the spirit of inquiry, reform and scientific temper of the users. On this reasoning, non-extension of fair use to the digital world doesn't hold true.

3) *Social justifications of fair use*: If the user requires the information for the purpose of say criticism or parody, then it is quite likely that the copyright holder would restrict use of the work for the said purposes. In such cases, there is a requirement for the extension of fair use to the digital medium.⁸⁷

V. NEED FOR BALANCE

It seems that in the recent past, it seems impossible to discuss these issues without being immediately categorised as being 'pro' or 'contra' copyright. The middle ground, sadly, seems to be disappearing entirely.⁸⁸ One is either "one of us" or "one of them."⁸⁹

⁸⁵Denis T Brogan, *Fair use no longer: How the Digital Millenium Copyright Act bars fair use of digitally stored copyrighted works*, 16 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 691,704 (2002).

⁸⁶Fundamental Duties – It shall be the duty of every citizen of India to develop the scientific temper, humanism and the spirit of inquiry and reform.

⁸⁷Wencke Baesler, *Technological Protection Measures in the United States, the European Union and Germany: How much fair use do we need in the "Digital World?"*, 8 VIRGINIA JOURNAL OF LAW AND TECHNOLOGY 1, 10 (2003).

⁸⁸Jane Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS61 (2002) (holding copyright holders and consumers equally responsible for the current problems with copyright law); Cynthia M. Ho, *Attacking the Copyright Evildoers in Cyberspace*, 55 SMU L. REV. 1561 (2002) (arguing that both the sides tend to shift the entire blame on the other); Mark A. Lemley and R. Anthony Reese,

It has been argued that one way to reach such middle ground is by targeting direct infringers of copyrights rather than facilitators.⁹⁰ However, such a proposal seems infeasible due to the anonymity⁹¹ and internationality⁹² that characterises the internet.

Thus, copyright protection is required but at the same time, we need to keep in mind that exclusive rights result in corresponding decreased access to works. Thus, Landes and Posner argue that copyright law must, at least approximately, maximise the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.⁹³ Balance can be struck when a model accounts for not only economic aspects, but also moral rights and utilitarian considerations.⁹⁴

Reducing Digital Copyright Infringement without Restricting Innovation, 56 STAN. L. REV.1345, 1350-1351 (2004) (observing that when courts pass judgments regarding copyright infringement, the social benefits and harms caused by the actions are not reconciled, but either permitted in entirety or rejected in entirety.)

⁸⁹Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A complex relationship (Rethinking copyright in the light of Fundamental Rights)*, 5 THE NEW ECONOMY IN NEW DIRECTIONS IN COPYRIGHT LAW24, 24 (Fiona Macmillan ed. 2005).

⁹⁰Mark A. Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 STAN. L. REV.1345, 1350-1351 (2004).

⁹¹David Nimmer, *A Riff on Fair Use*, 148(3) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 673, 682 (2000) (noting that during deliberations on the DMCA, the House Commerce Committee added 'user privacy' to section 1201 by allowing them to disable 'cookies' which can be used to identify the location of users.); Doug Lichtman and David Jacobson, *Anonymity: A Double Edged Sword for Pirates Online*, The Chicago Tribune, April 13, 2000, <http://www.law.uchicago.edu/news/lichtman041300>. Further, there is no dearth of technology that enables a user to conceal their I.P. Address. For instance, the Tor Project which provides a free software to enable users to conceal their location or browsing habits, www.torproject.org.

⁹²Justice S. Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 IJLT 1 (2010).

⁹³TANYA APLIN, COPYRIGHT LAW IN THE DIGITAL SOCIETY; THE CHALLENGES OF MULTIMEDIA 24 (2005).

⁹⁴*Id.* at 25.

In an adequate protection model, the over protective aspects of the right should be at a minimal. Exceptions should include extraction for teaching, research, criticism or review. Further, the exceptions should keep in mind the public's right to information as well as public interest.⁹⁵ Due to strong lobbying for public interest by a coalition of educational, consumer and scientific groups,⁹⁶ the statute makers were compelled to attempt to harmonize the interests of copyright holders with public interest⁹⁷ and the judicial extension of fair use to reverse engineering⁹⁸ was also preserved.⁹⁹

A. Possible Solutions

Towards a Balanced Model: Moral rights¹⁰⁰ are the personal link between the author and his creation¹⁰¹. It includes:¹⁰²

⁹⁵ESTELLE DERCLAYE, THE LEGAL PROTECTION OF DATABASES; A COMPARATIVE ANALYSIS 279 (2008).

⁹⁶The Digital Future Coalition was the result of the collaboration between the different groups. Such representation of public interest was largely unprecedented, <http://www.copyright.gov/reports/studies/dmca/comments/Init009.pdf>. Julie E. Cohen raised questions about the sustainability of the coalition.

⁹⁷Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUROPEAN INTELLECTUAL PROPERTY REVIEW 236, 239 (1999); See also Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (the Supreme Court observed that the aim of copyright law is to "strike a balance between a copyright holder's legitimate demand for effective - not merely symbolic - protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.").

⁹⁸Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417, 454-55 (decided that home time shifting fell within the purview of fair use.)

⁹⁹17 U.S.C § 1201(f).

¹⁰⁰Moral rights are not mentioned in the Universal Copyright Convention. The Berne Convention recognizes these rights in Article 6bis. Article 9 of the TRIPS Agreement states that all member nations are required to comply with the provisions of the Berne Convention except Article 6bis. The decision by the Arbitrators on *EC — Bananas (Ecuador)* (Article 22.6 — EC), explained that parties are not exonerated from respecting moral rights simply because Article 9 of TRIPS excludes Article 6bis, Berne Convention.

- i. Paternity right:¹⁰³ the inalienable right to claim authorship of the work.¹⁰⁴
- ii. Integrity right:¹⁰⁵ the right to object to any derogation or mutilation of the work, which tends to lower the reputation of the author.¹⁰⁶

These rights can be justified on economic grounds and grounds of public policy.¹⁰⁷ Being a species of ‘personality’ rights, they protect literary and artistic property, protect personality, offer power to performers, and uphold their human rights.¹⁰⁸ Essentially, these rights pertain to the right of the authors to control the ascription of authorship in cases of copying and distribution of their creations.¹⁰⁹

¹⁰¹Follow up to the Green Paper on Copyright and Related Rights in the Information Society, Communication from the Commission of European Countries, 20 Nov., 1996, 27, http://aei.pitt.edu/939/1/copyright_gp_follow_COM_96_568.pdf; ELIZABETH ADENY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS* 2 (6th ed. 2006).

¹⁰²Article 6bis, Berne Convention, 1914

¹⁰³Copyright Bill 2012, § 38B (a).

¹⁰⁴The absoluteness of this right is disputed. See Joost Smiers, *Creative Improper Property: Copyright and the Non-Western World*, 1 *NEW DIRECTIONS IN COPYRIGHT LAW* 1, 6-8 (Fiona MacMillan ed., 2005) (Claims that the creator himself cannot be titled the true author as he has proceeded with the work of predecessors, relying on the common knowledge base of the community).

¹⁰⁵Copyright Bill 2012, § 38B (b).

¹⁰⁶Follow up to the Green Paper on Copyright and Related Rights in the Information Society, Communication from the Commission of European Countries, 20 Nov., 1996, 27, http://aei.pitt.edu/939/1/copyright_gp_follow_COM_96_568.pdf; Has been incorporated in the Berne Convention in Art 6; SIMON STOKES, *DIGITAL COPYRIGHT: LAW AND PRACTICE* 72, (3rd ed. Hart Publishing, 2009) (different view in authors’ rights countries such as France and Germany, where authors have a right to prevent destruction – greater right of integrity.)

¹⁰⁷*Id.*

¹⁰⁸ELIZABETH ADENY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS* 3 (6th ed. 2006); SIMON STOKES, *DIGITAL COPYRIGHT: LAW AND PRACTICE* 72 (3rd ed. 2000) (In countries such as France and Germany, it includes right to decide upon first publication)

¹⁰⁹SIMON STOKES, *DIGITAL COPYRIGHT: LAW AND PRACTICE* 71 (3rd ed. 2009)

Given the effects of the internet on implementation of copyright law,¹¹⁰ and the tendency of anti-circumvention provisions to override fair use and adversely impact the dissemination of knowledge,¹¹¹ it is apparent that a customized regime needs to be adopted to regulate copyright laws on the internet. One possible solution is to incorporate a hybrid of a ‘copyleft’ model,¹¹² such as the Creative Commons (CC) license, along with certain economic rights of authors, to reach a balance between the rights of users and copyright holders.

CC offers a set of “some rights reserved” (as opposed to the “all rights reserved” form under copyright law) licenses designed primarily for authors and artists.¹¹³ Essentially it seeks to create a solution by assembling ‘a layer of reasonable copyright’ on top of the existing law.¹¹⁴

Moral rights may also include the right to withdraw a work from the public domain or the right of access to the work – right of retraction (publishers are generally indemnified for exercise of such rights). For instance, in *Fox Film Corp. V. Doyal*, 286 US SC 123 (1932), 127 the SCOTUS recognized a similar right observing that, “the owner of the copyright, if he pleases, may refrain from vending or licensing, and content himself with simply exercising the right to exclude others from using his property.” But such a right is not recognized in India, or under the Berne Convention.

¹¹⁰James Bessen & Eric Maskin, *Intellectual Property on the Internet: What’s Wrong with Conventional Wisdom? Research on Innovation, Working Paper*, 2004, <http://researchoninnovation.org/iippap2.pdf>.

¹¹¹The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House., 2008 (106) D.R.J. 482 at para 23; *Entertainment Network (India) Ltd. v. Super-Cassette Industries Ltd.*, 2008 (9) S.C.A.L.E. 69

¹¹²Copyleft is a general method for making an item of work free, and requiring all modified and extended versions of the program to be free as well.

¹¹³CREATIVE COMMONS, www.creativecommons.org; Adrienne K. Goss, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHICAGO-KENT LAW REVIEW 963, 965 (2007).

¹¹⁴LAWRENCE LESSING, *FREE CULTURE*, 282-283 (2004), <http://www.free-culture.cc/freeculture.pdf>.

The primary terms provided by CC licenses¹¹⁵ are:

- i. Attribution: right to copy, distribute, display, or transform a work done by one after giving due credit to the author.
- ii. Non-Commercial use: right to copy, distribute, display or transform a work under a CC license for non-commercial purposes
- iii. Share alike: once a derivative work is created after using a work under a CC license, the derived work should be placed under similar licensing
- iv. No Derivative Works: right to copy, distribute or display are restricted only the original work.¹¹⁶

The terms of license that are selected by the author are displayed along with the work itself. It is interesting that some concerns raised in the European Copyright Directive,¹¹⁷ such as the need to “identify better the work” and to “provide information about the terms and conditions of the work” are satisfied by CC licenses, as all this information is attached to the work itself. CC harmonises the needs of creators as well as users in a satisfactory manner, inculcating a spirit of creativity,¹¹⁸ bearing no ill effects on innovation. Such a system would also satisfy the demands of those who feel that copyright law is

¹¹⁵A similar set of licenses is a French system known as Artlibre. It is essentially a ‘free art license’ that protects the moral rights of creators, <http://artlibre.org/licence/lal/en/>.

¹¹⁶CREATIVE COMMONS, www.creativecommons.org.

¹¹⁷Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (EU Copyright Directive), 2001 O.J. (L 167) 10.

¹¹⁸William Patry, *Limitations and Exceptions in the Digital Era*, 7 INDIAN JOURNAL OF LAW AND TECHNOLOGY 1, 5-7 (2011) (arguing that copyright law ideally evolved to promote creativity, and this not only requires acceptance of the fair use doctrine, but alignment of copyright laws to the current digital environment.)

leading to a monopolistic exclusivity for cultural industries.¹¹⁹ However, to suggest that no economic compensation need be provided to authors would be a faux pas – the absence of remuneration would discourage creation of copyrighted works, which in its turn would adversely affect dissemination of knowledge.

B. Broader Exceptions in Legislations

The notion that fair use rights apply only when no licensing market exists¹²⁰ can be said to be a viewpoint in opposition to *good public policy*. Not only free speech but public interest functions are also ignored by such a view.¹²¹ Control of creator should not come at the cost of public access.

Keeping in mind the above mentioned factors, there seems to be no reason for excluding the applicability of fair use when it comes to TPMs and anti-circumvention provisions. Thus, a broad fair use doctrine, similar to the one under Section 107 of the US Copyright Act should be made applicable. Further, we can take inspiration from the European Copyright Directive. Article 6(4) refers to exceptions

¹¹⁹Joost Smiers, *Creative Improper Property: Copyright and the Non-Western World*, 1 NEW DIRECTIONS IN COPYRIGHT LAW 1-5 (Fiona MacMillan ed., 2005) (argues that monopolistic exclusivity of cultural industries which is eternal in nature, can be reduced by providing restricted ownership rights. This would lead to *normalization* of the industry, thereby allowing smaller players and artists to enter the market and compete fairly).

¹²⁰This is in opposition to claims that fair use exists only in order to compensate for market failure. In the digital world, with the copyright holder having complete control over the license, such a situation would not arise. Thus, fair use would be made redundant. See Jonathan Dowell, *Bytes and Pieces: Fragmented copies, Licensing and Fair use in a digital world*, 86 CAL. L. REV. 843,843 (1998).

¹²¹Jonathan Dowell, *Bytes and Pieces: Fragmented copies, Licensing and Fair use in a digital world*, 86 CAL. L. REV. 843,846 (1998).

and limitations provided for in Article 5¹²² of the Directive and partially allows and partially mandates “appropriate measures to be taken by member states to ensure that right holders make available to the beneficiary of an exception or limitation...the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where the beneficiary has legal access to the protected work or subject-matter concerned.” Thus, it can be seen that the Copyright Directive tips the balance in favour of the user at an earlier stage of the exercise of the exception constrained by a technological measure (as opposed to at the stage of sanctions against circumvention).¹²³

¹²²1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; 5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.

¹²³Wencke Baesler, *Technological Protection Measures in the United States, the European Union and Germany: How much fair use do we need in the “Digital World?”*, 8 VA. J.L. & TECH. 1, 13 (2003).

The aforementioned principles seem to be reasonable and would go a long way in ensuring a balance between the copyright holder and user's rights. However, the user must have legal access to the work in order to make use of the exceptions.¹²⁴ Under the Copyright Directive, though the user is not permitted to circumvent the technological measures, he however does have a claim against the copyright holder to furnish him with the means to exercise his rights.¹²⁵

A solution could be in the form of a technology which would be capable of distinguishing between lawful circumvention for fair use and one that results in copyright infringement. The same would help users exercise their rights in a lawful manner.¹²⁶

An important aspect of the exceptions and limitations provided under the Copyright Directive is that the user has to pay reasonable compensation for most of the fair uses. The same seems to be reasonable as not only the users' rights are being protected by allowing for fair use but the copyright holders' rights are also protected by compensating him for his efforts. The same is not very different from fair use in the analog world. Even if one wants to copy a certain passage from a book, one has to either buy it or make use of it from a library.¹²⁷

DRM is being introduced in India, but a pertinent difference lies between the Indian and American provisions. The Indian provision does *not* seek to punish facilitators for creating technology for circumvention, but only those who directly infringe copyright law by

¹²⁴*Id.* at 13.

¹²⁵*Id.* at 28.

¹²⁶*Id.* at 9.

¹²⁷*Id.* at 27.

using a technology for the purpose of circumvention.¹²⁸ Further, it is provided that utilisation of circumvention technology, for the purpose of circumvention research, lawful investigation etc.¹²⁹ is lawful. Thus, the process of innovation is not discouraged by the Indian system, as facilitators are not held liable for creation of technology.¹³⁰ Further, the Indian system surpasses the objection that fair use isn't achieved in practice because, unlike America, India does not prohibit the production of circumvention technologies. Further, there is no requirement to prove that the technology itself was not created for the purpose of circumvention.¹³¹

In *Emerson v. Davies*,¹³² Justice Story stated that every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.¹³³ The researchers feel there is no difference why the same should not hold true in the digital world as well. Having said the same, it is difficult to insist that the rights envisaged by traditional fair use should not be granted to the users.

¹²⁸Copyright Bill 2012, § 65A(1).

¹²⁹Copyright Bill 2012, § 65A(2). This Section also exempts necessary and authorised action taken for testing the security of a system, actions taken as an operator, actions taken in national interest, and any action not expressly prohibited by the Act.

¹³⁰Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*,²¹ EUROPEAN INTELLECTUAL PROPERTY REVIEW 236, 236-237 (1999) (argued that the legal ban on such technology, due to section 1201, DMCA, is likely to deter innovation, even for lawful purposes such as reverse engineering or encryption research.)

¹³¹Unlike Section 1201, DMCA, 1998.

¹³²8 F. Cas. 615 (CCD Mass 1845).

¹³³Denis T Brogan, *Fair use no longer: How the Digital Millennium Copyright Act bars fair use of digitally stored copyrighted works*, 16 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 691,703 (2002).

VI. CONCLUSION

The impact of restrictive DRM regimes on fair use creates a serious cause for concern. There is an urgent need to address the same. This not only adversely affects competition, but also leads to a great deal of consumer frustration.¹³⁴ The leading software producer, Apple, did away with DRM restrictions¹³⁵ due to the large amount of customer dissatisfaction with the same. Technology is in a state of flux and it is almost impossible to clearly identify or recognize the shape it may take in future years. This may render a lot of programs unreadable in the future.

In this paper, we have highlighted how the excessive extension of copyright has often not been counter balanced by an extension of its limitations. On the contrary, the limitations are still confined very strictly and the leeway for the users has been reduced to a minimum. Efforts need to be made to bring about a change in policies to harmonize interests of all involved. Since problems are created due to the ‘blind’ nature of technology, there is much reason to invest in technologies that are capable of distinguishing fair uses from unlawful ones.

It is increasingly felt that DRM cannot be successful in its current form due to its restrictions on fair use. After all, ‘an unexamined life

¹³⁴Keeping in mind problems of interoperability that have arisen where DRM has been imposed.

¹³⁵<https://www.apple.com/fr/hotnews/thoughtsonmusic/> (These restrictions disallowed users from playing any songs or videos that were not purchased on iTunes on any Apple gadgets, including iPods. Interestingly, Steve Jobs, in an open letter entitled ‘Thoughts on Music’, encouraged music industries to do away with DRM.).

is not worth living’¹³⁶ and overly restrictive DRM regime, impeding dissemination of knowledge, leads to just that.

¹³⁶Plato, THE APOLOGY (attributing the statement to Socrates).