

# **DRM PROVISIONS UNDER INDIAN COPYRIGHT LAW - A COMPARATIVE ANALYSIS WITH US AND EU AND A CRITICAL STUDY ON THE ISSUE BETWEEN CREATOR'S INTEREST AND PUBLIC INTEREST**

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## **ABSTRACT**

The Indian copyright act, 1957, endowments the creator of the copyrighted work a stack of rights in order to see his undertakings, ingenuity and explanation. Regardless, copyright is compelled by open interest thought by which the overall population is fit the bill for the benefits of the copyrighted work subject to explicit repressions that a copyright holder or creator may constrain. This has a questionable issue of achieving a sensible agreement between fighting interests of an owner of copyright and society free to move around at will.

Law, development and society, structure a triangle which fuses the possibility of Digital Rights Management and they are tirelessly interfacing with each other, impacting the economy and creative spirit, in couple. The social and fiscal enhancement are, furthermore, impacted by the present phases of checking copyright and are clearly connected with the frameworks given by our information society. The possibility of DRM gives the essentialness of the gadgets used for the accomplishment of its inspiration. The market and the quick advancement of electronic business extended the excitement of re-portraying the noteworthiness of responsiveness on the web, the centrality and impact of archive sharing and the effects of digitalization.

Digital rights management have gotten some worldwide legal backing by execution of the 1996 WIPO Copyright Treaty (WCT). In spite of the way that India isn't a signatory to WIPO, our country has incorporated Digital rights management in 2012. This paper fundamentally takes a gander at the introduction of digital rights management in Indian copyright law in battle with open eagerness free to move around at will. With regards digital work and easier digital

replication of copyrighted work, the dilemma is to achieve a balance between the interest of the copyright holders and the copyrighted work's user of fair use to gain right to freedom of speech and expression. The present paper intends to analyse the legal provisions of DRM, to perceive the overall instruments and evaluate the present improvements and legislations in EU and US. These two significant geographical areas and their sanctioning have been picked because of their impact far and wide. The effect of the online substance providers to authorized advancement rights relies upon endeavors developed in US and EU, where the mechanical improvement changes the online scene well ordered. The work will join a review of goals and other authorization, case law, standard law, course books and articles similarly as electronic material got from various web areas.

**Keywords:** digital rights management, technological protection measures, copyright, fair use, public interest, creator's interest.

## INTRODUCTION

The DRM frameworks are a piece of the idea of the copyright in the digital era. The extension of the web to an expand buyer base made the information and data reachable by various end-users. The music business was the primary business area influenced by the wide spread of its copyrighted work on the web. In fact, the digitalization of these works changed the business to rights management organizations. In the last quarter of the twentieth century the expanding of PC gadgets encouraged the file sharing and the distribution through peer to peer (P2P) innovation technology. The last includes the immediate web based communications between at least two specialists so as to sidestep the PC server. The advancement of methods empowering the simplicity of capacity and transmission of data in a digital world is springing from the improvement of computerized pressure as methods for media outlets to encourage circulation and production of services.

The digital age has brought with it many challenges in terms of technology, its use and its abuse. Traditionally, the concept of copyright infringement was restricted to physical imitation of copyrighted work, and reproduction or copying of the work accompanied with the unauthorised sale or distribution of copyrighted material the number of physical copies produced will determine the extent of piracy. With the development of digitalization and

technology, piracy has made much easier. Many countries across the globe have incorporated the legislations on technological protection measures in their copyright law for the better protection and access of copyrighted law. Digital piracy seems to be the only challenge being taken seriously by the legislatures of the world. India has joined the race and imposed TPMs<sup>1</sup> by amending the Copyright Act, 1957 vide the copyright (Amendment) Act, 2012<sup>2</sup>. This is despite India not having signed, and thus, not being a contracting state for either the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty.

The present paper attempts to analyse the balance between the copyright holders and the public interest. This paper also analyses whether India is ready for technological protection measures. This paper represents a viewpoint that the implementation of Digital Rights Management (DRM) in India which contrast with various public policy concerns and also to the extent infringes the fundamental rights to freedom of speech and expression guaranteed under the Constitution of India. This paper also makes a comparative study with US and EU laws regarding the DRM provisions.

## **DEFINITIONS**

Digital Rights Management (DRM) refers to protecting digital data from unauthorized copying, distribution, access and data that include asserted rights and need to be managed. It is an access and usage control technology, usually software, based on encryption, used by copyright holders to limit usage of digital content. DRM Systems can be also viewed as instruments to enable digital distribution platforms where innovative business models can be implemented<sup>3</sup>. DRM is being used by content providers (CP) to protect their rights by preventing access to

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<sup>1</sup> 'TPMs' is abbreviation for 'Technological Protection Measures'

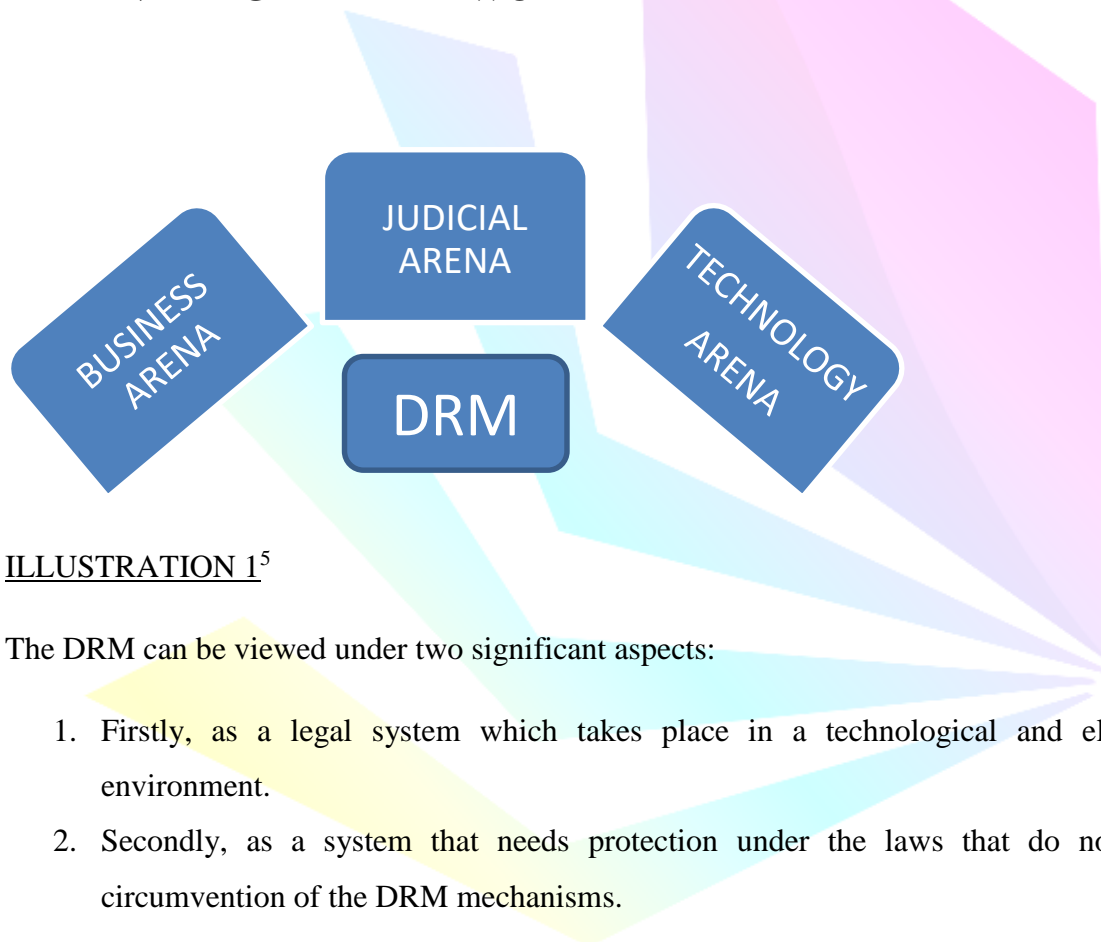
<sup>2</sup> The Copyright (Amendment) Act, 2012 (No. 27 of 2012) received the assent of the President on 07.06.2012 and came into force on 21.06.2012 after being notified in the official Gazette by the central government.

<sup>3</sup> Bechtold Stefan, *From Copyright to Information Law-Implications of Digital Rights Management, in Security and Privacy in Digital Rights Management*, Lecture notes in Computer Science, 2002, [http://link.springer.com/chapter/10.1007/3-540-47870-1\\_14](http://link.springer.com/chapter/10.1007/3-540-47870-1_14)

unauthorized users as well as preventing copying or converting digital data into another format even by authorized users<sup>4</sup>.

The term Technical Protection Measures (TPM) can be used alternately with DRM. The term TPM demonstrates a theoretical case under which a particular structure has express limits as a digital rights system, to the extent being meriting legitimate security. The TPM are related to the affirmed use of digital content.

## DRM IN A LEGAL FRAMEWORK



### ILLUSTRATION 1<sup>5</sup>

The DRM can be viewed under two significant aspects:

1. Firstly, as a legal system which takes place in a technological and electronic environment.
2. Secondly, as a system that needs protection under the laws that do not allow circumvention of the DRM mechanisms.

<sup>4</sup> Asoke K. Talukder, Manish Chaitanya, *Architecting Secure Software Systems*, CRC Press, 302, 2008.

<sup>5</sup> Schollin Kristoffer, *Digital Rights Management*, Stockholm, 382 ,2008.

***The DRM in the World Intellectual Property Organisation:***

Article 11 of WIPO Copyright Treaty (WCT) notes that “Contracting Parties shall offer adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

Also, Article 18 of the WPPT, notes that “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.”<sup>6</sup>

The key words in both the WIPO and WPPT (articles 11 and 18 respectively), are the legal protection with effective legal remedies against the circumvention of technological measures used by the right holders in order to protect their rights. The reference of circumvention of the technological measures, used by the creators of copyrighted material in the electronic environment, was the threshold of the introduction of the DRM in the legal construction of WIPO.

***The DRM in the Legislation of the European Union:***

The EU adopted the DRM concept in its 2001/29/EC Directive of 22 May 2001 in its Articles 6 under the title Obligations as to technological measures and in Article 7 under the title Obligations concerning rights-management information<sup>7</sup>. The main objective of this adoption was to transpose the obligations springing from the WIPO Internet Treaties to the European Community’s legal structure. In the past, the European Commission had expressed its concerns about the development of technical devices regarding their use to control unauthorized copying

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<sup>6</sup>WORLD INTELLECTUAL PROPERTY ORGANISATION-<https://www.wipo.int/portal/en/index.html>

<sup>7</sup> Directive 2001/29/ EC, of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society.

mentioning the necessary attention given to the development of technical devices that might be used to prevent or control copying of recorded material.<sup>8</sup>

It is notable that in the European Community law, already, exist two different legal regimes applicable to DRMs:

1. One was established by the Conditional Access Directive, which applies to television and radio broadcasting by any means, including provisions for “information society services”<sup>9</sup>
2. The other, is the aforementioned Copyright Directive, which prohibits the circumvention of the DRMs and the operation in illicit devices along with the circumventions of services.

The Copyright Directive imposes some obligations to the Member States in order to harmonize their laws on copyright and related rights, by setting specific objectives regarding the establishment of an internal market avoiding the distortion of competition<sup>10</sup>

A closer analysis to Articles 6 and 7 of the Copyright Directive might be enlightening for the position of DRM in EU legislation. Firstly, in Article 6 (3) of the Directive the DRM concept is defined as “effective technological measure” and requires the effectiveness of the system in case of a controlled protected work. The DRM system does not protect the digital work as a single technology but has to operate in a specific architecture of a system. That means that the modules of the DRM can claim the protection of Article 6 (3) only if they contain measures that control access to digital material. The inclusion is related to encryption mechanisms, security of transferred information, user identification and management systems along with constraints of usage of the protected content.

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<sup>8</sup> European Commission, Green Paper on Copyright and the Challenge of Technology, Brussels, 119, 31 January 1989.

<sup>9</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, Article 2

<sup>10</sup> Directive 2001/29/EC, Recital 1



Secondly, Article 7 (2) of the Copyright Directive provides the DRM under the concept of “rights- management information” (RMI). In this case, the right holders provide the relative information for the identification of their protectable work.

That kind of information has two characteristics:

The one of those is to offer the means for identification of the work in subject matter or identification of a subject-matter referred to in the Directive or referred to the sui generis right for the protection of databases under the Directive 96/9/EC.

The other, is related to the information provided by the right holder regarding the terms and conditions of use of the work in the digital environment and numbers or codes, if present, representing that information. In the case of Article 7(2) the law provides the recognition of the rights based on technological means that are able to distinguish between the nature and the degree of the permission in a work.

Thus the copyright law in Europe is not completely developed at community stage and there are many differences in the approaches taken by different member states of EU. The Information Society Directive of 2001 made mandatory that all member state should adapt DRM regulation in national legislation of member states. While few member states have restricted the protection to instances of copyright infringement and some have protected the technological measures per se.

### ***The DRM in the United States Legislation:***

The United States Digital Millennium Copyright Act (US DMCA) was enacted in 1998, implementing the WCT and the WPPT. A new chapter, the 12th, is added to Title 17 of the U.S. Code, in particular the section 1201.

The DMCA by creating the legal platform for launching the global digital on-line marketplace for copyrighted works, aimed to make available, via the internet, the movies, music, software and literary works that are the fruit of American creative genius.<sup>11</sup>

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<sup>11</sup>David`s Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, University of Pennsylvania Law Review, VOL. 148, 681(2000)

section 1201 prohibits the circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as “access controls”), as well as the trafficking in technology or services that facilitate such circumvention. It also prohibits trafficking in technologies or services that facilitate circumvention of technological measures that protect the exclusive rights granted to copyright owners under title 17 (also known as “copy controls”)<sup>12</sup>

This ban prohibits computer repair services from assisting a librarian in the preservation of software stored on decaying media and it prohibits librarians from developing a technology to facilitate circumvention.<sup>13</sup>

3. The additional violations in 1201 (b) include almost the same phrasing and prohibit trafficking in devices, applications or services, in order to enable the circumvention of a DRMs if that protects a copyrighted content. The effectiveness of the technological measures that control access to a protected work is the subject matter of the protection that is offered by the DMCA. These technological measures are divided into two categories: the first includes the access- control measures and the second one is related to copy-control measures.

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<sup>12</sup> Section 1201 defines three different types of anti- circumvention violations, which are as follows:

1. The basic provision in paragraph (1) (A) of 1201. According to this, “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.” For example, it is illegal for a user to hack the requirement of a unique serial number that is necessary during the installation of a computer program.

2. The prohibition on trafficking, which is included in paragraph (2) provides that “no person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:

A) Is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or acting in concert with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.”

<sup>13</sup> Bill D. Herman, *The fight over Digital Rights*, Cambridge University Press, 2013, page 44 , paragraph 2



***The DRM in the Indian Legislation:***

Rights management information which is included with digital content as the title of the work, name of the creator, name and address of the owner, terms and conditions about the use of the work. The definition of RMI the provision specifically excludes any device or procedure intended to identify the user.<sup>14</sup>

For introduction of anti-circumvention provisions in India, Section 65A and B have been added in the copyright act, 1957 .

Section 65A protects Technological protection measures (TPM) which is used by the copyright holders to protect their copyrighted work. <sup>15</sup>

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<sup>14</sup> Section 2 (xa) defines Rights Management Information that is to be included with digital content as: a) the title or other information identifying the work or performance; b) the name of the author or performer; c) the name and address of the owner of rights; d) terms and conditions regarding the use of the rights; and e) any matter or code that represents the information referred to in Sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.

<sup>15</sup> Section 65A Protection of Technological Measures

(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.

(2) Nothing in sub-section (1) shall prevent any person from,—

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act: 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 (d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; or (e) operator; or (f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or (g) taking measures necessary in the interest of national security.

The Indian copyright act does not distinguish between technological measures which prevent unauthorised access to a copyrighted work and measures that prevent unauthorised copying of a copyrighted work. The “anti-circumvention provisions” was introduced into U.S. law through the DMCA in 1998. It only prohibits the circumvention of the access control measures and not the copy control measures because copying of a work may be fair use under appropriate circumstances.

Section 65B is a penal clause that defines the punishment for removing or altering any rights management information without authority or knowingly disseminates copies of any works that have been so altered. The users of the information is favoured because they can be punished only if they disseminate any work with the knowledge that the rights management information has been removed or altered.<sup>16</sup>

The DMCA Provides for a civil right of action, in addition to criminal remedies. Therefore, any person injured by the circumvention of the technological measures intended to protect his rights can seek monetary damages against the offender in the U.S. Federal Court. Whereas Indian legislation fails to give copyright holders a civil right of action and it provides only for criminal remedies.

## **FAIR BALANCE: ISSUE BETWEEN CREATOR’S INTEREST & PUBLIC INTEREST**

The purpose of copyright is to promote the progress of useful arts and science by protecting the exclusive rights of the authors or the creators to benefit from their work. However the basic idea under the violation of copyright is “thou shalt not steal”. This forms the basis of the

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<sup>16</sup> Section 65B: Protection of Rights Management Information – Any person who knowingly

- i) removes or alters any rights management information without authority, or
- ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management has been removed or altered without authority shall be by punishable with imprisonment which may extend to two years and shall also be liable to fine.

protective provisions with regard to copyright infringement.<sup>17</sup> The Indian copyright Act, 1957 defines “copyright” in respect of a work or any substantial part thereof as exclusive right to do or authorize the doing of the acts and this rights also includes the right to store the work in any medium electronic means.<sup>18</sup> Along with this section 57 of the Indian Copyright Act, 1957 gives

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<sup>17</sup> Dent .C. Copyright as (decentred) regulation: *Digital piracy as a case study*, Monash University Law Review,35(2009) 348-375.

<sup>18</sup> 14. Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—1[14. Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely\;—“(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
  - (ii) to issue copies of the work to the public not being copies already in circulation;
  - (iii) to perform the work in public, or communicate it to the public;
  - (iv) to make any cinematograph film or(v) to make any translation of the work;
  - (vi) to make any adaptation of the work;
  - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) in the case of a computer programme,—
- (i) to do any of the acts specified in clause (a); 2[(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: 2[(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:" Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.
- (c) in the case of an artistic work,—
- (i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
  - (ii) to communicate the work to the public;(iii) to issue copies of the work to the public not being copies already in circulation;(iv) to include the work in any cinematograph film;(v) to make any adaptation of the work;
  - (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
- (d) in the case of a cinematograph film,—
- (i) to make a copy of the film including a photograph of any image forming part thereof;
  - (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;(iii) to communicate the film to the public;
- (e) in the case of a sound recording,—

moral rights to the author which retains with the author even after the work has been assigned to third party.<sup>19</sup> Copyright infringement is dealt under section 51 of the copyright act whereas the section 52 deals with certain acts not to be infringement of copyright. There is a constant struggle between exclusive private rights on one hand and the freedom to read and express oneself on the other hand. DRM by its nature and function disrupts the balance between public rights and private interests the copyright law aims to achieve during the period of implementation DRM made an unnecessary expansion of the exclusive rights of the copyright holder.

The public interest under copyright law can be extracted from Directives Principles of State Policy under Part IV of the Constitution of India. It directs the state to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.<sup>20</sup> It also contains provisions which mandate that the State shall direct its policy towards securing the ownership and control of the material resources of the community are so distributed as best to sub serve the common good<sup>21</sup> and also include that the operation of the economic system does

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(i) to make any other sound recording embodying it; (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the sound recording to the public. Explanation.— For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.]

<sup>19</sup> 57. Author's special right.—[(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right - "(a) to claim authorship of the work; and (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of section 52 applies. Explanation.—Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.]

(2) The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

<sup>20</sup> Article 38(1) of the Constitution of India.

<sup>21</sup> Article 39(b) of the Constitution of India.

not result in the concentration of wealth and means of production to the common detriment.<sup>22</sup> in addition to this, the fundamental duties as to every citizen's endeavour being 'to develop scientific temper, humanism and the spirit of inquiry and reform'<sup>23</sup>, and 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement'.<sup>24</sup>

However the right to freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution of India cannot be exercised without limitations. These limitations includes not only those as contained under Article 19(2),<sup>25</sup> but also the principles as provided for under Part IV, since the State is under obligation to legislate keeping in mind the principles of common good and ownership. Though the author of the work has right to express and subsequently get protection for his work and every citizen also has a right to receive information<sup>26</sup>. Thus from this it is clear that no law can abridge freedom of speech and expression which is expressly guaranteed to all citizens under the Constitution of India.

## CONCLUSION AND SUGGESTION

The DRM provisions in the US and EU are chosen not only for their prominent role in evolution of the WCT and WPPT, but they are considered importantly for their comparatively longer experience with the DRM provisions. Comparative analysis of the Indian DRM provisions with similar provisions in the US and EU certainly shows that Indian Legislature is taking a minimalist approach with regard to DRM measures.

The provisions of Digital Rights Management introduced through 2012 Amendment in Copyright Act, 1957, was definitely an intrusion into the fundamental right to freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution of India. The

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<sup>22</sup> Article 39(c) of the Constitution of India.

<sup>23</sup> Article 51 A (h) of the Constitution of India.

<sup>24</sup> Article 51 A (j) of the Constitution of India.

<sup>25</sup> Article 19(2) of the Constitution of India.

<sup>26</sup> The right to receive information under Article 19(1)(a) was recognized in India in as early as 1958 by the Supreme court of India in *Express Newspapers (Pvt.) Ltd. & Anr. V Union of India & Ors.*, decided on 8 Jan 1958. Even though the mediums of imparting information have changed, the law remains applicable as such.

DRM provisions instead of balancing the interest between public and copyright owners, it is biased towards the copyright owners considering that the lobby of copyright owners seems united in its stand and economically much more viable than ordinary Indian users of digital versions of copyrighted works, it is likely that the Amendment may not be challenged. In such case the government should make attempts to create awareness among the students at the School and colleges and should also initiate massive publicity campaigns about the consequences of the copyright infringement and its criminalization. There should be an attempt to analyse the socio-economic effectiveness of the DRM provisions. Thus the main aim of copyright law is to provide balance between the public interest and the interest of the creator's but the same copyright law which included the DRM provisions, abridges the fundamental freedom of speech and expression , so the DRM provisions added through amendment 2012 has to be re-examined.