Journal of Law and Society
Vol. XLVIII, No. 70

Law College
University of Peshawar
Jan-June, 2017

WIPO COPYRIGHT TREATY OF 1996 & LEGITIMATE INTERESTS OF THE USERS OF COPYRIGHT WORKS: AN ANALYSIS

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Abstract
The WIPO Copyright Treaty (1996) has changed the copyright law by adopting an international legislation on Technological Protection Measures. The treaty's main goal was to protect copyright work owner's right through maintaining a balance between the legitimate interests of copyright owner and the legitimate interests of the user. But, this aim has yet not been fully achieved, as users' legitimate interests are often ignored while protecting copyright work owners' rights.

Keywords : Copyright, Interests, Technological Protection Measures, Users, WIPO

Introduction

The advent of internet's spectacular expansion and digital networks – contributing to cheap, easy, speedy and quality copying, and decentralized infringement – have raised several challenges to the copyright regime. One of these problems include that how to protect the rights of copyright holders while harmonizing a balance in legitimate interests between the copyright owners and the public. Considering the issues related to the exploitation of authors' rights in digital environment particularly internet, and to bring the copyright law in line with digital age and to stop the infringement of copyright law by internet piracy, delegates of more than 120 states at the WIPO Diplomatic Conference held in Geneva concluded two new treaties in December 1996. These treaties are known as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT).

To address the challenges of digital media and internet, the WCT set new international standards such as: the applicability of rights for the

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storage and transmission of work in digital system;[1] the limitations and exceptions of rights in digital environment;[2] protection of technological measure;[3] and rights management information.[4]

The aim of this paper is to explain how ant-circumvention provisions of the WCT have changed the copyright law to deal with the challenges of digital media and internet. It includes whether giving extra legal protection to the copyright owner, or by enshrining the principles of Technological Protection Measures (TPMs) in international legislative treaty, or by ignoring the doctrine of fair use, have changed the copyright law. This paper also discusses whether a balance between the legitimate interests of the copyright owners and legitimate interests of the public have been maintained under article 11 of WCT.

The paper is divided into two parts. In its first part, an attempt is made to explain and to critically assess the TPMs, considering article 11 of the WCT. Second part of this paper involves explanation and critical assessment of the implementation of anti-circumvention provision in the US Digital Millennium Copyright Act 1998 (DMCA), in comparison with article 6 of the European Union Copyright Directive (EUCD).

Explanation and Critical Assessment of Protection of Technological Measures Under Article 11 of WCT 1996

What are technological measures? A technology, which is used in equipments such as computer programs, CDs, DVDs and Websites, that is particularly designed to prevent users or infringers from copying, reproducing and/or distributing the copyrighted work without permission or authorization of the right holder.

Advanced technology assures the authors that they could control or minimize the possibility of infringement of their rights, such as by detecting the existence of unauthorized reproductions and adaptations of their original or copyrighted works.[5] A handsome investment has already been made in refining and developing technological tools to protect copyrighted material in its digital form. This is because 'the principal concern of publishers is that what one technology can do, another technology may well be able to undo through clever circumvention or bypassing techniques'.[6] Many authors also believe that for controlling copying in developed digital environment, there

should be technical system of protection.[7] In support of this proposition, Stanley Lai says that 'in such an (digital) environment, no right may be applied efficiently with out the support of technological measures of protection'.[8]

Considering the proposals from the US and the EU about technical measures, the Chairman of the WIPO Committee of Experts decided to include a provision on technical measures in his basic proposal for the substantive provisions of the WIPO Copyright Treaty (WCT).[9] At the time of inserting provisions on legal protection of devices that should be dealt with, there was difference of opinions or views among signatory member countries on issues, such as which anti-copy devices should be covered under the treaty, what types of activities (such as distribution and use) should be covered and moreover what type of remedies should be provided.[10] However, after a healthy and thorough debate, the following article was adopted in the WCT 1996, which states that 'contracting parties shall provide 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'.[11] Simply put, an international Legislation in form of Art.11 of the WCT, 1996, supplementing Berne Convention, enshrined a principle for protection of technical measures, already laid down by the court.[12]

The article 11 of WCT has changed the copyright law by safeguarding the rights of the copyright owner in the following three ways. Firstly, it authorizes the copyright holder, not expressly but impliedly, to apply technical measures, for example codes on CDs or web pages, to prevent piracy. Secondly, it prohibits circumvention of technical protection devices. Thirdly, if circumvention still happens, the concerned author has the right to sue the infringer for damages.[13]

On the one hand, WCT adopted a new principle of anti-circumvention of technical measures for copyright protection. However, on the other hand, it is silent on how anti-circumvention should be legally ensured. It requires the contracting parties only to provide adequate legal protection and effective legal remedies against the circumvention of effective

technological measures that are used by rights holders about the exercise of their rights under this treaty and that restrict acts, in respect of their works which are not authorised by the rights holders concerned or permitted by the law.[14]

The word 'effective' in relation to technological measures is also not defined and the responsibility is placed on the signatory states to adopt legislative approaches, in order to make suitable interpretation of the word 'effective'.[15] This un-defined meaning of the word 'effective' has created problems in the proper implementation of anti-circumvention provisions. For example, on 25 May 2007, Helsinki District Court, a Finnish court, ruled out a case on grounds that only those TPMs were effective, which had achieved the protection objective.[16] In other words, a protection measure is no longer effective when it is widely available device that implements circumvention procedure.

It is true that WCT under its article 11 has made change to the copyright law by prohibiting the circumvention of technological measures. However, questions such as what type of circumvention should be banned, whether access control (limit access to a wok) or right control (technologies that protect the rights of the copyright owner to reproduce, distribute and/or publicly display) should be protected, are not fully answered. Legislative approaches of the member countries to these issues are quite diverse.[17] The US approach draws a distinction between tampering with 'access controls' and tampering with 'rights control'. In comparison to this, the EU Information Society Directive does not discriminate between access and rights control.[18] It should be mentioned here, however, the objective of both the approaches are same, that is to protect the rights of the copyright owner by TPMs.[19]

The Preamble of WCT stresses on maintaining a balance between the rights of authors and the larger public interest, particularly in education and research.[20] Laddie says that 'not all copying is bad', 'sometimes copying and developing is to the general good'.[21] Yet, while protecting the rights of copyrighters through technical measures, the possibility of restricting public from lawful access to information in relation to education, news, or research exists.[22]

In its next part, this paper explains and critically assesses the implementation of anti-Circumvention provisions under the US's Digital Millennium Copyright Act (DMCA) of 1998, in comparison to article 6 of the European Union Copyright Directive (EUCD).

Implementation of Anti-Circumvention Provisions Under DMCA and EUCD

After taking into consideration right owners suitable investment in use of technological measures to avoid piracy, the "White paper" of Clinton's Administration on 'Intellectual Property and National Information Infrastructure' proposed to declare illegal the manufacturing and distribution of devices whose primary purpose is to circumvent the technological measures for infringement of rights of the copyright owners.[23] In October 1998, after around two years of WCT, the Clinton's administration adopted DMCA, and the US became one of the first countries that made a domestic legal instrument to implement WIPO treaties to meet the challenges of digital media and internet.[24] Following the US, the EU enacted its domestic legal mechanism (referring to EUCD) to implement WIPO treaties in 2001. The anti-circumvention rules in the DMCA are codified under 17 U.S.C. §1201. The EU decided to implement article 11 of WCT through adoption of article 6 under EUCD. It should be noted here that article 6 of EUCD does not apply to computer programs, because they already enjoy legal protection on technological measures in article 7 (1)(c) of Software Directive

Section 1201 of DMCA divides technological measures into two categories, such as measures that prevent unauthorized *access* to a copyrighted work and measures that prevent unauthorized *copying* of a copyrighted work.[25] DMCA prohibits the circumvention of the technological measure that effectively controls access to the copyrighted work.[26] Furthermore, DMCA protects the rights of the copyright holder by prohibiting the manufacturing and distribution of any technology or device which main purpose is to circumvent the encryption technology.[27] In light of Section 1201, making or selling of devices or services, that are used to circumvent either category of technological measure, is prohibited. But, in relation to the act of circumvention, the provision prevents unauthorized *access* to a copyrighted work, the first category of technological measures, not the second one.

Likewise, article 6(1) of EUCD obliges the member states to prevent the circumvention of any effective technological measures by adopting or providing adequate legal protection. But the person who is involved in circumvention must know, or have reasonable grounds to know, that he or she is causing circumvention of any effective technological measures. Article 6(2) of EUCD requires the member states to outlaw different acts such as manufacturing, selling regarding devices, which are promoted or advertised for circumvention purposes, or have only limited commercially significant purpose or use other than to circumvent or designed, produced or adapted for abetting purposes or adding circumvention. This clause provides a broader scope for anti-circumvention of devices.

Sub-clauses (d) to (j) of Section 1201 of DMCA provide exceptions to the circumvention of access control measures. For example, a non-profit or educational institutes can gain access to a commercially exploited copyright work under some circumstances. Likewise, articles 6(4) and 5 of EUCD also enumerate exceptions or limitations in favor of public policy and public interest, which should be ensured, despite the employment of technological measures by copyright holders. For instance, article 6(4)(1) states that, instead of anything contained in article 6(1), the signatory states of EUCD should promote voluntary measures made by the copyright owner to achieve the goals of certain exceptions, provided for in the national law. Article 6(4)(2) deals with private copying exception, but this exception is not certain. This is because it is not mandatory for the member states to take measures to fulfill this exception.

Considering a potential for wide scale piracy through internet and digital media, legislation needs to satisfy the authors by means of an adequate legal framework, providing them with an incentive to create and to protect their works on the one hand, and to satisfy the user interests by making them able to access the copyright material on the other hand.[28] The term 'fair use' (covering criticism, commentary, news, teaching, research and certain personal uses) of the copyrighted work is not subject to the permission of the copyright owner. For instance, using a tape recorder to record song from television for later listening. This doctrine is essential in maintaining a balance between the legitimate interests of the copyright holders and legitimate interests of the public by

permitting them to access creative works. In the upcoming section, this paper discusses whether the strict technological measures, adopted by copyright holders to protect the illegal use of their works, place the exceptions such as fair use of copyright work, which is permitted by law, in danger.

The US Copyright Act does not expressly specify that which uses are fair, but sets out four criteria with respect to fair use. These include: purpose of use; copyrighted work's nature; magnitude of portion used in relation to copyrighted work; and the most important its effect on the potential market of copyrighted work.[29] Judge Posner has candidly admitted that from Section 107 a minimal guidance can only be drawn.[30] Congress legislated dartboard, rather than four factors of fair use.[31] Similarly, the EU Directive on copyright law also failed to provide a certain definition of fair use copyright works, rather it divides them into mandatory and non-mandatory categories. In 'Mulholland' case, Court of Appeals commented that rules on legal protection of technological measures in copyright law are still in many aspects flawed and incomplete, requiring the legislators to clarify the complicated relationship between the private copying and the usage of technological measures.[32] Article 6 that provides extra protection to the copyright owner, made consumers feared that it could create a technical monopoly over all the use of copyright works, both lawful as well as unlawful.[33]A copyright protected CD can not be used even for copying a movie for later viewing. Scholars, students, researchers and public cannot make fair use of the material without bypassing the digital locks. The reason behind these tools is to prevent the 'internet piracy'.

The circumvention of tools for fair use is whether legal or not, fair or not, it should be decided by the courts. This makes prospective fair users deter from making best use of the doctrine of fair use, as there is a potential risk of high cost litigation and the unpredicted damages, which a court could award if it disagrees with the user's fair use rationale.[34] Similarly, technical devices are not capable of respecting the balance available under the given law. A technical blockage is 'blind' and cannot discern whether a user is about to make a lawful or unlawful use of the work.[35]Put Simply, the signatory states, by giving extra-legal, in other words bullet proof, protection for the rights of the copyright owners, has failed to provide an adequate mechanism to provide the user with right

of fair use.

Furthermore, the prosecution of the Russian programmer Dmitry Sklyarov, and then ElcomSoft (Employer of Dmitry Sklyarov), by the US government for creating a program, which could disable the technical measure for protection of Adobe's eBook Reader,[36] and the threatening of Professor Felton's research team by SDMI,[37] made it evident that copyright owners under Section 1201 of DMCA stifled the freedom of free speech.[38] Pamela Samuelson comments that 'recent legislation in the united states and Europe whose ostensible purpose is to protect copyrighted works from pirates is being used to inhibit science and stifle academic research and scholarly communication'.[39] It can be argued that freedom of expression, a fundamental right, hardly exists to the extent today as it was existed in the past.

The widespread of technological protection measures also inflicts the service of interoperability. For instance, the distribution of large number of CDs by Sony BMG MUSIC CDs, which contained a rootkit-like program to embed itself its in the windows operating system, to monitor and to prevent the use of Musical files form CDs.[40]

Some TPMs are also designed to invade user's privacy. For example, 'The Warden', TPMs, distributed by the 'Blizzard', for controlling cheating and hakers, monitored each user's computer.[41] BBC comments that 'Game maker Blizzard has been accused of spying on the four million players of World of War-craft'.[42] Likewise, as illustrated in the Chamberlain Group, Inc. v. Skylink Technologies, Inc. case,[43] the TPMs also create lockout problem for the user. Succinctly speaking, the signatory states have changed copyright law, following article 11 of WCT 1996, by taking pre-emptive steps through imposing maximum restrictions on the user.

Conclusion

The creation of WCT is considered as one of the significant steps forward in the history of international copyright right legislation. It has adopted provisions on the anti-circumvention of technological measures, aiming to safeguard rights of the copyright owners in such an advanced digital environment where copyright works could easily be accessed, copied, reproduced and/or distributed without owners' permission.

On one hand, WCT under its article 11 provides a mechanism for the protection of copyright works, by requiring signatory states to adopt adequate legal protections against the circumvention of technological measures. On the other hand, the same treaty under its preamble and article 10 requires its member states to maintain a balance between the rights of authors and the larger public interests. In other words, WTC aims to safeguard, or to maintain a balance between, the legitimate interests of both copyright work owners and users while protecting copyright works from infringement. However, in reality, it has failed to achieve this end. The legitimate interests of the users are often compromised in protecting copyright work owners' interests, requiring greater attention from the law makers.

Notes and References:

[1] World Copy Right Treaty 1996, Art. 8.

[2] WCT, Art. 10.

[3] WCT, Art. 11.

[4] WCT, Art. 12.

[5]See, e.g., Proceedings On Technological Strategies For Protecting Intellectual Property In The Networked Multimedia Environment, 1 J. Interactive Multimedia ASS'N 1 (Jan. 1994).

[6] P. Samuelson, 'Technological Protection For Copyrighted Works' (Harvard, 1996), 2. Available at http://people.ischool.berkeley.edu/~pam/courses/cyberlaw97/docs/techpro.pdf

[7] T. C. Vinje, 'Copyright imperilled?' 21(4)EIPR(1999) , 197.

[8] S. Lai, 'Digital copyright and watermarking' EIPR(1999), 172.

[9] Basic proposal for the substantive provisions of the treaty on certain questions concerning the protection of literary and artistic works to be considered by the conference, prepared by the chairman of the committee of Experts on a possible Protocol to the Berne convention, Article 7, WIPO document CRNR/DC/4, p. 29, August 30, 1996("Basic Proposal") Art. 13.

[10] J. Reinbothe and others, 'The new WIPO treaties: a first resume' EIPR (1997), 171.

[11] WCT, Art 11.

[12] The court already empowered the copyright owners to control the sale all those technologies that are used to enable copyright infringement. See e.g. *SONY CORP. OF AMER. v. UNIVERSAL CITY STUDIOS, INC*., (1984) 464 U.S. 417. Available at "http://www.law.cornell.edu/copyright/cases/464_US_417.htm"

[13] WCT, Art. 11.

[14] Ibid.

[15] See, e.g., section 1201(a)(3)(B) of U.S Code, as added by DMCA: a technological measure effectively controls access to a work if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work". EU Copyright Directive, article 6(3), starts with the same language as DMCA. It defines that a technological measure is "effective" if it "in the normal course of its operation" restricts the exercise of copyright in the work. The essay explains how the word "Effective" is interpreted by different nations in the light of article 11 of WCT in the second section.

[16] See, for example, M. Valimaki, 'keep on hacking: a Finnish court says technological measures are no longer effective when circumventing applications are widely available on the internet' 4 (2007). Available at http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/valimaki.asp.

[17] O. Dmytrenko and J. X. Dempsey, 'Copyright & the Internet: Building Nnationa Legislative Frameworks based on International Copyright Law', Global Internet Policy Initiative Papers (Dec. 2004), 18.

[18] Ibid. 18-19.

[19] WCT, Art. 11.

[20] Preamble of WCT.

[21] J. Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?', 5 E.I.P.R.(1996), 260.

[22] T. C. Vinje; 'Copyright imperilled?' EIPR (1999), 198.

[23] P. Samuelson, 'More Sensible Anti-Circumvention Regulations', 2.

Available at http://www.people.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf.

[24] Ibid.

[25] See, e.g., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. Copyright Office Summary, (1998), 3-4.

[26] Section 1201(a)(1) of DMCA states "no person shall circumvent a technical measure that effectively controls access" to a [copyrighted] work.

[27] Sections 1201 (a) (2) and 1201 (b) state that "no person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology" that can circumvent access controls or copy protection technologies.

[28] M. Wing and E. Kirk, 'European/U.S.Copyright Law Reform: Is the Balance Being Cchieved?' IPQ (2000), 139.

[29] 17 U.S.C section 107.Available at http://www.copyright.gov/title17/92chap1.html

[30] *See, e.g., Ty, Inc. v. Publications Int'l, Ltd.,* (7th Cir. 2002) 292 F.3d 512, 522 (Posner, J.).

[31] D. Nimmer, 'Fairest of Them All' and 'Other Fairy Tales of Fair Use', 66 (1/2) Law & Contemp.Probs (2003), 263, 280.

[32] N. Helberger, 'Not so silly after all â€"new hope for private copying', (2005), 5. Available at http://www.indicare.org/tiki-read_article.php?articleId=132

[33] M. Hart, 'The Copyright in the Information Society Directive: An Overview'. 24(2) EIPR (2002), 62.

[34] See, e.g., generally, M. Heins and T. Beckles, 'WILL FAIR USE SURVIVE? Free Expression in the Age of COPYRIGHT CONTROL' 55 (2005).

[35] C. Geiger, 'Copyright and Free Access to Information - For a Fair Balance of Interests in a Globalised World' 28(7) EIPR (2006), 366-373.

[36] See, e.g., D. McCullag, 'Russian Adobe Hacker Busted, (2001). Available athttp://www.wired.com/politics/law/news/2001/07/45298.

[37] See, e.g., G.Burton, 'Professor threatened over copyright protection hack' .Available at http://www.informationage.com/article/2001/april/professor_threatened_over_copyright_protection_hack

[38] First amendment of U.S Constitution says Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[39] P. Samuelson, 'Anticircumvention Rules: threat to science', (2001), 2028-2031.

[40]See, e.g., 'compliance toolkit: MPs demand DRM safeguards'. Available at http://news.zdnet.co.uk/internet/0,1000000097,39273097,00.htm

[41] See, e.g., Article, 'Warcraft game maker in spying row' (2005), BBC. Available at http://news.bbc.co.uk/2/hi/technology/4385050.stm.

[42] Ibid

[43] The "GDO", a company tried to use TPMs to ensure that GDO remotes should be used by its customers for opening their garage doors. For detail see *Chamberlain Group, Inc. v. Skylink Technologies, Inc* (2004).