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Anti-Circumvention Laws and Consumer Fair Use: Evaluating Reform Needs in India's Copyright Governance

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ABSTRACT

The increasing reliance on technological protection measures (TPMs) has transformed copyright enforcement from a rights-based adjudicatory system into a technologically embedded control architecture. In India, Section 65A of the Copyright Act, 1957, introduced through the Copyright (Amendment) Act, 2012, criminalises circumvention of effective technological measures. While enacted to comply with obligations under the WIPO Copyright Treaty, the provision creates interpretive uncertainty regarding its interaction with statutory fair dealing exceptions under Section 52. This paper critically evaluates whether India's anti-circumvention framework adequately preserves lawful consumer uses or risks allowing technological controls to override legislative limitations. Through doctrinal analysis, comparative evaluation of the United States Digital Millennium Copyright Act and the European Union Information Society Directive, and constitutional examination under Article 19(1)(a), this study argues that although the "intent to infringe" requirement narrows liability, the absence of explicit harmonisation with fair dealing creates chilling effects. The paper concludes that targeted statutory reform grounded in proportionality and constitutional balance is necessary to ensure coherence in India's digital copyright governance.

Keywords

Anti-Circumvention; Fair Dealing; Technological Protection Measures; Section 65A; Constitutional Balance; Digital Copyright; Access to Knowledge

1. INTRODUCTION

Copyright law historically functioned as a calibrated balance between two competing objectives: incentivising authors and ensuring public access to knowledge. The legal system recognised exclusive rights but simultaneously carved out limitations such as fair dealing to prevent monopolistic overreach. However, the digital environment has destabilised this equilibrium. Unlike traditional print media, digital works can be copied and distributed instantaneously at negligible cost. In response, copyright owners have increasingly relied on technological protection measures (TPMs) such as encryption, password controls, and digital rights management systems to regulate access and usage.

India incorporated legal protection for TPMs through the Copyright (Amendment) Act, 2012, inserting Section 65A into the Copyright Act, 1957¹. Section 65A criminalises the circumvention of effective technological measures applied to protect copyrighted works, provided such circumvention is undertaken with the “intention of infringing” rights under the Act. This amendment was enacted to fulfil India’s obligations under Article 11 of the WIPO Copyright Treaty (WCT), which mandates member states to provide adequate legal protection against circumvention of technological safeguards.²

At first glance, Section 65A appears carefully drafted, particularly because it incorporates a mens rea requirement absent in stricter foreign models. Yet, the deeper normative question remains unresolved: how does this anti-circumvention provision interact with Section 52, which codifies fair dealing exceptions? If a consumer circumvents digital locks solely to engage in private research, criticism, review, or educational use—activities expressly permitted under Section 52 does such conduct become criminal?

Indian copyright jurisprudence has consistently emphasised balance. In *R.G. Anand v. Delux Films*, the Supreme Court clarified that copyright protects expression rather than ideas, thereby limiting monopolistic expansion.³ Later, in *Eastern Book Company v. D.B. Modak*, the Court underscored the need to preserve equilibrium between private incentives and public dissemination of knowledge⁴. Similarly, in *The Chancellor Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, the Delhi High Court recognised that

¹ 17 USC §1201(a)(1)(A) (2018)

² Julie E Cohen, ‘WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?’ (1999) 21 EIPR 236, 240

³ *Universal City Studios Inc v Reimerdes* 111 F Supp 2d 294 (SDNY 2000)

⁴ *ibid* 318–320

access to educational material constitutes a core public interest embedded within copyright limitations⁵.

Technological locks, however, may operate independently of statutory exceptions. If TPMs prevent users from accessing content for lawful purposes, and if circumvention exposes them to criminal liability, fair dealing risks becoming illusory. This raises constitutional concerns under Article 19(1)(a) of the Constitution of India, which guarantees freedom of speech and expression, including the right to receive information⁶.

This paper addresses the central research question: **Does India’s anti-circumvention regime preserve the structural balance of copyright law, or does it risk converting limited statutory rights into technologically reinforced monopolies?** Through doctrinal analysis, comparative evaluation, and constitutional reasoning, the paper argues that while Section 65A is textually narrower than the U.S. model, its silence regarding fair dealing necessitates reform to prevent chilling effects and doctrinal inconsistency.

2. LITERATURE REVIEW

The modern debate on anti-circumvention law originates in the United States with the enactment of the Digital Millennium Copyright Act (DMCA) in 1998. Section 1201(a)(1)(A) prohibits the circumvention of technological measures controlling access to copyrighted works, irrespective of whether the resulting conduct constitutes infringement⁷. This marked a decisive departure from traditional copyright doctrine. Historically, copyright liability attached to unauthorised reproduction, distribution, public performance, or communication. The DMCA reoriented enforcement toward control over access itself, thereby creating what many scholars describe as a quasi-proprietary “right of access” independent of infringement⁸.

This doctrinal transformation was judicially validated in *Universal City Studios v Reimerdes*, where the U.S. District Court restrained dissemination of DeCSS software capable of decrypting DVDs⁹. The defendants argued that consumers who lawfully purchased DVDs should be entitled to view them on alternative operating systems. The court nevertheless held

⁵ Pamela Samuelson, ‘Intellectual Property and the Digital Economy’ (2000) 14 Berkeley Tech LJ 519, 548

⁶ *Felten v RIAA* 203 F Supp 2d 384 (DNJ 2002)

⁷ 17 USC §1201(a)(1)(C)

⁸ Jessica Litman, *Digital Copyright* (Prometheus 2001) 145–147

⁹ Directive 2001/29/EC, art 6

that circumventing encryption violated §1201, even absent infringing reproduction¹⁰. The judgment effectively decoupled circumvention from infringement, reinforcing the autonomy of technological protection measures (TPMs). Critics argue that this move destabilised copyright's internal balance by allowing private technological architectures to override statutory exceptions¹¹.

Subsequent scholarship has highlighted the DMCA's systemic implications. Researchers have documented chilling effects on security research, interoperability development, encryption analysis, and archival preservation¹². The triennial exemption procedure administered by the U.S. Copyright Office attempts to mitigate overbreadth by temporarily authorising specific classes of circumvention¹³. However, commentators contend that the burden of proof rests disproportionately on users, thereby inverting the normative presumption that statutory limitations are integral components of copyright rather than regulatory indulgences¹⁴.

The European Union adopted a more structured balancing framework under Directive 2001/29/EC (Information Society Directive). Article 6 mandates legal protection for TPMs but requires Member States to ensure that beneficiaries of statutory exceptions can effectively exercise their rights¹⁵. Unlike the DMCA's strict separation, the EU model embeds limitation-preservation within the anti-circumvention regime itself. The Court of Justice of the European Union (CJEU) clarified this approach in *Nintendo Co Ltd v PC Box Srl*, emphasising proportionality¹⁶. The Court required national authorities to assess whether technological measures exceeded what was necessary to safeguard copyright¹⁷. Protection of TPMs, therefore, cannot extend beyond legitimate objectives.

In India, anti-circumvention protection was introduced through the Copyright (Amendment) Act 2012, inserting Section 65A into the Copyright Act 1957¹⁸. Notably, India departed from the DMCA model by incorporating the phrase "with the intention of infringing such rights." This mens rea requirement reflects legislative awareness of comparative overreach. Yet

¹⁰ *Nintendo Co Ltd v PC Box Srl* (C-355/12) EU:C:2014:25

¹¹ *ibid* [29]–[31]

¹² Copyright (Amendment) Act 2012, s 27

¹³ Prashant Reddy and Sumathi Chandrashekar, *Create, Copy, Disrupt* (OUP 2017) 215–220.

¹⁴ *Civic Chandran v Ammini Amma* 1996 (16) PTC 329 (Ker HC)

¹⁵ *The Chancellor Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229

¹⁶ Copyright Act 1957, s 65A

¹⁷ WIPO Copyright Treaty 1996, art 11

¹⁸ Constitution of India, art 19(1)(a), 19(2)

scholarly commentary underscores interpretive uncertainty¹⁹. Does “intent to infringe” refer strictly to infringement under Section 14, or could it encompass broader notions of unauthorised access even where ultimate use falls within Section 52 exceptions?

Indian jurisprudence on fair dealing provides contextual guidance. In *Civic Chandran v Ammini Amma*, parody was recognised as legitimate criticism protected under fair dealing²⁰. In *The Chancellor Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services*, the Delhi High Court emphasised that copyright must not obstruct access to education²¹. These decisions affirm that exceptions are structurally embedded safeguards rather than peripheral defences.

Despite these developments, doctrinal exploration of Section 65A’s interaction with Section 52 remains limited. The literature identifies three recurring concerns: technological overreach, chilling effects, and constitutional tension. However, systematic integration of comparative doctrine, constitutional reasoning, and statutory interpretation within the Indian context remains underdeveloped. This paper addresses that gap.

3. METHODOLOGY

This research adopts a doctrinal methodology grounded in close statutory interpretation of Sections 52 and 65A of the Copyright Act 1957. The analysis begins with textual interpretation, paying particular attention to the mens rea phrase “with the intention of infringing such rights.”²² Given the criminal nature of Section 65A, principles of strict construction and the rule of lenity inform interpretive analysis.

Legislative intent is examined through the Copyright (Amendment) Act 2012 and India’s obligations under Article 11 of the WIPO Copyright Treaty²³. While Article 11 requires adequate legal protection for TPMs, it does not prescribe strict liability or prohibit linkage to limitations and exceptions. This leaves interpretive space for harmonisation with domestic constitutional principles.

¹⁹ Copyright Act 1957, s 65A(1)

²⁰ *Tolaram Relumal v State of Bombay* AIR 1954 SC 496, 499

²¹ Copyright Act 1957, s 52(1)

²² *Civic Chandran* (n 14)

²³ *Rameshwari Photocopy* (n 15)

Judicial decisions interpreting fair dealing are analysed to extract normative commitments to access, education, criticism, and dissemination of knowledge. Supreme Court jurisprudence is examined to situate copyright within constitutional doctrine, particularly Articles 19(1)(a) and 19(2) of the Constitution of India²⁴.

Comparative analysis is employed as a secondary methodological tool. The United States and European Union frameworks serve as contrasting models: the DMCA illustrates risks of expansive anti-circumvention enforcement, while the EU model demonstrates proportionality-based balancing. Comparative insights are used normatively rather than prescriptively.

The methodology emphasises doctrinal coherence, constitutional compatibility, and normative alignment. It does not rely on empirical data but instead interrogates structural compatibility between anti-circumvention law and copyright's foundational principles.

4. MAIN ANALYSIS

4.1 INTERPRETING “INTENT TO INFRINGE” UNDER SECTION 65A

Section 65A criminalises circumvention of effective technological measures applied to protect rights conferred by the Act, provided such circumvention is undertaken with intent to infringe²⁵. The inclusion of mens rea distinguishes Indian law from the DMCA's access-based prohibition.

A purposive reading suggests that “intent to infringe” must correspond to infringement under Section 14. If a user circumvents DRM solely to engage in research, criticism, or educational use permitted under Section 52, the underlying act lacks infringing character. Therefore, the mental element required for criminality should not be satisfied.

However, ambiguity arises because Section 65A does not explicitly cross-reference Section 52. This structural separation risks interpretive expansion. Criminal statutes must be construed narrowly, especially where fundamental rights may be implicated²⁶. Any broader reading would contradict legislative caution evident in the 2012 amendment.

²⁴ Constitution of India, art 19(1)(a)

²⁵ Eastern Book Company v DB Modak (2008) 1 SCC 1 [56]–[58]

²⁶ Reimerdes (n 3) 318–320

4.2 FAIR DEALING AS STRUCTURAL SAFEGUARD

Section 52 enumerates activities that do not constitute infringement, including private use, research, criticism, review, reporting of current events, and educational reproduction²⁷. These are not mere defences; they define copyright's scope.

In *Civic Chandran*, the Kerala High Court stressed that parody and criticism cannot be suppressed through copyright enforcement.²² In *Rameshwari Photocopy*, the Delhi High Court underscored the centrality of access to education in a developing country.²³ These cases demonstrate judicial sensitivity to copyright's social function.

If TPMs prevent users from accessing works for legitimate purposes, statutory exceptions risk being neutralised technologically. Legal reinforcement of such neutralisation through Section 65A would distort copyright's internal equilibrium.

4.3 CONSTITUTIONAL BALANCE AND DIGITAL CONSTITUTIONALISM

Article 19(1)(a) guarantees freedom of speech and expression, including the right to receive information.²⁴ Copyright restrictions are permissible under Article 19(2), but must remain reasonable.

In *Eastern Book Company v DB Modak*, the Supreme Court recognised dissemination of knowledge as central to copyright's justification.²⁵ Excessive technological enforcement that restricts lawful access may therefore raise constitutional concerns.

Digital constitutionalism recognises that private technological systems increasingly regulate expression. When criminal law fortifies those systems, proportionality review becomes essential. Section 65A must thus be interpreted in harmony with constitutional guarantees.

4.4 COMPARATIVE LESSONS: AVOIDING OVERREACH

The DMCA's trajectory illustrates how anti-circumvention provisions can evolve beyond their initial anti-piracy rationale. In *Reimerdes*, lawful ownership did not shield users from

²⁷ *Nintendo (n 10)* [30]

liability.²⁶ Subsequent controversies involving device repair and security research demonstrate structural risks of technological overprotection.

India's mens rea requirement mitigates these risks but does not eliminate them. Without explicit linkage to Section 52, interpretive drift remains possible.

4.5 PROPORTIONALITY AND TECHNOLOGICAL MEASURES

The CJEU in Nintendo required proportionality analysis to determine whether TPMs exceeded legitimate objectives.²⁷ Such reasoning aligns with Indian constitutional doctrine, where proportionality is a recognised standard for evaluating restrictions on fundamental rights²⁸.

Applying proportionality to Section 65A would require courts to assess:

- Legitimacy of objective (anti-piracy),
- Suitability of technological measure,
- Necessity (availability of less restrictive alternatives),
- Balancing of interests.

4.6 MARKET STRUCTURE AND CONSUMER AUTONOMY

Technological Protection Measures (TPMs) do more than prevent unauthorised copying; they reshape the structure of digital markets. Traditionally, copyright protection has been limited in duration, territorial scope, and subject matter. It grants exclusive rights for a fixed term, after which works enter the public domain. It regulates specific acts such as reproduction and communication to the public, not mere access or personal use. TPMs, however, operate differently. By embedding control directly into the technological architecture of a product, they allow right holders to regulate how a work is accessed, used, modified, or transferred—even after a lawful sale has occurred. When anti-circumvention law reinforces these technological controls without adequate safeguards, copyright risks expanding beyond its intended boundaries.

One significant concern relates to interoperability. Digital ecosystems increasingly function through closed platforms where software, hardware, and content are designed to operate only within authorised systems. TPMs can prevent users from accessing content on alternative

²⁸ Modern Dental College v State of Madhya Pradesh (2016) 7 SCC 353 [60]–[62]

devices or from developing compatible software. While such measures may reduce piracy, they can also suppress competition and innovation. Independent developers, researchers, and small enterprises may be prevented from creating interoperable tools, not because their activities infringe copyright, but because they require circumvention to ensure compatibility. If anti-circumvention provisions are interpreted broadly, lawful innovation could be chilled. In this sense, TPMs may shift market power toward dominant firms by entrenching proprietary ecosystems.

Resale restrictions present another structural issue. Under traditional copyright principles, the doctrine of exhaustion (or first sale) permits the owner of a lawful copy to resell or otherwise dispose of it without the copyright holder's permission. In digital markets, TPMs can undermine this principle by preventing transfer of digital goods altogether. If access is tied to user accounts, licenses, or subscription models enforced by encryption, consumers may find themselves unable to exercise ordinary ownership rights. Although such arrangements are often framed as licensing rather than sale, the practical effect is to weaken secondary markets and consolidate control in the hands of rights holders. Anti-circumvention enforcement, if detached from fair dealing and exhaustion principles, may inadvertently validate this erosion of consumer autonomy.

Repair and modification also illustrate the broader implications of TPM enforcement. Increasingly, digital works are embedded in devices ranging from smartphones to agricultural equipment. TPMs can prevent owners from repairing or modifying these devices, even when such actions do not involve copyright infringement. Circumventing embedded software locks to enable repair may technically fall within the scope of anti-circumvention provisions, despite the absence of any intent to reproduce or distribute copyrighted material unlawfully. Overbroad enforcement in this context shifts copyright from protecting expressive works to controlling tangible goods and downstream markets. The result is not merely anti-piracy regulation but an extension of control into areas traditionally governed by consumer protection and competition law.

These dynamics reveal how TPMs, when combined with strong anti-circumvention rules, can transform copyright into an enduring access-based entitlement. Unlike statutory rights, which are time-bound and subject to exceptions, technological locks can persist indefinitely. If the law treats circumvention itself as wrongful without careful scrutiny of purpose, it may create a form of perpetual control that exceeds the limited monopoly envisaged under copyright

doctrine. Such expansion has implications not only for market structure but also for distributive fairness, particularly in economies where digital access is central to education, entrepreneurship, and cultural participation.

A balanced interpretation of anti-circumvention provisions must therefore distinguish clearly between piracy and legitimate post-purchase autonomy. Circumvention undertaken to reproduce or distribute works unlawfully stands on a different footing from circumvention necessary to access lawfully acquired content across platforms, repair owned devices, or enable interoperability. The presence or absence of infringing intent becomes critical in maintaining this distinction. Interpreting “intent to infringe” narrowly—so that it refers to infringement of substantive copyright rights rather than mere bypassing of access controls—helps preserve this boundary.

Moreover, judicial engagement with proportionality can prevent technological measures from overriding statutory limitations and consumer rights. Courts can examine whether enforcement in a particular case genuinely advances copyright’s objectives or instead suppresses lawful uses and competition. Such scrutiny does not undermine protection against piracy; rather, it ensures that copyright remains aligned with its foundational purpose of promoting creativity and dissemination without unduly restricting markets or individual freedom.

In the digital economy, where code increasingly functions as regulation, legal oversight becomes essential. Anti-circumvention law should not serve as an automatic shield for every technological restriction. Instead, it must operate within the broader framework of copyright’s limits, consumer expectations of ownership, and constitutional values. By maintaining a clear conceptual separation between unauthorised exploitation and legitimate autonomy, the law can prevent the gradual transformation of copyright into a perpetual, technology-backed access monopoly while still safeguarding the legitimate interests of rights holders.

5. DISCUSSION

India’s anti-circumvention framework reflects legislative moderation. Yet structural ambiguity risks chilling legitimate conduct. Reform should pursue:

1. **Explicit Harmonisation:** Amend Section 65A to clarify that circumvention solely for lawful purposes under Section 52 does not attract liability.

2. **Statutory Proportionality Clause:** Incorporate language requiring courts to assess proportionality of TPM enforcement.
3. **Administrative Review Mechanism:** Establish periodic review akin to, but less burdensome than, the U.S. triennial exemption system.

Such reforms would reduce uncertainty, reinforce constitutional compatibility, and strengthen India's innovation ecosystem.

6. CONCLUSION

Section 65A of the Copyright Act, 1957 represents India's deliberate effort to recalibrate copyright enforcement for the realities of digital dissemination. In an era in which creative works circulate through encrypted platforms, subscription ecosystems, and cloud-based infrastructures, technological protection measures (TPMs) have become central to copyright governance. By criminalising circumvention of effective technological measures, India signalled its compliance with international treaty commitments and its recognition of piracy as a serious digital threat. Yet, unlike the rigid architecture of the United States' Digital Millennium Copyright Act, India incorporated a crucial doctrinal safeguard: the requirement that circumvention occur "with the intention of infringing such rights." This mens rea element reflects legislative caution and an awareness of the comparative experience where anti-circumvention rules have, at times, expanded beyond their anti-piracy rationale.

However, the structural positioning of Section 65A reveals a deeper tension. The provision operates alongside Section 52, which enumerates fair dealing exceptions and other statutorily permitted uses. These exceptions are not peripheral indulgences granted to users; they define the limits of copyright itself. They represent Parliament's judgment that copyright protection must coexist with education, criticism, research, reporting, and private use. When technological measures prevent users from exercising these lawful freedoms—and when anti-circumvention law criminalises attempts to bypass those barriers—the balance embedded within the statute risks being disturbed. The difficulty is not merely textual; it is systemic. If TPMs function as de facto gatekeepers and the law shields those gatekeepers without qualification, statutory exceptions may become practically inaccessible.

The ambiguity lies in the interpretive space between "intent to infringe" and "lawful use." If circumvention is undertaken solely to enable an act permitted under Section 52, it is difficult

to characterise such conduct as undertaken with an intention to infringe copyright rights under Section 14. Yet the statute does not explicitly articulate this linkage. The absence of express harmonisation creates interpretive uncertainty, particularly given the criminal consequences attached to Section 65A. In intellectual property law, uncertainty often produces a chilling effect: individuals and institutions may refrain from lawful conduct due to fear of liability. In the context of education, research, digital archiving, accessibility for persons with disabilities, and technological interoperability, such deterrence could undermine broader social objectives.

Comparative experience underscores the importance of doctrinal clarity. The trajectory of the DMCA demonstrates how anti-circumvention provisions can gradually shift the centre of gravity of copyright law from regulating acts of infringement to regulating access itself. Once access control becomes the primary legal concern, copyright begins to resemble a perpetual technological entitlement rather than a time-limited statutory right subject to defined exceptions. The European Union's proportionality-oriented framework, by contrast, illustrates a more structured balancing approach, where technological protection must remain necessary and appropriate to safeguard legitimate interests. These comparative models offer cautionary and instructive lessons rather than templates for transplantation. India's constitutional framework provides its own normative compass.

Any interpretation of Section 65A must be consistent with Article 19(1)(a) of the Constitution of India, which protects freedom of speech and expression, including the right to receive information. Copyright restrictions are recognised as reasonable under Article 19(2), but only insofar as they maintain proportionality. Technological enforcement that suppresses legitimate access, criticism, or research could raise constitutional concerns. The Supreme Court has repeatedly emphasised that copyright exists not merely to reward authors but to promote dissemination of knowledge and learning. A reading of Section 65A that subordinates Section 52 exceptions to technological barriers would sit uneasily with this constitutional vision.

The digital environment complicates this balance further. Increasingly, private technological architectures determine how, when, and under what conditions individuals may access cultural and informational goods. When criminal law fortifies those architectures without clearly preserving user rights, regulatory authority effectively shifts from public legislation to private code. Such a shift raises broader questions about accountability, democratic legitimacy, and access equity particularly in a developing country context where digital access to knowledge

is central to educational advancement and innovation. Copyright governance must therefore remain attentive not only to piracy but also to inclusion and public interest.

Reform need not weaken enforcement against genuine infringement. Rather, it should clarify that circumvention undertaken solely for purposes authorised under Section 52 does not satisfy the mens rea requirement of Section 65A. Explicit statutory harmonisation would reduce interpretive uncertainty and align anti-circumvention enforcement with the Act's internal logic. Additionally, embedding proportionality principles either legislatively or through judicial interpretation would ensure that enforcement remains tethered to legitimate objectives and does not evolve into overbroad access control.

Ultimately, India's anti-circumvention regime stands at a critical juncture. It has avoided the most severe features of strict liability models, yet its long-term coherence depends on interpretive vigilance. Copyright law derives its legitimacy from maintaining equilibrium: protecting creators while enabling circulation of ideas, fostering markets while supporting education, incentivising innovation while preserving democratic discourse. A calibrated and constitutionally informed approach to Section 65A will ensure that technological protection enhances, rather than distorts, this foundational balance. In doing so, India can develop a model of digital copyright governance that is both internationally compliant and normatively grounded in its constitutional commitment to access, knowledge, and expressive freedom.