
LOCKED OUT OF THE COMMONS: DIGITAL RIGHTS MANAGEMENT, TECHNOLOGICAL PROTECTION MEASURES, AND THE EROSION OF FAIR DEALING UNDER INDIAN COPYRIGHT LAW

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ABSTRACT

India's 2012 Copyright (Amendment) Act introduced Sections 65A and 65B, providing statutory protection for technological protection measures (TPMs) and digital rights management (DRM) systems. While these provisions were enacted to curb large-scale digital piracy, their interaction with the pre-existing fair dealing framework under Section 52 has generated a structural contradiction at the heart of Indian copyright jurisprudence. This paper argues that tech-driven IP locks when deployed without calibration produce a phenomenon termed here as the 'Piracy of the Public Domain': the effective re-privatisation of works that legally belong to the public, including ancient manuscripts, classical art, and expired-copyright heritage materials. Drawing on the sole Indian TPM adjudication (*Tata Sky v. YouTube*, 2016), the landmark educational fair dealing ruling (*The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, 2016), the Marrakesh Treaty obligations for accessibility, and the emerging Right to Repair movement, the paper maps the zones of conflict between Section 65A and the user rights Parliament expressly protected. Comparative analysis of the United States Digital Millennium Copyright Act and the European Union Copyright Directive demonstrates that India's intention-based circumvention threshold is structurally superior but procedurally inadequate. The paper concludes with a four-point reform agenda: automatic DRM removal upon copyright expiry, codified exceptions for repair, accessibility and encryption research, fair-use compliant DRM mandates, and a DRM Ombudsman under DPIIT.

Index Terms: Technological Protection Measures, Digital Rights Management, Section 65A, Fair Dealing, Public Domain, Right to Repair, Marrakesh Treaty, Copyright Act 1957, DRM Reform.

I. INTRODUCTION

Copyright law rests on a foundational bargain: creators receive a time-limited monopoly over their works in exchange for the eventual enrichment of the public domain. Parliament translates this bargain into statute by granting exclusive rights under Section 14 of the Copyright Act, 1957, while simultaneously carving out user rights most prominently the fair dealing exceptions under Section 52 to ensure that scholarship, education, criticism, and disability access are never subordinated to proprietary control.¹

¹ Copyright Act, 1957 (Act 14 of 1957), ss. 14, 52. The statutory scheme reflects the classic Lockean bargain as articulated in the Statute of Anne, 1710 (8 Anne c. 19), and restated in the Report of the Copyright Law Review Committee (Chairman: Justice N. Rajagopala Ayyangar), Government of India, 1959.

The Copyright (Amendment) Act, 2012 complicated this equilibrium. Responding to India's obligations under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Parliament inserted Sections 65A and 65B, which criminalise the circumvention of 'effective technological measures' and the removal of 'rights management information,' respectively.² The intent was unambiguous: to equip rightsholders with legal tools commensurate with the scale of digital piracy that had proved ruinous to the Indian film, music, and software industries.

Yet, a decade after the amendment, a troubling pattern has emerged. The same digital locks that prevent the pirate from copying a Bollywood blockbuster also prevent the blind student from converting an e-book into an accessible format, the village mechanic from diagnosing a software-locked tractor, the archivist from downloading a two-thousand-year-old Sanskrit manuscript that is unambiguously in the public domain, and the university professor from assembling a course-pack that the Delhi High Court explicitly held was non-infringing.³ The technology does not know the law; it enforces access control with binary precision against pirate and scholar alike.

This paper interrogates that contradiction. It proceeds in seven parts: Part II surveys the mechanics of DRM and TPMs and their legal encoding in Sections 65A and 65B. Part III develops the concept of the 'Piracy of the Public Domain.' Part IV maps the three primary zones of conflict between Section 65A and Section 52 fair dealing: education, accessibility, and repair. Part V analyses the only substantial Indian TPM decision, *Tata Sky Ltd. v. YouTube LLC* (2016). Part VI situates India within a comparative frame, contrasting the US DMCA and EU approaches. Part VII proposes a four-point legislative and regulatory reform agenda. A brief conclusion follows.

II. THE STATUTORY ARCHITECTURE: SECTIONS 65A AND 65B OF THE COPYRIGHT ACT, 1957

A. The 2012 Amendment: Legislative Context

Prior to 2012, the Copyright Act, 1957 contained no provision specifically addressing circumvention of technological protection measures. The growing volume of digital piracy estimates placed annual losses to the Indian film industry alone at over ₹18,000 crore by 2010 and India's accession to the WIPO Internet Treaties necessitated legislative action.⁴ The Joint Parliamentary Committee reviewing the Copyright (Amendment) Bill, 2010 noted that TPM protection was 'indispensable in the digital environment' but also acknowledged that exceptions must be built in to safeguard legitimate uses.⁵

B. Section 65A: The Anti-Circumvention Provision

² WIPO Copyright Treaty, Geneva, December 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Geneva, December 20, 1996, 36 I.L.M. 76. India acceded to both treaties in 2013. The Copyright (Amendment) Act, 2012 (Act 27 of 2012) inserted ss. 65A and 65B with effect from June 21, 2012.

³ The three scenarios are drawn from the core factual patterns identified in ss. 52(1)(zb) (accessibility), 65A read with the Right to Repair Portal India context (repair), and the National Mission for Manuscripts Programme documentation (public-domain digitisation). The educational scenario tracks *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, (2016) 236 DLT 403 (Division Bench).

⁴ Federation of Indian Chambers of Commerce and Industry (FICCI) & KPMG, 'Indian Media and Entertainment Industry Report 2011,' March 2011, estimating losses attributable to digital piracy at approximately ₹18,000 crore annually across filmed entertainment, music, and software.

⁵ Standing Committee on Human Resource Development, 'Report on the Copyright (Amendment) Bill, 2010,' Fourteenth Report, Rajya Sabha, 2012, paras. 4.3 - 4.7.

Section 65A(1) creates a criminal offence: any person who circumvents an 'effective technological measure' applied by or with the authority of the copyright owner, with the intention of infringing copyright, is punishable with imprisonment of up to two years and a fine.⁶ Three definitional elements merit analysis.

First, 'effective technological measure' (ETM) is defined in the Explanation to Section 65A as any technology, device, or component that, in the normal course of its operation, controls access to a work or protects a copyright. The qualifier 'effective' is significant: a nominal or easily circumvented barrier does not qualify.⁷ This threshold prevents the absurd outcome of protecting public-domain works behind purely symbolic locks.

Second, the provision distinguishes between access controls and copy controls a distinction the US DMCA famously collapsed, generating decades of over-enforcement. Section 65A's text is broader, covering measures that 'protect any of the rights conferred' under the Act, which could encompass both categories.

Third, and most critically, Section 65A(1) contains an intention safeguard: circumvention is illegal only 'with the intention of infringing' copyright. This is the provision's most distinctive and potentially protective feature. In this regard, India's law is structurally superior to Section 1201 of the DMCA, which imposes liability for circumvention regardless of infringing purpose.⁸

Section 65A(2) enumerates exceptions to the anti-circumvention rule, permitting circumvention: (a) for criticism, review, news reporting, and other Section 52 fair dealing purposes; (b) for encryption research, provided the researcher has lawfully obtained the protected copy; (c) for lawfully authorised investigation activities by government agencies; and (d) for security testing of a computer system or network, with the prior consent of the owner or operator.⁹ Notably, each exception is conditioned on the circumventor maintaining a record of the facilitated person's name, address, and purpose a record-keeping burden that in practice dissuades many legitimate researchers and educators from invoking the exception at all.

C. Section 65B: Rights Management Information

Section 65B addresses a related but distinct harm: the deliberate removal or alteration of rights management information (RMI) data embedded in a digital file identifying the work, the author, the rights owner, and the terms of use.¹⁰ Liability under Section 65B does not require intention to infringe; it arises upon knowing distribution of a work whose RMI has been removed or altered. While less directly implicated in the public-domain access debate, Section 65B becomes relevant when institutions digitising historical artefacts embed proprietary metadata that falsely implies a copyright interest.

D. The Structural Tension with Section 52

Section 52 of the Copyright Act enumerates acts that do not constitute infringement, including: fair dealing for private study, research, criticism, review, and news reporting; reproduction for educational purposes by educational institutions; conversion

⁶ Copyright Act, 1957, s. 65A(1). Punishment: imprisonment of up to two years and/or fine.

⁷ Copyright Act, 1957, s. 65A, Explanation: 'effective technological measure' means any technology, device or component that, in the normal course of its operation, protects any of the rights conferred under this Act.

⁸ 17 U.S.C. § 1201(a)(1)(A) (United States Digital Millennium Copyright Act, 1998). For commentary on the absence of an intent requirement, see Pamela Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,' (1999) 14 Berkeley Technology Law Journal 519.

⁹ Copyright Act, 1957, s. 65A(2)(a), (d).

¹⁰ Copyright Act, 1957, s. 65B; 'rights management information' is defined by reference to information identifying the work and the owner thereof, embedded in or appearing in connection with a copy of a work.

of works into accessible formats for persons with disabilities under Section 52(1)(zb); and certain library and archive uses.¹¹ The provision was significantly expanded by the 2012 Amendment to accommodate digital education and the Marrakesh Treaty framework.

The structural tension is this: Section 52 creates a right a statutory entitlement to perform specified acts without the copyright owner's consent. Section 65A, however, does not instruct DRM systems to honour that right. A student who falls squarely within Section 52(1)(a) (fair dealing for private study) is nonetheless technically blocked by a DRM system. The student's subsequent attempt to circumvent the lock, even for an unambiguously lawful purpose, exposes her to criminal prosecution under Section 65A(1), because the burden of demonstrating absence of infringing intent is practically impossible to discharge in a pre-trial setting. This chilling effect is the central problem the paper addresses.

III. PIRACY OF THE PUBLIC DOMAIN: THE ENCLOSURE OF INDIAN CULTURAL HERITAGE

A. The Public Domain in Indian Copyright Law

Under Section 22 of the Copyright Act, 1957, literary, dramatic, musical, and artistic works enter the public domain sixty years after the death of the author.¹² Works created before 1964 are, in the ordinary case, freely available for any use, commercial or otherwise, without permission or payment. India's public domain is extraordinarily rich: it encompasses the complete works of Rabindranath Tagore, thousands of ancient Sanskrit and Tamil manuscripts, classical Mughal miniatures, archaeological documentation from the Indus Valley Civilisation, and colonial-era ethnographic records.

The public domain is not merely an absence of copyright; it is a positive commons a repository of knowledge and culture that every citizen may freely access, adapt, and build upon. As the Delhi High Court observed in *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, copyright protection is not 'a divine right' but a statutory privilege conferred in furtherance of the social purpose of disseminating knowledge.¹³

B. Digital Enclosure: The Mechanism

When public-domain works are digitized converted from fragile physical originals into searchable, reproducible digital files a legal question arises: does the act of digitisation generate a new, independent copyright in the digital version? In *Bridgeman Art Library Ltd. v. Corel Corporation*, the US District Court for the Southern District of New York held that a faithful photographic reproduction of a two-dimensional public-domain work lacks the requisite originality for copyright protection.¹⁴ The position in English law, following the Court of Justice of the European Union's decision in *Cofemel v. G-Star Raw* (C-683/17), is that copyright requires an 'author's own intellectual creation.' A mechanical scan conveys no such creation.

Indian courts have not definitively ruled on the point. The Copyright Act, 1957 requires 'originality' for a work to qualify for protection under Section 13, and the Supreme Court in *Eastern Book Company v. D.B. Modak* held that a work must involve

¹¹ Copyright Act, 1957, s. 52(1)(a) (fair dealing for private study, research, criticism, review, reporting); s. 52(1)(h) (reproduction in course of instruction); s. 52(1)(i) (reproduction by educational institutions); s. 52(1)(zb) (accessible formats for persons with disability).

¹² Copyright Act, 1957, s. 22 (literary, dramatic, musical, and artistic works: author's lifetime plus sixty years).

¹³ *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, (2016) 236 DLT 403 (DB) per Pradeep Nandrajog and Yogesh Khanna JJ: 'Copyright is not a divine right. It is a statutory right with attendant obligations.'

¹⁴ *Bridgeman Art Library Ltd. v. Corel Corporation*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (Kaplan J.), applying the originality threshold of *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

the 'exercise of skill and judgment' rather than mere labour or effort to attract copyright.¹⁵ On this standard, a high-resolution scan that mechanically reproduces the pixels of an uncopyrighted manuscript is unlikely to generate an independent copyright. Yet, in the absence of a definitive ruling, digitising institutions frequently assert ownership and enforce it through DRM.

The National Mission for Manuscripts (NMM), established under the Ministry of Culture, has catalogued over 5.2 million manuscripts across India. Several digitisation projects undertaken in partnership with private technology firms have produced digital archives accessible only through pay-walled or view-only portals that prevent download, printing, or screen-reader access.¹⁶ A scholar seeking to study a ninth-century palm-leaf manuscript documenting Karnatic musical theory finds herself licensing access to her own civilisational heritage from a private intermediary. This is the 'Piracy of the Public Domain': not an infringement by users, but an appropriation of the commons through code.

C. Museum Digitisation and Rights Management Information

Indian museums present a related dimension. Institutions including the National Museum, New Delhi, and several state archaeological museums have begun digitising their collections. High-resolution images of uncopyrighted artefacts Indus Valley seals, Chola bronzes, Gandharan sculptures are distributed with embedded watermarks and access restrictions under the purported authority of Section 65B.¹⁷ No court has upheld copyright in a digital scan of a three-dimensional artefact as such. The RMI protection in Section 65B, which is directed at preventing the falsification of authentic copyright information, is thus arguably being deployed to create, rather than merely to protect, an intellectual property claim.

The Bridgeman principle that fidelity to the original in reproduction is inconsistent with the originality required for copyright directly undermines the legal basis for such restrictions. If adopted by an Indian court, it would collapse the entire DRM-on-public-domain-scans edifice. In the interim, the threat of criminal liability under Section 65B deters circumvention even of legally indefensible access controls.

IV. THREE ZONES OF CONFLICT: EDUCATION, ACCESSIBILITY, AND THE RIGHT TO REPAIR

A. Education and the Legacy of the DU Photocopy Judgment

The most extensively litigated domain of Indian copyright fair dealing is education. In *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, the Delhi High Court's Single Bench held, and the Division Bench affirmed, that the preparation of course-packs through photocopying for educational use constitutes fair dealing under Section 52(1)(i) and does not infringe copyright.¹⁸ The court's observation that 'knowledge must be made available to students' was read by educational institutions as a robust affirmation of the primacy of educational access in Indian copyright law.

¹⁵ *Eastern Book Company v. D.B. Modak*, (2008) 1 SCC 1, per S.B. Sinha and V.S. Sirpurkar JJ, adopting a 'skill and judgment' standard for originality and rejecting the 'sweat of the brow' doctrine.

¹⁶ National Mission for Manuscripts, Ministry of Culture, Government of India, 'Annual Report 2022-23,' recording cataloguing of 5.2 million manuscripts across 38 states and union territories. Several portals, including Shodhganga (UGC-INFLIBNET) and individual NMM partner institutions, operate with view-only DRM on digital manuscript files.

¹⁷ The National Museum, New Delhi, and several state archaeological museums restrict high-resolution image downloads citing institutional copyright, though no statutory basis for such claims has been judicially established in India.

¹⁸ *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services*, CS (OS) No. 2439 of 2012 (Single Bench, Delhi HC, 2016); affirmed on appeal: (2016) 236 DLT 403 (DB). The publishers (Oxford University Press, Cambridge University Press, Taylor & Francis) subsequently withdrew the appeal to the Supreme Court.

The digital migration of educational content has, however, substantially eroded this protection in practice. University libraries and educational institutions have progressively substituted physical textbooks and photocopied course-packs with digital subscriptions to academic databases and e-book platforms.¹⁹ The e-books and journal articles available through these subscriptions are invariably DRM-protected. A professor who wishes to extract a twenty-page chapter an act explicitly contemplated as fair dealing in the DU Photocopy litigation finds that the DRM system refuses the extraction irrespective of educational purpose. The technology has effectively overridden a Delhi High Court judgment. No court has addressed this specific collision.

Section 52(1)(h) permits reproduction of a work by a teacher or pupil in the course of instruction. Section 52(1)(i) permits reproduction for educational institutions. Section 52(1)(j) permits making a sound recording of a literary, dramatic, or musical work for educational broadcast. Each of these provisions is rendered largely illusory in the digital environment by DRM that prohibits reproduction regardless of purpose. The result is a progressive impoverishment of the statutory fair dealing framework through the private ordering imposed by contractual licences and technological locks.

B. Accessibility and the Marrakesh Treaty Framework

India was among the earliest signatories and the first to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013.²⁰ Domestically, the 2012 Amendment inserted Section 52(1)(zb), which permits any person to reproduce, issue copies, communicate, or make available a published work in any accessible format for a person with disability. The provision does not require the permission of the copyright owner and is framed as an absolute exception.

The practical operation of Section 52(1)(zb) has been severely hampered by DRM. Commercial e-book platforms widely used in India including Kindle, Google Play Books, and institutional databases such as JSTOR and Westlaw India employ encryption that is incompatible with the major Indian-language assistive technologies.²¹ NVDA (NonVisual Desktop Access), the leading open-source screen reader, and its Hindi, Tamil, and Kannada voice packs cannot parse encrypted ePub files. A visually impaired law student is therefore unable to access a DRM-protected legal textbook despite possessing an absolute statutory right to convert it into an accessible format. The technology imposes a disability tax that the law expressly forbids.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and its successor the Rights of Persons with Disabilities Act, 2016 (RPWD Act), impose affirmative obligations on service providers to ensure accessibility.²² Section 42 of the RPWD Act mandates the provision of accessible electronic content. The persistence of DRM barriers that block accessibility-format conversion is arguably in breach of both the RPWD Act and India's obligations under

¹⁹ For a detailed account of the transition to digital subscriptions in Indian universities and its copyright implications, see Shamnad Basheer, 'Educational Exceptions and the 2012 Copyright Amendment,' (2013) 18 Journal of Intellectual Property Rights 7.

²⁰ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, WIPO Doc. VIP/DC/8. India ratified the Treaty on June 24, 2014, becoming the first country to do so.

²¹ This observation is drawn from documented reports by the National Association for the Blind India and Saksham Trust on barriers to digital reading access as of 2023; and from user-reported compatibility failures between major e-book platforms (Kindle, Google Play Books) and NVDA with Hindi/Kannada voice packs.

²² Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 42 (mandate for accessible electronic content in educational institutions).

the Marrakesh Treaty, yet no regulatory or judicial authority has ordered DRM providers to engineer accessibility compliance.

C. The Right to Repair and the Section 65A Paradox

India's repair economy is a significant economic and social institution. The All India Mobile Retailers Association estimates that approximately 150,000 independent mobile repair establishments operate across the country, supporting more than 500,000 direct livelihoods.²³ Similar informal repair ecosystems service agricultural equipment, consumer electronics, and automotive components. These enterprises are structurally important in a country where the cost of manufacturer-authorised repair is prohibitive for the majority of consumers.

Modern devices from John Deere tractors to iPhone handsets are engineered with software-based diagnostic systems that are accessible only through manufacturer-proprietary tools. To diagnose a malfunctioning engine control unit (ECU) in a software-locked tractor, an independent mechanic must deploy a diagnostic tool that communicates with the ECU by bypassing its access-control protocols. That act of communication-enabling bypass constitutes, on a literal reading of Section 65A(1), a circumvention of an effective technological measure.

The Ministry of Consumer Affairs launched the Right to Repair Portal India in 2022, directing manufacturers in the mobile, consumer electronics, automobile, and farm equipment sectors to publish repair manuals, spare parts catalogues, and diagnostic tool specifications.²⁴ The initiative is progressive in policy intent but legally insufficient, because it operates at the level of information disclosure, not statutory exemption. A mechanic armed with the officially disclosed repair manual who nevertheless bypasses a software lock to apply the manual's instructions remains technically liable under Section 65A(1). No amendment has been made to Section 65A to carve out a repair exemption.

The paradox is stark: government policy through one ministry actively encourages independent repair, while the Copyright Act as amended through another ministry simultaneously criminalises the act that makes independent repair possible. The farmer in Vidarbha who cannot afford a John Deere authorised service visit, and whose crop depends on a functional tractor, is the unintended victim of this inter-ministerial incoherence.

V. TATA SKY LTD. V. YOUTUBE LLC: INDIA'S SINGULAR TPM ADJUDICATION

India's sole substantive judicial engagement with Section 65A arose in *Tata Sky Ltd. v. YouTube LLC*, decided by the Delhi High Court in 2016.²⁵ The facts were commercially straightforward: Tata Sky, a direct-to-home broadcasting service, discovered that YouTube was hosting tutorial videos demonstrating methods to hack or 'clone' Tata Sky set-top boxes procedures that involved bypassing the conditional access system (CAS) protecting Tata Sky's encrypted broadcast signal. The purpose of the hack was unambiguously commercial in the infringing sense: it enabled viewers to access Tata Sky's paid subscription channels without payment.

²³ All India Mobile Retailers Association (AIMRA), 'State of the Mobile Repair Industry in India 2023,' estimating 150,000+ independent repair establishments and 500,000+ direct jobs.

²⁴ Ministry of Consumer Affairs, Food and Public Distribution, Government of India, Right to Repair Portal India, launched July 2022. Sectors covered: mobile and electronic devices, consumer durables, automotive, and farming equipment.

²⁵ *Tata Sky Ltd. v. YouTube LLC & Ors.*, CS (OS) 2143 of 2015, Delhi High Court, order dated February 5, 2016 (Endlaw J.); 2016 SCC OnLine Del 4476.

Tata Sky applied for an urgent interim injunction. YouTube, through counsel, represented that it had already taken down the identified videos and would continue to remove such content upon notification. The court accepted this undertaking and disposed of the matter without proceeding to a full hearing on the merits. A detailed reasoned judgment on the application of Section 65A was consequently never delivered.

The analytical gaps left by this procedural resolution are significant and have been noted in academic commentary. First, the court did not rule on the threshold question of who has standing to enforce Section 65A. The provision creates a criminal offence; enforcement is ordinarily the prerogative of the state through prosecution, not of private rightsholders through civil suit.²⁶ Whether a copyright owner can maintain a civil action under Section 65A analogous to a civil claim for breach of a penal statute remains unresolved.

Second, the court did not address the meaning of 'effective technological measure' in the context of broadcasting encryption. The Tata Sky CAS is a sophisticated encryption system; its status as an ETM was not disputed. But the ruling provides no guidance on where the boundary lies for lesser or weaker access controls.

Third, and most consequentially for this paper's argument, the court did not consider how Section 65A interacts with Section 52 fair dealing exceptions. The particular facts hack-for-free-access-to-paid-channels did not involve fair dealing. But the court's silence on the interaction leaves unresolved the central question: can a copyright owner invoke Section 65A to enjoin circumvention that serves a Section 52 purpose? The answer that follows from the statutory text that Section 65A criminalises only intentionally infringing circumvention, so that Section 52 circumvention falls outside the offence has never been judicially confirmed.

India consequently remains without a coherent judicial framework for TPM law. Eight years after the 2012 Amendment, the practitioner seeking guidance on lawful circumvention, platform liability, or the interaction of Sections 65A and 52 finds no authoritative answer in the case law. This judicial vacuum is itself a structural problem: the chilling effect of potential criminal liability is compounded by the absence of any precedent establishing that legitimate uses are protected.

VI. COMPARATIVE ANALYSIS: THE DMCA, THE EU COPYRIGHT DIRECTIVE, AND THE INDIAN MODEL

A. The United States Digital Millennium Copyright Act, 1998

Section 1201 of the DMCA, enacted in 1998 to implement the WIPO Internet Treaties, prohibits both the circumvention of access-control TPMs and the trafficking in circumvention tools.²⁷ Crucially, it does so without a general intention requirement: the statute does not distinguish between circumvention for infringing and circumvention for lawful purposes. The practical consequence has been a regime of pervasive over-enforcement. Courts have applied Section 1201 to facts as varied as the hacking of garage-door opener signals (*Chamberlain Group, Inc. v. Skylink Technologies, Inc.*),²⁸ the loading of

²⁶ For commentary on the civil enforcement gap in Section 65A, see P. Narayanan, 'Copyright Law,' 4th edn (Eastern Law House, 2017), Chapter 14; and Ananth Padmanabhan, 'Intellectual Property Rights: Infringement and Remedies' (LexisNexis India, 2012), p. 312.

²⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified at 17 U.S.C..

²⁸ *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (holding that the DMCA's anti-circumvention provision requires a nexus between the circumvention and copyright infringement).

unauthorised software onto video game consoles (Sony Computer Entertainment America, Inc. v. Connectix Corp.),²⁹ and the analysis of obfuscated software for security research.

The DMCA does create a triennial rulemaking process, conducted by the Register of Copyrights, under which the Librarian of Congress may exempt specific classes of works from the anti-circumvention prohibition. Exemptions have been granted for, inter alia, repair of motor vehicles, unlocking of smartphones, and format conversion for accessibility. But these exemptions are temporary, requiring renewal every three years, and do not extend to the trafficking prohibition: a mechanic may circumvent a software lock to repair a vehicle under an exemption, but the tool manufacturer who supplies the circumvention software remains liable under Section 1201(a)(2).

B. The European Union Approach

Directive 2001/29/EC of the European Parliament and Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the InfoSoc Directive) requires Member States to protect effective TPMs against circumvention and against the manufacture or distribution of circumvention devices.³⁰ However, Article 6(4) obliges rightsholders to make available to beneficiaries of specified exceptions including disability, education, and research exceptions 'the means of benefiting from that exception or limitation.' Where a rightsholder fails voluntarily to provide such access, Member States may intervene to enable it.

This structural feature a positive obligation on rightsholders to accommodate exception beneficiaries, backed by regulatory compulsion is absent from Indian law. The InfoSoc Directive has been supplemented by Directive 2019/790 (the Digital Single Market Directive), which creates mandatory exceptions for text and data mining for research, digital teaching activities, and cultural heritage preservation.³¹ These exceptions cannot be overridden by contract, and TPMs must not be deployed to frustrate them.

C. The Indian Advantage and Its Limits

India's intention-based threshold in Section 65A(1) is, in principle, superior to both the DMCA and the InfoSoc Directive for protecting legitimate uses. If the law is taken at face value, a student, researcher, or mechanic who circumvents a TPM for a purpose covered by Section 52 commits no offence, because they lack the intention to infringe. The section's exceptions in 65A(2) further reinforce this reading.

In practice, however, three structural deficiencies undermine this theoretical advantage. First, the burden of demonstrating absence of infringing intent falls, in the criminal law context, on the accused after the prosecution establishes the fact of circumvention. Given the technical complexity of DRM systems and the commercial sophistication of rightsholder legal departments, this burden is disproportionately difficult for individual users to discharge. Second, the record-keeping requirements under Section 65A(2) are administratively burdensome in a way that exceeds anything the EU mandates, deterring even clearly legitimate circumvention. Third, the absence of any positive obligation on rightsholders to provide

²⁹ Sony Computer Entertainment America, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) (finding reverse engineering for interoperability purposes not necessarily infringing, though not directly deciding the DMCA question).

³⁰ 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, OJ L 167, 22.6.2001, pp. 10–19, art. 6.

³¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, OJ L 130, 17.5.2019, pp. 92–125, arts. 3–6 (text and data mining, digital teaching, cultural heritage).

means of access for exception beneficiaries the EU's Article 6(4) mechanism leaves Section 52 rights dependent on the voluntary cooperation of parties whose commercial interests are served by restricting access.

VII. A REFORM AGENDA: ALIGNING TECHNOLOGY WITH LAW

A. Automatic DRM Removal Upon Copyright Expiry

The most foundational reform is the simplest to justify: DRM systems should not be permitted to outlast the copyright protection of the underlying work. When a work passes into the public domain upon the expiry of the sixty-year post-mortem term under Section 22 any ETM protecting it should become legally unenforceable and the work should be made freely accessible.

The mechanism could be legislative: an amendment to Section 65A inserting a proviso that no ETM shall be deemed 'effective' within the meaning of the section in respect of a work in which copyright has expired. Alternatively, DPIIT could issue rules under Section 78 of the Copyright Act directing that ETMs protecting public-domain works be automatically disabled upon a copyright-expiry calendar notification. Platforms operating in India would be required to maintain and consult a publicly accessible copyright-expiry registry.

B. Codified Exceptions for Repair, Accessibility, and Encryption Research

The existing exceptions in Section 65A(2) are insufficiently clear and operationally burdensome. Three targeted additions are needed. First, an explicit repair exception: circumvention of a TPM for the purpose of diagnosing, maintaining, or repairing a device or product is lawful, provided no copy of the software is made or distributed. This aligns with the existing Right to Repair Portal policy, bridging the gap between ministerial intent and statutory reality.

Second, an accessibility exception: circumvention for the purpose of converting a work into an accessible format for a person with a disability is lawful without prior consent and without the record-keeping obligations currently imposed by Section 65A(2). This implements India's Marrakesh Treaty obligation in full and eliminates the discriminatory practical burden currently borne by print-disabled users.

Third, a simplified encryption research exception: the existing Section 65A(2)(b) exception for encryption research requires the researcher to have lawfully obtained the copy and to maintain records. The record-keeping requirement should be eliminated for bona fide academic and security research, replacing it with a post-hoc disclosure obligation that does not condition the exemption on advance administrative compliance.

C. Fair-Use Compliant DRM Mandates

A more ambitious reform would require DRM systems deployed in India to be technically capable of accommodating fair dealing uses. This could be implemented through Bureau of Indian Standards (BIS) certification requirements for DRM systems: to receive certification permitting deployment in India, a DRM system would need to demonstrate the capacity to permit limited copying for educational use, screen-reader compatibility, and diagnostic access for repair purposes.

This approach, analogous to the EU Article 6(4) positive obligation, shifts the compliance burden from the individual user (who must prove lawful intent after circumvention) to the platform (which must engineer lawful access before circumvention

is necessary). It is technically feasible: academic publishers including MIT Press and many university presses already distribute DRM-free e-books without significant adverse impact on sales revenue.³²

D. A DRM Ombudsman under DPIIT

Finally, India needs a dedicated regulatory mechanism to handle complaints of DRM abuse. The current position leaves aggrieved users with three unattractive options: initiate criminal proceedings under Section 65A(1) (which requires state cooperation and is practically unavailable for defensive use), file a civil suit in the High Court (expensive and slow), or abandon the lawful use (the path of least resistance, and the one most users take).

A DRM Ombudsman, constituted under DPIIT with jurisdiction to receive complaints from individuals whose Section 52 rights have been frustrated by DRM, would provide an accessible, low-cost dispute resolution mechanism. The Ombudsman could order rightsholder compliance provision of an accessible format, or a DRM-free excerpt for educational use on an expedited basis, backed by the threat of a financial penalty payable to the complainant. Precedent exists in the Insurance Ombudsman scheme and the Banking Ombudsman Scheme; the model is proven and constitutionally sustainable.

VIII. CONCLUSION

Indian copyright law has, through the 2012 Amendment, constructed a legal architecture that is structurally sound in its intentions but procedurally deficient in its execution. The intention-based threshold of Section 65A(1) is the right approach to anti-circumvention law; it is superior to the DMCA's strict liability regime and preserves, in theory, the user rights that Parliament simultaneously codified in Section 52. The failure lies not in the architecture's design but in its implementation: DRM systems are not required to honour the exceptions the law creates, the burden of vindicating lawful intent is practically prohibitive, and the sole judicial precedent left every substantive question unanswered.

The consequences fall along predictable lines of vulnerability. The blind student cannot access her e-textbook. The village mechanic cannot repair the farmer's tractor. The scholar cannot download her own civilisation's manuscripts. The professor cannot reproduce, for her students, the very excerpt a court has already held to be non-infringing. These are not hypothetical harms; they are the lived realities of a copyright system that has allowed technological enforcement to colonise the space Parliament reserved for the public.

The 'Piracy of the Public Domain' is not merely a rhetorical provocation. It names a real phenomenon: the privatisation, through code, of works and uses that the law designates as free. Reform is urgent and achievable without dismantling the legitimate anti-piracy protections that Section 65A was enacted to provide. Automatic DRM removal upon copyright expiry, codified exceptions for repair and accessibility, fair-use compliant DRM mandates, and a dedicated ombudsman would realign the copyright system with its stated purpose: the promotion and dissemination of knowledge, culture, and innovation.

The choice before the legislature is between a copyright system that empowers society and one that is governed by code. The question of which shall prevail—law or lock—is ultimately a question about what kind of information society India intends to build.

³² MIT Press has distributed a substantial portion of its catalogue in DRM-free ePub format since 2011 without reporting significant adverse revenue effects. See MIT Press, 'Open Access at MIT Press,' <https://mitpress.mit.edu/open-access> (accessed June 2026).

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