

has the exclusive right to do certain acts in relation to the work, such as making a copy, broadcasting or selling copies to the public.

## **Music**

Generally, music is said to be an organisation of sounds with some degree of rhythm and harmony. Music is sounds in melodic or harmonic combination, whether produced by voices or instruments. ‘musical work’ as defined in sec. 2(p) of the Copyright Act, 1957 means a work “consisting of music and includes any graphic notation of such work but does not include any words intended to be sung, spoken, or performed or any action intended to be sung, spoken or performed with music”.

## **Internet Service Provider**

Internet Service Provider (ISP) is an entity that connects people to the Internet and provides other related services such as website building and hosting. An ISP has the equipment and the telecommunication line access required to have a presence on the Internet for the geographic served. In order to connect to the Internet, a user requires an ISP and a medium for communication to allow passage of information to and from the computer.

# **CHAPTER I**

## **BRIEF OVERVIEW OF COPYRIGHT INFRINGEMENT IN FILM**

## **MUSIC INDUSTRY**

### **THE FRAME**

Film music has always been an important source of entertainment in India. Hindi film music is considered to be the most popular music. Among the regional music industries in India, Bengali film music occupies a significant position. The Indian music industry is one of the major copyright based industries, which relies primarily on copyright in musical work and sound recordings. Sale of music rights forms an important revenue stream for the film industry. Nevertheless, over the last decade the music industry in India has observed a paradigm shift in the music business model. The sale of physical music is continuously declining and digital format of music is fetching a significant revenue in the music industry. Both Hindi and Bengali music industry is undergoing significant changes. The law of copyright has given the required incentives for the entertainment industry to make the necessary investments towards the development of the culture of the nation. The provisions conferring economic rights to the copyright owners as well as the assignment and licensing provisions under Copyright Act, 1957 has regulated the value chain in the music industry effectively. This has helped in generation of significant revenue, contributing to the national economic development. The copyright based industry is also responsible for providing livelihood to artists, composer, owners of sound recording and a wide array of people related to them.

However, the public goods aspect of copyright protected work has given rise to the 'free-rider problem'. This has made the music industry vulnerable to the threat imposed by piracy of copyrighted music. The sale of physical music has already been affected. The expected revenue from online music sales are also not drawn because of the unauthorised dissemination of digital music over the internet. Many retail music stores are compelled to down their shutter due to the massive losses caused to them because of pirated sound recordings since they were not able to recoup their investment. Thus, copyright infringement, primarily in the form of music piracy, is having a rippling effect on the Indian music industry generally and Hindi and Bengali film music industry particularly.

## **THE FOCUS**

The present study is based on the hypotheses that unauthorised distribution of illegal music due to weak enforcement of law has caused to economic losses to the Hindi and Bengali music industry. This chapter elaborates the evolution of the music industry in India. It explains the operation of the law of copyright within the music industry. The chapter attempts to explain the declining sales

of physical music and the subsequent revolution in the online music business. It highlights the prevalent forms of copyright infringement in the music industry and tries to identify the consequences of the same in the industry. Therefore the main focus of the chapter is to trace the shift in the music business model and to enunciate the nature of copyright infringement in the film music industry and assess its effects on the creative industries and local economies.

## **THE OBJECTIVE**

This chapter intends to trace how the dissemination of music has evolved over a period of time. It focuses upon those provisions of the Copyright Act, 1957 that impact upon the industry. Drawing inferences from different reports the chapter aims at outlining the changing music business model. It gives a broader picture regarding different forms of copyright infringement affecting the Indian music industry and elucidates how the provisions in the Copyright Act, 1957 is violated. Lastly it evaluates the consequences met by the stakeholders in the music industry due to this rampant piracy.

This chapter initiates with an insight into the Indian music industry, especially Hindi and Bengali Film Music industry. The way the value chain operates within the industry is described. The gradual evolution of the music industry right from the gramophone era till the internet age has been traced. Thereafter the operation of copyright in the music industry is analysed. The relevant statutory provisions describing the musical work, sound recording, the issues related to authorship and ownership as well as licensing and assignments of the pertinent works are highlighted. The next segment has classified the different forms of copyright infringement existing in the music industry accompanied by a brief description of each category of copyright infringement. The last segment makes an attempt to make an estimation of loss of sales due to copyright infringement based on various reports published in this regard both at global level as well as specific to Indian music industry. The reasons for decline in sales of music had discussed and the consequent effects on the music industry had been identified.

### **I.1. Overview of the Indian Music Industry**

The Indian music industry is one of the strongest actors in the entertainment sector in India. The market size of the music industry is INR 10.8 billion in 2015 and is expected to grow to INR 20.6 billion by 2020.<sup>13</sup> These estimations include the physical and digital sales of music. The development of new media and merging of media with newer revenue streams need to be considered while understanding the length and breadth of the music industry. Nearly 40% of the music consumed is Bollywood, 30% is regional, 10% is classical and devotional and 20% is the rest of the market.<sup>14</sup> Bollywood is one of the many regional film industries which represents the Hindi language movies. In 2012, the Indian Media and Entertainment Industry Report, published by FICCI and KPMG demonstrated that Hindi movies contribute 17% of the total number of movies after and the remaining 83% is distributed among other regional film industries, Telegu (18%), Tamil (18%), Kannada (13%), Bengali (12%), Marathi (10%) and Malayalam (9%) constitute the highest in terms of the percentage of the movies certified among the other regional film industries.<sup>15</sup>

In India the existence of music is deeply related to the cultural life of the common man and sale of music rights forms a significant revenue stream for the film industry. For instance, in November 2015, Rajshri's production has sold the music rights for "Prem Ratan Dhan Payo" for INR 180 million.<sup>16</sup> In 2014, Zee Music Company tied up with Sony Music for selling the international music rights of several Bollywood movies like, 'Bang Bang', 'Holiday: A Soldier is Never Off Duty', 'Bombay Velvet', etc. Music rights are contributing 2% to the total film industry's revenues. According to the report published in 2015, big budget films are selling their music rights for approximately INR 100-150 million.<sup>17</sup> The greater and visible impact of piracy on film music industry, compared with other industries is the reason for considering the music industry for the present study.

### **1.1.i. The Value Chain in the Music Industry**

The key players of the music industry are musicians/singers, composers, lyricists, content aggregators, film producers, music companies, industry associations, radio distributors, telecom

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<sup>13</sup> KPMG-FICCI, The Future: Now Streaming, Indian Media and Entertainment Industry Report 2016, p. 136

<sup>14</sup> Ibid.

<sup>15</sup> KPMG, Digital Dawn: FICCI-KPMG Indian Media and Entertainment Industry Report 2012, p. 70-71.

<sup>16</sup> KPMG-FICCI, The Future: Now Streaming, Indian Media and Entertainment Industry Report 2015, p. 75

<sup>17</sup> Ibid.

operators, music retailers. In the music industry value chain firstly, the film producers appoint the music director, lyricists and artists. Then the physical, digital and broadcast distribution rights are sold to the concerned music company by the film producer. The music is converted into CDs/Cassettes by the music company to the consumer through the radio broadcast in association with the collecting societies. The content aggregators purchase the rights from the music company and those musical works are converted into formats which are compatible with telecom operators. It helps the consumers for downloading music in their mobile and other electronic gadgets.

The traditional formats of music are witnessing a decline and subsequently newer forms of music listenership has created opportunities for different forms of players in the forms of content aggregators, telecom operators and organised retailers. The industry is experiencing a transition from traditional formats to the new age digital formats. Digital music now accounts for 55% of the revenue of the overall size of the Indian music industry<sup>18</sup> and a significant decline has been observed in physical sales at the rate of 30-35% year on year.<sup>19</sup> Approximately INR 5 – 100 million is invested in the music industry for making and distribution of music. According to the experts the revenue share of film music is 30:70, where music accounts 30% and 70% for film. The mobile music industry is developing at an exponential rate. There the revenue split is 25:75, respectively for the music industry and telecom operators. Sometimes the ratio is 40:60, however in this case the music industry's share is apportioned as 15:25. 15% among the producers and music companies. However, the return on investment is becoming a real concern for the music industry. Although there is an increasing consumption of music, the monetisation of the same is not taking place appropriately. Different reports from the music industry are indicating that there is a decline of physical sale of CDs and cassettes. It is claimed that the music industry is not able to recover the investments made in making music.

### **I.1.ii. Hindi film music**

In India, music production is either film music or non-film music. Film music is one of the chief content feeders for movie, television and radio and therefore important for other sectors of the entertainment industry. Films have dominated the Indian music industry. Peter Manuel observed

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<sup>18</sup> KPMG-FICCI, The Future: Now Streaming, Indian Media and Entertainment Industry Report 2016, p. 136.

<sup>19</sup> KPMG-FICCI, Shooting for the Stars, Indian Media and Entertainment Industry Report 2015, p. 3

that ‘film music came to constitute about half of the market, the remainder consisting of regional folk and devotional music and other forms of non-filmi or in industry parlance, basic pop music.’<sup>20</sup> Popular music in India mainly comprised of popular songs produced for commercial films, primarily in Hindi. The release of the music of a film happens a few months earlier to release of the film itself. In the daily life, film music is one of the affordable sources of entertainment in their lives. Usually all commercial films contain songs which play a crucial role in the commercial success of a film.<sup>21</sup> Inclusion of songs in films is vital to acquire the full potential of the vast market. Film songs get popular through dissemination as a part of the film rather independent of the parent film.<sup>22</sup> Film song is the dominant form of Indian popular music and in the twenty-first century film song outsold Indian music by more than eight to one.<sup>23</sup> The widespread use of Hindi film songs by Indian listeners and performers indicate that popular film song is preferred to other types of music and consequently film songs hold mass appeal for the Indian audience.<sup>24</sup>

The term “Bollywood” is understood synonymously for film industry in India. However, ‘Bollywood’ specifically refers to the Hindi films produced in different studios of Mumbai. Generally, one of the distinctive characteristics of Hindi films is the inclusion of six to eight songs. Incorporations of the songs into filmic narratives is one of the important factors for the increasing dominance of Hindi film songs in the arena of Indian popular music.<sup>25</sup> The song’s picturization is an important element of Hindi films with the initiation of sound film and performs different functions within an individual film.<sup>26</sup> In India the close relationship between popular film and music production has explained the characteristic of popular music as an Industry from 1931.<sup>27</sup> Film songs had shown their presence in Hindi Sound films since 1931. The first Indian sound film was *Alam Ara* (1931) and it contained many popular songs. Then in 1932 songs were used in

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<sup>20</sup> Peter Manuel, *The Cassette Industry and Popular Music in North India*, 10, *Popular Music*, 204 (1991).

<sup>21</sup> ANNA MORCOM, *HINDI FILM SONGS AND THE CINEMA* 183 (1<sup>st</sup> ed. 2007).

<sup>22</sup> *Id.*, at p. 181.

<sup>23</sup> Gregory D. Booth, *Preliminary thoughts on Hindi popular music and film production: India’s ‘culture industry(ies)’ 1970-2000*, 9 *South Asian Popular Culture*. 215, 217-18 (2011).

<sup>24</sup> Alison E. Arnold, *Aspects of Production and Consumption in the Popular Hindi Film Song Industry*, 24 *Asian Music*. 122 (1992).

<sup>25</sup> Jayson Beaster Jones, *Evergreens to Remixes: Hindi Film Songs and India’s Popular Music Heritage*, 53 *Ethnomusicology*, 425, 427-28 (2009).

<sup>26</sup> *Id.*, at p. 428

<sup>27</sup> Gregory D. Booth, *Preliminary thoughts on Hindi popular music and film production: India’s ‘culture industry(ies)’ 1970-2000*, 9 *South Asian Popular Culture*, 215, 217-18 (2011).

‘Mahuri’. However, not all the songs from a film used to be recorded, since there was no way of transferring songs recorded on the film soundtrack into gramophone record.

For centuries man had dreamed of capturing the sounds and music of his environment. Many had attempted it but no one had succeeded until Thomas Alva Edison discovered a method of recording and playing back sound. On December 24, 1877, Edison applied for the US Patent 200 521 which covered talking machines and sound writers to be known as Phonographs.<sup>28</sup> The first phonographs used tin foil cylinders. The earliest system used was cylinders on which sound waves were scribed. In the 19th century, sheet-music publishers started to dominate the music industry.<sup>29</sup> At the dawn of the early 20th century, the recording of sound began to function as a disruptive technology to the commercial interests publishing sheet music. The original industry standard was overtaken around 1914 by flat disks, the manufacture of which was less costly per unit than wax cylinders. This change in standard led to increasing but still modest levels of competition in the industry. Real competition in the industry started in the 1950s with the advent of magnetic tape recording. Magnetic tape was easy to edit unlike recording technology prior to the development of tape and the recording devices themselves were inexpensive to purchase.

#### **I.1.ii.a. Gramophone Records**

With the emergence of gramophone record,<sup>30</sup> by the late 1940s, almost all the songs started to be released on gramophone. Then film music dominated HMV’s record sales and HMV was having a near monopoly on recording in India. Although in the early days the gramophone record market was limited in size, but gradually achieved momentum in the 1960s. By 1970s, film music grew to approximately 70% of the HMV’s sales. In 1970, Polydor of India Ltd. entered the Indian music industry. Thereafter the value of recorded music commodities started to soar. Ownership and control of music resources became a matter of increasing contention. In India the total values of sales of recorded music at this point of time was estimated to be approximately three crore Indian rupees. The commercial value of a song was considered in respect of their capacity to promote the film rather than something in themselves to make money from them. By 1970s the producers used

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<sup>28</sup> *The History of Recorded Music*, (Jul. 10, 2013, 6 PM) <http://www.soc.duke.edu/~s142tm01/history.html>.

<sup>29</sup> *Music Industry*, (Aug. 10, 2013, 4 PM) [http://en.wikipedia.org/wiki/Music\\_industry](http://en.wikipedia.org/wiki/Music_industry).

<sup>30</sup> From 1902 to 1908, all recordings made in India by the Gramophone Co. Ltd. were manufactured into gramophone records in Germany. In 1908 the manufacture of gramophone records began in India at the Sealdah Factory in Calcutta.

to acquire INR 50, 000 to 1, 00,000 as royalties from hit music. For instance, producer of Sholay received a royalty payment of INR 5, 00,000 from Polydor. An important point to be noted here is that after the shift to vinyl format, radio emerged as the medium which brought the film music to the public and their homes apart from cinema theatres. Similar observation has been advanced in respect of the distinctive nature of Kolkata as a diverse local music market.

### **I.1.ii.b. Cassettes**

The commercial potential of film music was realised on a whole scale with the arrival of cassettes in India. The advent of cassette technology has restructured the Indian music industry. Cassettes accounted for 95% of the recorded music market by the mid-1980s.<sup>31</sup> The monopoly in the recording industry formerly enjoyed by HMV, declined to less than 15% of the market. The sales of film music expanded potentially from \$1.2 million in 1980 to over \$12 million in 1986.<sup>32</sup> Film music accounted for half of the market. The revolution brought through cassette industry ended the unchallenged hegemony of Gramophone Company. By the late 1980s, 2.5 million cassette players were being purchased by the Indian annually. From the above discussion, two explanations are certain: Firstly, the point at which audio cassettes entered the musical market of India, the market was relatively small considering the last ten years after the arrival of cassettes. Secondly, estimation has revealed that through the 1960s and 1970s the sales of Hindi film songs represented 80% to 90% of those revenues. Mumbai was the centre of Hindi film and film music production and almost maximum of the profit was made by sales of Hindi film songs.<sup>33</sup>

The advent of cassettes had an important bearing on the size of the purchasing audiences and music production got much more democratised. Consequently consumers got greater power in the market. However, effective marketing avenues via television gave greater power to producers. The songs were an important part of publicising the film. With the television the film could be used to market the songs and in turn it would market the film. The music is one of the important marketing device for the film. Film songs as a part of a film enabled the Hindi film market to outsell other

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<sup>31</sup> Peter Manuel, *The Cassette Industry and Popular Music in North India*, 10, Popular Music. 204 (1991).

<sup>32</sup> Ibid.

<sup>33</sup> Gregory D. Booth, *Preliminary thoughts on Hindi popular music and film production: India's 'culture industry(ies)' 1970-2000*, 9 South Asian Popular Culture. 215, 217-18 (2011).



genres.<sup>34</sup> In case a film turns to be a hit one, the songs used to drive on the success of the film and acquire commercial sales within the Hindi films market. The profitability of film songs changed significantly with cassette revolution and professional marketing. The relationship between film song rights and the success of the parent film is very crucial. Generally, the music company starts by placing 7, 00,000 to 1 million cassettes in the market.<sup>35</sup> The music sales are limited before the release of the film. However, release of the film determines whether the extent of the music sales.<sup>36</sup> Film songs are marketed in two phases – through the release of trailers and through the release of the film. Audio cassettes brought a significant musical, cultural and industrial changes by mid-1980s onwards. The economic value of music increased at significant rates. In 1983, Kajal Basu stated that, in 1982 the Indian music market was worth Rs. 50 crore”.<sup>37</sup> In 1989, according to O.P. Malik, “Indians spent 400 crore on recorded music” a 700% increase in music sales from 1982 to 1989.<sup>38</sup> Kajal Basu reported an enormous increase in the financial value of the Indian music market.

At the same time, illegal recordings of new film sound tracks were found to be of the greatest number in India’s music market consistently. Majority of the illegal cassettes are imported from abroad. However, pirated copies produced in India are quickly available. Satpal, entrepreneur in Delhi’s Lajpat Rai market, moved into the production of blank cassettes in 1983. “Then this [cassette] boom came, and we saw that there was this new thing. So we thought we could get into it. We made cassettes, blank cassettes. We made five lakh cassettes every month.” Satpal claimed that he had no awareness that recorded music is a subject matter of intellectual property protection. He also commented, “In the beginning, nobody thought about all this copyright business. We were in the market, no? Things came, we sold them. If they sold fast, we sold more. Like that. But then

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<sup>34</sup> According to popular Hindi music director, Anand Milind, “very good music and if the film fails, your music goes nowhere and very bad music and if your film is a hit, your music is a big hit.... The music is like a child and the film is like a mother.”

<sup>35</sup> For instance, in the case of Subhash Ghai’s movie ‘Taal’, initially TIPS put 1.5 million cassettes in the market. The total cassette sales from star cast films were anything from about 1 million cassettes to 12 million in exceptional cases.

<sup>36</sup> Mukesh Desai, industry expert, observed that, “ And then once the film is released if the film is appreciated, then the sales zoom up, then it goes up, then it goes up to [1.5, 2, 2.5, 3, 4 million]. Ramesh Taurani of TIPS explained in percentage terms the sales of music before and after the release of the parent film. For an averagely successful film, the sales would be 50/50. For a hit, they would be ‘40/60, 40 before release, 60 after release’. For a super hit, even more will sell after the release: ‘Then it must be 20/80, if it is super-duper hit. However, if the film is a flop, then it will be more like 100/0, in other word, sales will just about to cease after the film is released”.

<sup>37</sup> The Sunday Observer, November 13 1983.

<sup>38</sup> The Times of India, December 5 1990.

one time, I think it was 1985 or '86, just here, in front of us, there was a raid. The police came and arrested these guys. And they said the merchandise was pirated that they were selling. So when we saw that, we agreed that from that point, we would not sell any pirated merchandise. So the relationships we had with the business selling pirated merchandise, we closed those relationships.” In the article, “Will the Indian Music Industry Collapse?” Kajal Basu asserted that “the legitimate music companies fell to 18 crore from Rs 23 crore in 1979-80” (The Sunday Observer 13 November 1983). As he went on to note, “After the switch from disc to cassette, pirates have taken over the music business and ranked in a phenomenal Rs 32 crores last year.”

### **I.1.ii.c. CD, VCD and DVD**

By the 1990s other profitable forms of music and film commodification came into existence through CD, VCD and DVD. Simultaneously cassettes still existed and dominated. In the early 1990s CDs started gaining popularity CDs were extremely popular because of their convenience and flexibility. Music listeners could repeat songs, shuffle, skip, etc. all with the easy touch of a button — much faster and easier than the guess and check of rewinding a cassette or the delicate finesse of moving a record player arm. At the turn of the millennium, a new form of media began to threaten the dominance of the CD. The MP3 provided similar improvements over its predecessor that the CD had compared to tapes and records only a decade before.<sup>39</sup>

In 2001, there was an estimation of approximately 60 million cassette players and 4 million CD players. According to an estimation mentioned in an article, ‘Screen’ in 2000, the Indian music industry sold approximately ‘210 million music cassettes and 13 million CDs.’ 15% increase has been observed in the CD market. Film songs were also used to be released with their visuals on video via VCD or DVD. A larger market for repackaged songs came into existence through audio CDs. Some used the original song and compiled in new packages. While the others made changes to the original song by adding more instruments or re-recording the entire song, with a new artist.

The symbiotic relationship of film and film songs gets reflected through the increasing corporate conglomeration of different media in the entertainment industry. Big film producers are opening in-house music companies. In 2006, one of Mumbai’s most successful film producer, Mr. Yash

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<sup>39</sup> Douglas Walters, *Causes and Solutions for the Recent Decline in Recorded Music Sales*, Honours Theses 104.

Chopra observed that the revenue from the sale of film songs continued to grow. He said, “The amount of money we could get from the music companies [for a film soundtrack] was fabulous until four years back: sometimes seven, eight, nine, ten crore of rupees. From 1990 to 2000 was a glorious period for money from music companies. So I started my own company [Yash Raj Films-Music].... [Now] the music is good, but the sad part is, the money is not coming because of piracy.” According to Mr. Chopra, not only the reappearance of music piracy (in the new MP3 format), but also the development of new media platform together had a negative impact on the economic value of India’s primary popular music.<sup>40</sup>

Globally the year 2003 was considered to be a bad year for the music industry. According to the Reuters report, “global music sales fell 7.6% in 2003..... the steepest decline since the advent of the compact disc.” Industry observers like International Federation of the Phonographic Industry attributed the MP3 based piracy for this decline. In the 2001-2003 period the legal music market minimized by 27% in unit terms and 38% in value terms. According to Suresh Thomas,<sup>41</sup> “2003 was a really bad year for everybody. Universal was down six million and Crescendo was down two million.” The early changes of 2000 resulted to a long term restructuring of Indian music economy.

Post 2000 a large drop in sales volumes have been observed at around 30-40% of the pre-2000 market. While the Internet was considered to be insignificant to the music industry in 1999-2000, presently it is attributed as a major cause in the music sales decline due to illegal downloads from the internet using MP3.<sup>42</sup> Increasing audio-visual consumption led consumers wanted to buy audio-only products, i.e., film songs sound tracks on cassettes or CD. The TV-led audio-visual era also played a significant role in the downfall, subsequently leaving the audio-only product behind. Although the market has taken a hard knock since 2000, film song still continue to have a commercial value. The key factors responsible for expansion of the music market are: increase in the pressing capacity of gramophone records; advent of cassette technology; spread of television industry in the early 1990s.

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<sup>40</sup> In the words of Mr. Chopra, “The music market has crashed; there is no profit now in music. Piracy, that’s the big factor; MP3. Now more people are seeing the films, more people are hearing the films; but they are not buying the music. Why should they? They can see on TV.”

<sup>41</sup> One of the India’s non-film and western popular music pioneers.

<sup>42</sup> ANNA MORCOM, HINDI FILM SONGS AND THE CINEMA 183 (1<sup>st</sup> ed. 2007).

Before Internet and digitisation emerged, the supply chain in the traditional music industries depended largely on the recording companies, who produced the physical music product. The record companies promoted the music album to the customers. Music World retail outlets, one of the early retail outlets in India, sold audio CDs, DVDs and other accessories. It started scaling down its operations from 2012. After digitisation of music, consumer preferences started shifting from purchasing the physical CD and DVDs towards digital format.

#### **I.1.ii.d. MP3 and Internet**

In India, the online music started acquiring grip around 2006-07. During this period Saregama, HMV, T-Series, Sony BMG and other prominent music industries started digitising their tracks. During 2007, Saregama started Hindi music download business with competitive price tag of INR 10 per track download. The digital growth has taken place primarily through mobile channels. Consumption of online music has observed steady growth. The presence of mobile, especially smartphones with high speed 3G and 4G connections, has contributed immensely in this regard. Presently, mobile contributes around 85-90% to the total digital music consumption in India. Prominent service providers, such as Airtel, Idea, Vodafone, Tata Docomo and others offer different types of music services, including ringtones, ringback tones, downloads and mobile radio streaming services. Streaming services such as Gaana, Dhingana, Saavn and other download stores began to emerge.

According to Indian Media and Entertainment Industry Report of 2012, the Indian music industry achieved a 19% year-on-year decline in physical music sales. This decline was reimbursed by an increase of 24% year-on-year in digital music. In 2012, the FICCI-KPMG study has shown digital sales overtook physical sales and around 55-60% of the music sale happens through digital route. During the same time illegal downloads of music continued on a great scale. Advent of internet technology has reduced the costs of distribution, but has increased piracy, that has diminished economic rewards provided by copyright.<sup>43</sup> Today, digital music is more dominant and there exists many sites which allow unauthorised download of the digital files. Consequently, illegal distribution of music files resulted in revenue loss for the music recording companies. International

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<sup>43</sup> Prabha Susy Mathew, *Case Study: Impact of Digitisation on Music Industry in the Recent Times*, 2 International Journal of Management and Social Sciences Research. 13 (2013).

Federation of Music Industry estimation showed that more than half of the Internet users (54%) access unlicensed services on a monthly basis in India.<sup>44</sup> The speedy decline in physical format sales, the presence of global music capital in India and the resultant requirement to align the Indian music and film industries with global norms have contributed to bring changes in the existing copyright law in India.

### **I.1.iii. Music Industry in West Bengal**

In tune with the developments across the country, in West Bengal, the media industry has observed rapid evolution across the ecosystem in the industry. There is an increasing change from analogue to digital medium. This trend is noticeable from content production to content consumption throughout the value chain. Explosion of new devices, faster and better delivery channels and digitisation of content has influenced the way in which media is consumed by people. The different stakeholders and players in the industry are evolving and trying to adapt themselves to this disruption throughout the value chain. In West Bengal, the distinctive inclination of the people has rendered a unique characteristics to the media and entertainment industry in this state. Bengal's contribution in all the periods of traditional and modern Indian society is significant. Film directors like late Satyajit Ray<sup>45</sup> and Mrinal Sen<sup>46</sup> has increased the visibility of cinema of West Bengal throughout India. Kolkata had a radio station way back in 1920s. Bengali cinemas are increasingly producing commercially successful films adapted from the literary heritage. The Bengali film music industry has been consistent on its growth. Quite a few mass commercial films continued to find success through content adapted from other vernacular languages, predominantly from the South India, to cater to the rural and semi-urban audience. In parallel, the commercial successes like, 'Bhooter Bhabhishyat' have helped to sustain an alternative genre of content more targeted towards urban and multiple audiences.

Bengali film music industry has watched a decent flow of investment in the industry. Greater production budgets in films have led to more sequences in the films and songs therein. At the same time, there is an increase in small budget films that are being made at the budgets of less than INR 60 lakhs. Another important aspect of the industry is that Bengali films invest lesser marketing

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<sup>44</sup> (Nov. 12, 2014) <http://www.ifpi.org/india.php>

<sup>45</sup> Academy Honorary Award Winner and recipient of Bharat Ratna, India's greatest civilian honour.

<sup>46</sup> Recipient of French distinction of Commander of the Order of Arts and Letter.

and advertising spends compared to other regional industries. In the recent years social media like Facebook pages for films and stars are involved to promote the films as well as the songs used therein. Recent sources of income by the producers in West Bengal include ringtones as well as online streaming and YouTube. Producers like Shree Venkatesh Films and Eskay Movies are concentrating at their online properties to increase supplemental revenue. The TV industry is witnessing the launches of music channels with Bengali film music. According to Mahua Lahiri of Asha Group, “West Bengal has a vast repertoire of non-film music. Multiple genres of Bengali non-film music are very popular in the state, especially in the cities. As far as radio in West Bengal is concerned, film music dominates programming, talk shows or topical conversations interspersed with music have been gaining airtime. Product placements in terms of interviews with company executives or users calling in to share their experiences about a particular brand or products are now being increasingly heard on Kolkata radio stations. An innovation done by Red FM in Kolkata was to get a DJ to play the entire session on a newly launched music phone and getting live bytes from the discotheque into the radio station as it was happening.

During the course of study Mr. Vinay Kumar Berry was interviewed. He is the owner of Berry Music House and Sursangam Kiran Recording Co. Both of the company operates its business under the logo/mark “KIRAN”, which has been registered in the Trademark and Patent Office, Salt Lake, Kolkata. Both of the companies were established in 1970. Vinay Kumar Berry @ Billoo Bhai. Mr. Berry is a member of IMI (Kol), PPL (Kol), IPRS (Mumbai) for the last 40 years. Mr. Berry receives royalty from All India Radio, BBC Radio, and Phonographic Performance Limited when the songs from Kiran Recording are broadcasted over the radio or they are commercially exploited. He also receives royalty in the form of caller tune, call back tune from hungama.com, Rama Communication, Luthinga, Phoneytunes, etc. They are called aggregators. They provide the music to the mobile service providers, like Airtel, Vodafone, etc. Mr. Berry has granted non-exclusive license to them.

The service providers charge Rs. 30/- per song as caller tune. They assure Rs. 15/- for the copyright owners. However, Mr. Berry alleges that the service providers are not returning the assured amount. One of the recording studios is in Behala, which is equipped with the advanced technologies, like, Neuundo (Recording Software) with digital mixers and microphones. Mr. Berry purchased the studio and its total area is 1100 sq. ft. Different types of music recorded in the studio

are all type of folk songs, like, Bhawaiya, Chatka, Dariya, Bhatiali, Maishal, Rajbongshi, Mushidi, Baromashiya, Fakiri, Dehatatwa.

Mr. Berry claimed that music recording company is a serious victim of music piracy. He admits that although there is a huge market for music, but the entire music industry is ruined by piracy. It has destroyed the entire business. The main reason behind this phenomenon is that in case of cassette, even if it is duplicated there was a deterioration in the quality of music and so the pirated copies could be easily identified. However, in case of CD, (MP3 format), there is no difference in quality between the original and duplicate/pirated copies. From 2000-01 music cassettes started fading and the era of CD began to emerge. From 2012 onwards physical sales have dropped by 40%-60%. Digital sales increased to some extent. Now, the major source of income in digital format includes caller tune, ringback tune, mobile radio, etc. The media of income from music is going through a paradigm shift. But at the same time, Mr. Berry alleges that there is a lack of transparency when the issue of profit sharing comes. He has not allowed uploading the songs of his publishing house on online sites, not even on YouTube too, although he was approached several times in this regard.

He said that, previously he barely got any time to interact with people, since he was used to be too much busy with his business. Even he didn't get time to take his lunch. Cassettes, CDs were of huge demand. But now-a-days sales have reduced to an alarming level. He laments that these days he gets too much time to relax. He added that today he can afford two-three hours to talk with me and to answer my questions, which was not possible even before two-three years back. It is very hard to say that whether it is a matter of fortune for researcher to interview him for long hours or a sorry state of affairs for Mr. Berry as his business has fallen prey due to the problem of music piracy.

Indrani Sen is one of the prominent singers in the Bengali music industry. She was also interviewed by the researcher in connection with the present study. She said that However, she is concerned about the loss of music sales due to piracy. She said the major retailing music services have started to be closed down. For instance, she said "Planet M" has already shut down and the day is not so far when "Music World" is going to be closed. The music retailing business is under threat due to music piracy.

She said that people of elder generations are more inclined towards buying genuine music CDs/cassettes. The present generation is more attracted towards pirated CDs, cassettes, downloading of music via websites offering free music. But, personally she has no opinion about online distribution of music. Lastly she said that both Srikanto Acharjee and Indranil Sen are having music companies and have fallen victim of music piracy.

## **I.2. Copyright in the Music Industry**

To aid in the creation and dissemination of cultural works through business process, copyright system has been considered as one of the crucial institutions. Music is an essential copyright industry based on creative talent and highly specialised assets. Copyright present the legal mechanism for protecting and appropriating from creative expressions. The law of copyright provides a framework to deal with the issues related to joint consumption and imperfect excludability of musical works. Since intellectual can be consumed jointly, it involves significant fixed costs in development and can be reproduced very cheaply. In other words, intellectual property has characteristic of a public good. This characteristics are referred to as ‘non-rivalrous’ and ‘non-excludable’ aspects of a public good. A non-rivalrous good is a good for which consumption by one consumer does not prevent the simultaneous consumption by other consumers. A non-excludable good is a good for which it is not possible to prevent individuals (who do not own the good) from consuming it or partaking of the benefits at a relatively low cost. Since intellectual objects are non-rivalrous and non-excludable, without copyright protection authors would reduce the production of intellectual objects. Without legal protection, arguably, authors would not be able to receive compensation for their work.

### **I.2.i. Incentive structure of Copyright law**

According to Richard Posner, the cost of creating a copyright protected work is often high, but the cost of reproducing the work is often low. Once the copies are made available, it becomes inexpensive for the users to make additional copies. If the creator of the work fixes the price of the work at or close to the marginal cost, the creator’s total revenues may not cover the cost of creating the work. Although others may be discouraged from making copies. According to Posner, “Copyright protection – the right of the copyright owner to prevent others from making access -



trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in its first place.”<sup>47</sup> The cost of producing a copyrightable work has two components. The first is the cost of creating the work. It consists of “the author’s time and effort plus the cost to the publisher of soliciting and editing the manuscript and setting it in type.” Posner has described this cost as “cost of expression”. The other cost is the cost of making additional copies, which Posner called as “cost of producing the work”. According to him, “a new work to be created, the expected return from the sale of copies must exceed the cost of expression.”

Unlike, public goods, by way of intellectual property rights, it is possible for the creator of an expression of an idea to exclude others from using it, consequently opening the possibility for their wider commercial exploitation. Conferring property rights for the expression of ideas implies a market price higher than its marginal costs. In turn this means that continual drive to expand the market for ideas generate greater rents. Similarly, copyright provide direct economic incentives for sharing expression of musical ideas through trade. Therefore, the economic status of a cultural musical idea changes after it is separated from a performance and embodied in a tangible product, for instance, Compact Disk, or a digital music file. Law of copyright facilitates in defining a marketable music product by helping to provide an institutional framework, thereby creating a reliable income flows through protecting the resource musical resource.

Copyright on music uphold the entrepreneurial spirit for development of the industry. Effective copyright protection permits the firms to develop an industry or market. Copyright law is believed to have provided a breathing room for the investor to invest without worrying that another firm will steal the expression of idea.<sup>48</sup> Richard Posner has argued that “in a world without IPRs, where anyone is free to use others’ ideas, inventive activity would be biased towards activities that involve minimum preparatory investment.”<sup>49</sup> In the absence of intellectual property rights protection, inventors would not be encouraged to continue their inventive activities as the costs of development will not be recovered and there will be no expectation of profit. Without copyright

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<sup>47</sup> W.M. Landes and R. Posner, *An Economic Analysis of Copyright Law*, 28 *Journal of Legal Studies*. 325, 326-27 (2009).

<sup>48</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul Wright, *Rents, Rights N’ Rhythm: Conflict and Cooperation in the Music Industry*, *Industry & Innovation*. 6 (2007).

<sup>49</sup> RICHARD POSNER, *THE ECONOMIC THEORY OF PROPERTY RIGHTS: STATIC AND DYNAMIC ASPECTS*, 32 (4th ed. 1992).

protection, the author will not be able to recover the cost of expression. Consequently a sustainable music industry will not be developed. Legal protection of musical ideas provides incentives to effectively use musical resources through investment in developing the music industry.

Different utilitarian economists, such as, Jeremy Bentham, Adam Smith, John Stuart Mill and John Bates argued that intellectual property rights enhance “the prospect of reward”. This subsequently encourages creative and technological advancement by providing incentives to invent and further develop new ideas. Without the required incentives, the encouragement would be declined. It is observed by the Douglas North that through the intellectual protection rights the sustained inventions and innovations help to increase the private rate of return. According to him, the ‘IPR induced incentives to invent’ justification for IPR is based on two assertions: (a) adequate inventions will not be made without proper incentives. Inventions will not be properly exploited if the inventors failed to believe that they will generate profits and that make their efforts and risking their money worthy; and (b) intellectual property rights are the most effective and economical means for the society to hold out the incentives.<sup>50</sup>

After establishing the justification for intellectual property rights protection, an issue which requires attention is that “whether something so personal as musical expression really is the outcome of an incentive system?”<sup>51</sup> Generally it is assumed that non-commercial musical cultures develop without the copyright system. However, it is to be considered that the concerns of commercial music industry for development of industry is totally diverse. The commercial value of music is increased by collaborating the joint efforts of creation of joint product among the music authors and an array of musical resources, freely available but requires inducements. “Even in certain cases it is argued that IPR system is not the most required element to encourage people to invent, it motivates invention. The classical economists contends that “IPR privileges offer prizes to creative minds they arouse the mental powers and give them a direction.” According to Posner, to increase the economic efficiency copyright law should “at least approximately maximise the benefits from creating additional works minus both the losses from limiting access and the costs

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<sup>50</sup> Douglas Walters, *Causes and Solutions for the Recent Decline in Recorded Music Sales*, Honors Theses 104.

<sup>51</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul Wright, *Rents, Rights N’ Rhythm: Conflict and Cooperation in the Music Industry*, Industry & Innovation. 8 (2007).

of administering copyright protection.”<sup>52</sup> The commercial aspect of music elucidates the reason of investing more money by the music industry in the popular music.<sup>53</sup>

However, since the cultural idea has the features of a non-rival product, it gives rise to huge problem in commercialising the investment made in the music industry. This non-rivalrous feature results in the possibility of extensive copying and imitation through use of modern technology at the time of reproduction of music. The low cost of reproduction of an idea makes the market undermined by copying and makes it uncertain and fragile. The risk is especially in relation to cultural products, like a sound recording. Therefore, in spite of enhancing copyright protection to protect music attached to technological carriers, there has been a significant decline of revenue in the copyright system. Illegal copying of music files on cassette tapes and CDs has taken a form of big business and becoming a part of organised crime. This problem of piracy or illegal duplication results due to high fixed costs of development when it is compared with very low marginal costs of making additional copies.

### **I.2.ii. Development of Copyright Law in India**

Basic concept of copyright can be traced back to Irish sixth century case involving St. Columba, an Irish missionary. St. Columba went on a visit to the Monastery of his former teacher, Abbot Finnian. St. Columba borrowed one manuscript from Abbot Finnian. Possibly without permission and secretly he copied it with the intention of keeping it for his own use. Finnian argued it was theft as it was illegal copying and demanded St. Columba should hand over the copy he made. Columba believed he had done nothing wrong as he attempted to spread the words of Church. King ruled in favour of Abbot Finnian, famously saying ‘To every cow belong its calf, to every book its copy.’

Invention of movable type mechanical printing technology, credited to German printer Johannes Guttenberg (1440), is considered to be a milestone in the development of copyright law. Before invention of printing press, there was little practical need for legal protection of authors. Afterwards with the introduction of printing press, printing of multiple copies became possible,

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<sup>52</sup> W.M. Landes and R. Posner, *An Economic Analysis of Copyright Law*, 28 *Journal of Legal Studies*. 325, 327-28 (2009).

<sup>53</sup> *Ibid.*

which resulted in a new market for books. Subsequently, serious question as to protection of literary works arose.

On 18th December, 1847 India got its first copyright law. It was “An Act for Encouragement of Learning in the Territories subject to the Govt. of East India Company, by defining and providing for the enforcement of the right called copyright therein.” The Act provided for compulsory licensing to publish book. British Copyright Act of 1911 extended application of this Act to all British dominions and enabled legislatures of dominion to alter or modify provisions of Act. Government of India enacted Copyright Act, 1914. Parliament of Independent India passed Copyright Act, 1957.

### **I.2.iii. Copyright in musical work and sound recording under Copyright Act, 1957**

Music industry initiates income generation with musical compositions and sound recordings. The final musical product, which is made available to consumers contains a combination of different copyrights. In the Indian scenario, a song that is a part of a film will attract several degrees of protection under section 13 of the Copyright Act.<sup>54</sup> A musical composition consists of music (i.e. the melody)<sup>55</sup> and accompanying words (i.e. the lyrics)<sup>56</sup>. The Copyright Act recognised the rights of authors to own their works in the first instance.<sup>57</sup> The author of the melody is generally the composer and the author of the accompanying words is the lyricist.<sup>58</sup> The musical work must be reduced into notated copy or in the form of a sound recording.<sup>59</sup> In respect of the sound recording, producer is the author and consequently the owner of the same.<sup>60</sup> Once a musical composition is incorporated into a sound recording, respectively they become copyrightable. However, copyright ability of musical composition is dependent on its ‘originality’.

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<sup>54</sup> Copyright Act, 1957 § 13.

<sup>55</sup> Copyright Act, 1957, § 2 (p). “Musical work” means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.

<sup>56</sup> The lyrics are protected as a literary work under section 2 (o) of the Copyright Act, 1957.

<sup>57</sup> Copyright Act, 1957 § 17.

<sup>58</sup> Copyright Act, 1957 § 2 (d). “Author” means (i) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer.

<sup>59</sup> Copyright Act, 1957 § 2 (xx). “Sound recording” means recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

<sup>60</sup> Copyright Act, § 2 (uu). “Producer” in relation to a sound recording means a person who takes the initiative and the responsibility for making the work.

### **I.2.iii.a. Definition of Musical work**

The definition of ‘musical work’ in sec. 2(p) has been amended by Act of 38 of 1994 to mean a work “consisting of music and includes any graphic notation of such work but does not include any words intended to be sung, spoken, or performed or any action intended to be sung, spoken or performed with music”. The new definition has omitted the words “printed, reduced, to writing or otherwise graphically produced or reproduced.” This amendment to the definition of ‘musical work’ is intended to protect the Indian classical music particularly in view of the difference in some important respects between Indian and Western classical music which difference has been brought out thus:

Western classical music is created by composers who conventionally record their compositions in writing on paper, using an elaborate, well-established system of musical notation. Performers who can read the notation then perform their works: personal contacts between the composer and performer is not necessary and even before the era of sound recording, a composer’s work could be performed long after his death. This composer-performer dichotomy has become the paradigm in the conceptualisation of music as a form of copyrighted work, and of the different rights arising out of its creation and use, but it does not precisely fit the Indian situation. Indian civilisation gave birth to the only classical form of music that has reached heights of sophistication comparable to that of the West, but on altogether different principles. Here the same persons both compose and perform simultaneously, improvising, within the framework of a highly developed discipline, on pre-selected traditional themes (‘ragas’) as they sing or play on musical instruments.<sup>61</sup>

The Copyright Act, 1957 as originally enacted limited the definition of ‘musical work’ to the composer’s recorded graphical notation. The new definition inserted in sec, 2(p) by the amending Act of 1994 sought to meet the requirements of Indian music, while at same time retaining protection for graphical notation in the Western form. However, while this amendment does remove a purported anomaly where our classical musicians were not credited with the creation of musical works, it still remains to be seen whether it makes very much real, practical difference to their situation. It is generally felt that given the nature of the music of Indian composer, being

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<sup>61</sup> JAGDISH SAGAR, INTELLECTUAL PROPERTY RIGHTS – A GLOBAL VISION IN 210 (S K Verma et al. eds., 1<sup>st</sup> ed. 2004).

composition and performance at the same time, the performer's right also conferred by the amending Act of 1994, is likely to be of much greater practical value.<sup>62</sup>

Initially the music copyright was focused on sheet music and live performance.<sup>63</sup> However, with the development in music creation techniques as well as its recording and delivery, certain related or neighbouring rights have come into existence. They are: (i) new sound recording and music playing technologies (e.g. magnetic tapes, compact disks (CDs), video, digital audio technology) and (ii) broadcasting and public performance techniques (e.g., radio, television, cable, satellite, internet).<sup>64</sup> They have evolved the musical copyright and expanded its scope include mechanical rights and synchronisation rights as well as performance rights. These neighbouring rights enables collecting royalties and licence fees. The exclusive rights, enjoyed by the author or owner of copyright over the bundle of rights can be transferred or licensed to another party, separately or together. The author of an original composition transfer ownership to a publisher. Generally the owner of a sound recording transfers ownership to a record company. The record company owns the recording rights.

Section 13(4) of the Copyright Act, 1957 provides that in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or the sound recording is made. As provided in Sec. 13(4) film song composers did "retain the right of performing [their compositions] in public for profit". Despite the provisions of Section 13, a composer's ownership of the musical work he or she created for a film was a purely abstract concept, as there was no publication, no notated or recorded form of a film song prior to its recording in the film recording studio when it became the film producer's property. Hence, film songs continued to be part of the cinema. The copyright of the cinematograph films belongs to the film producers and the copyright over the sound recording is owned by the record company. Therefore, previously before the amendment of Copyright Act, 1957 in 2012, the film songs could not have any other distinct commercial existence. However, after the incorporation of a new proviso to section 17 of the Copyright Act, the situation stands: "in case of

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<sup>62</sup> Bushan Tilak Kaul, *Copyright Protection: Some Hassles and Hurdles*, 46 Journal of the Indian Law Institute, 236, 245-46 (2004).

<sup>63</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul Wright, *Rents, Rights N' Rhythm: Conflict and Cooperation in the Music Industry*, Industry & Innovation. 8 (2007).

<sup>64</sup> Ibid.

any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.” Thus, now individual protection exists over the lyrics and music, independent of the right over the sound recording.

The owner of music copyright owns the exclusive copyright over a ‘bundle of rights’. They are: (a) reproduction of the work in any material form including the storing of it in any medium by electronic means; (b) to issue copies of the work to the public not being copies already in circulation; (c) to perform the work in public, or communicate it to the public; (d) to make any cinematograph film or sound recording in respect of the work; (e) to make any translation of the work; (f) to make any adaptation of the work.<sup>65</sup> The control of each right can be transferred via assignment and licensing agreements. These agreements can be exclusive as well as non-exclusive. In certain cases, the ownership or control is not transferred. Share of revenue or profit from musical works is negotiated through contractual agreements.

#### **I.2.iii.b. Assignment and license of copyright**

The owner of copyright in musical work and sound recording may assign the copyright wholly or partially for the whole or any part of such copyright to any person. The assignment of copyright may be a limited assignment both in content and period. The amendment of 2012 has added a proviso to section 18(1). It provides that the author of a literary or musical work incorporated in a cinematograph film or sound recording shall not assign the right to receive royalties in any form other than as a part of the film or sound recording. Section 19 lays down the conditions for the assignment of copyright. It is an essential condition that the assignment of copyright should be in writing and signed by the assignor or his duly authorised agent, otherwise it shall not be valid. The assignment of copyright must identify the specific work and specify the rights assigned, the duration and territorial extent of such assignment. Section 19(9) of the Act, newly added by the Amendment Act of 2012, stipulates that an assignment of copyright in any work to make a cinematograph film or sound recording shall not affect the right of the author of the work to claim royalties in any form other than as part of cinematograph film or sound recording. The owner of copyright in a work may grant any interest in his copyright to any person by licence in writing,

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<sup>65</sup> Copyright Act, 1957 § 14

which is to be signed by him or by his duly authorised agent. A licence may also be granted by a prospective owner of the copyright in any future work, subject to the condition that the licence shall come into effect only when such future work come into existence.<sup>66</sup>

### **I.2.iii.c. Divisibility of copyright and sale of exclusive rights under copyright**

Any or all of the exclusive rights under copyright or any subdivision of those rights may be assigned. This concept is known as divisibility of copyright and is one of the more important but frequently misunderstood features of the copyright law. Since copyright is divisible, a copyright owner is not limited to assigning just some percentage of undivided interest in his copyright. He may also transfer any of an endless number of exclusive rights which comprise the copyright. The owner of copyright has the exclusive rights to do and to authorise any of the following:

- a. To reproduce the copyrighted work in copies or sound recordings;
- b. To prepare derivative works based upon the copyrighted work;
- c. To distribute copies or sound recordings of the copyrighted work to the public by sale or otherwise transfer of ownership or by rental lease or lending;
- d. In case of literary, dramatic, musical and choreographic works, motion pictures and other audio-visual works, to perform the copyrighted work publicly; and
- e. In case of literary, dramatic, musical and copyrighted works and pictorial, graphic or structural works, including the individual images of a motion picture or other audio-visual work, to display the copyrighted work publicly.

Thus, for example, a copyright owner may assign to another the exclusive right to perform the work publicly, reserving all other exclusive rights, such as the right to produce the copyrighted work in copies or recordings and the right to prepare derivative works.<sup>67</sup> This was at one time what the song writers and music publishers and when they became member of the performing rights societies. In exchange for the copyright owner's assignment of performing rights from the songwriters and publishers, the performing rights societies agreed to perform certain tasks such as

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<sup>66</sup> Copyright Act, 1957 § 30.

<sup>67</sup> AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING, 427 (3rd ed. 2002).



surveying performances, collecting performance fees and distributing royalties to the song writer and publisher members.

The type of exclusive rights which may be assigned, is not limited to the several listed in the copyright law. A work may be exclusively licensed in particular markets in particular forms, in particular territories and over particular periods of time. For example, the owner of a copyright in a song may assign any or all of the following exclusive rights – the exclusive right to print sheet music throughout the world; the exclusive right to publish the song in songbooks; the exclusive right to publish the song in songbooks in one or more countries; the exclusive right to record the song and distribute the copies embodying the song recording.

As an example of the exploitation of the various rights associated with the copyright in a particular work, consider the author and owner of the copyright of a dramatic play. He decides to deal with the play in term of its publication, its performance in public and also because of the popularity of the play, is able to negotiate the making of a film based on the play and the making of sound recordings of famous actors and actresses reading the play. The following figure shows the types of relationships in terms of assignments and licensing that could ensure.<sup>68</sup>

In the creation of music industry, an important step is the release of copyright by the original author all the way down the music supply chain. When the copyright is secured, a producer can organise artists, producers, sound engineers, session musicians etc. Similarly, the record companies start marketing their product with an assurance that their high fixed cost investment will be protected against the problem of free riding. At the same time the artist is ensured fixed income on the basis of the popularity of his or her composition. Hence, it can be asserted that copyright in music portrays the joint ownership between the composer, the publisher, the record company and other entities involved in commercially exploiting the music product.<sup>69</sup>

Copyright protection in music encourages the stakeholders in effective commercial exploitation of musical work. Copyright provides a stimulus to the financier of the inventor. “This economics of music copyright rests on the assumption that musical ideas serve no economic purpose unless and

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<sup>68</sup> DAVID BRAINBRIDGE, *INTELLECTUAL PROPERTY*, 89 (5th ed, 2003).

<sup>69</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul Wright, *Rents, Rights N' Rhythm: Conflict and Cooperation in the Music Industry*, *Industry & Innovation*. 14 (2007).

until they are developed into commercial use and that a venture capitalist (e.g. a recording company) would be unlikely to engage in the development of a music invention unless it owns or controls the property rights or at least grab a share of the revenue from the musical works”.<sup>70</sup>

#### **I.2.iii.d. Protection of Producers of the Sound Recordings under Copyright Act, 1957**

Initially the Copyright Act of 1957 provided protection to ‘record’ and ‘recording’. However, the Amendment Act of 1994 substituted the term ‘sound recording; for ‘recording’ since the earlier definition became incompatible with outdated sound reproduction technology. The present definition is not associated with any particular technology. The sound recording manufacturing process comprises a unity of contents of the sound recording and the fact of recording. This makes it necessary to protect the content providers and also the producers of sound recording. This is called as ‘the unity of contribution’. At each stage of the recording process, different creative contributions are protected by an author’s rights.

‘Sound recording’ means ‘a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which such sounds are reproduced.’<sup>71</sup> Section 13(3) (b) of the Copyright Act provides that copyright shall subsist in any sound recording only if it is lawfully made. Copyright will not subsist in any sound recording made in respect of a literary, dramatic, or musical work if, in making the sound recording, the copyright in such work has been infringed. The copyright in a sound recording consists of the following exclusive rights: (1) to make any other sound recording embodying it; (2) to sell or give on hire or offer for sale or hire, any copy of the sound recording regardless of whether such copy had been sold or given on hire on earlier occasions; (3) to communicate the sound recording to the public.<sup>72</sup>

The producer of the sound recording vests is the author and as per section 17, the producer is vested with the copyright in the sound recording. Section 2 (uu) of the Act of 1957 provides the definition of ‘producer’. In this definition, the issue arises here is whether ‘responsibility for the recording’ means only making necessary financial arrangements. In *Gee Pee Films Pvt. Ltd. v. Pratik*

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<sup>70</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul Wright, *Rents, Rights N’ Rhythm: Conflict and Cooperation in the Music Industry*, Industry & Innovation. 12 (2007).

<sup>71</sup> Copyright Act, 1957 § 2 (xx).

<sup>72</sup> Copyright Act, 1957 §14.

Chaudhury,<sup>73</sup> the High Court of Calcutta rejected the contention that the author of a sound recording was the person responsible for necessary arrangements for producing the sound recordings, especially in pecuniary sense. The Court observed that, “the mere statement that a master tape of recording owed by the plaintiff was prepared and retained by it does not suggest that it has taken responsibility of such recording. If the person bears all the expenses for recording and keep the master tape thereof, such facts do not imply that he has also taken responsibility of the recording and thus cannot held to be a producer.” Court further held, ‘responsibility’ in sec. 2(uu) did not only denote mere financial responsibility but also the ‘consequential legal liability’ for such recording.

Another area of uncertainty regarding copyright ownership arises where a sound recording includes a musical work and the same musical work is used as a part of a cinematograph film. Section 13(4) lays down that copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made. Two simultaneous copyright comes into existence when the music has been written down and the composer records it. Precisely the issue for judicial determination remains in whether the copyright in the lyrics or the musical work is retained by the composer of the musical work if he licenses the author of the sound recording to include it in the sound recording. Supreme Court of India addressed this issue in *Indian Performing Rights society Ltd. v. Eastern India Motion Picture Association*.<sup>74</sup> As far as inclusion of a musical work as soundtrack in a cinematograph film is concerned, the court held that a conflict may arise between sections 13(4) and 14 (a) (iii), on the one hand and section 14 (e) on the other.

Justice Jaswant Singh attempted to construct the conflict harmoniously. According to him, if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of the film to be heard in public and nothing contained in section 13(4) of the Act can operate to affect the rights acquired by the author (owner) of the film by virtue of section 14(1) (c) of the Act. However, the composer of a lyric or a musical work retains the right of the performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be retrained from doing so. In other words, the

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<sup>73</sup> AIR 2002 Cal 33.

<sup>74</sup> AIR 1977 SC 1443.

author of a lyric or musical work, who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the owner of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as section 14(1) (c) of the Act expressly permits the copyright owner of the cinematograph film to do all these things. In such cases, the owner of cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of lyric or musical work.

Justice Krishna Iyer also provided a solution to the conflict. According to him, the film producer has the sole right to exercise what is his entitlement under section 14(1) (c) qua film; but he cannot trench on the composer's copyright which he does only if the 'music' is performed or produced separately in violation of section 14 (i) (a). For instance, a film may be caused to be exhibited as a film but the pieces of music cannot be picked out of the soundtrack and played in the cinema or other theatre. To do that is the privilege of the composer and that right of his is not drowned in the film copyright except where there is special provision, such as in section 17, proviso (c). Thus, beyond exhibiting the film as a cinema show, if the producer plays the songs separately to attract an audience or for other reason he infringes the composer's copyright.

This leads to the question that whether the producer of a cinematograph film can defeat the right of the composer of music or lyricist by engaging them. The key to the solution of this question lies in the provisos (b) and (c) to section 17 of the Act. According to the proviso (b), when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film or composing music or lyric therefor i.e., the sounds for incorporation or absorption in the sound track associated with the film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of lyric or music on one hand and the producer of the cinematograph film on the other. The same result follows according to proviso (c) if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. Therefore, it is clear that the rights of

a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c). Later this decision has seen severe criticism. To overcome the difficulties created by the judgment a new proviso was added to section 17 in 2012. The proviso has laid down that “in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of subsection (1) of section 13.”

#### **I.2.iv. Music production and the copyright contracts**

According to Peter Tschmuck, “music production is a very useful case to the study the tensions of information ownership and control.”<sup>75</sup> DiMaggio and Hirsch explained how “organisations of cultural production always exist in a field of tension between innovation and control.”<sup>76</sup> On one hand novelty is constantly demanded and on the other, it becomes necessary to provide protection to infinite stream of new concepts. Music production process can be traced back to 1940s during the period when sound recording producers appeared as the core component of the music industry. The three pillars of the ‘traditional’ music industry was (a) control over publishing rights, marketing; (b) promotional power and (c) control of distribution networks.<sup>77</sup> With the arrival of Internet, the artists and smaller record labels do not depend on the dissemination capabilities of the major companies. Without focusing on a physical good, like CD or DVD, production of music has turned to be ‘service’ now. Consequently music production costs have fallen down and marketable music production in a living room became possible. Moreover, musicians no longer depended on infrastructure provided by recording studios. Hence, the discussion leads to the assertion that market power of the oligopolistic music majors shattered. Resultantly, present copyright law provides protection largely to the ‘old’ music industry structure and restrains the potentials of innovative and democratic business models.

The commercial exploitation of music on the Internet is dependent on licensing of music titles by the major record producers. Now, the new entrants in the market run at a loss or make only marginal profits as the licensing fees turn out to be more than half of the total costs. The ‘old’

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<sup>75</sup> Peter Tschmuck, *Copyright, Contracts and Music Production*, 12 Information, Communication and Society, 251, 251-52 (2009).

<sup>76</sup> P. DiMaggio and P.M. Hirsch, *The Production of Culture* 73 (R.A. Peterson 1st ed., 1972).

<sup>77</sup> Peter Tschmuck, *Copyright, Contracts and Music Production*, 12 Information, Communication and Society, 254, 251-52 (2009).

sound recording paradigm in the music industry is becoming subordinate to internet and other digital technologies. In place of the record companies, the new players will be in a position to control the exploitation rights for music as well as the distribution network and the marketing and promotion channels. Consequently, “the actors/musicians can also profit from the increasing flexibility of the music industry’s structures by demanding advantageous contract clauses, especially in terms of limited exclusivity and a higher sales share.” Although there is no express publishing or recording contract in the music industry, certain ‘standard’ publishing and record contracts are included in every agreement.

a. The publishing contract

Individual song contract is the common type of publishing contract, through which the author transfers the exploitation rights of the specified songs exclusively to the publisher. Then the publisher promotes the song and grants a specified percentage of the sales to the authors. Then there is the songwriter’s contract, through which the author generally assigns all the rights for all the songs written in return for an advance. The publisher acquires all the exclusive rights. In the twentieth century the core competence of a publishing company depends on the licensing of compositions to recording companies. For this reason, the publishers cooperate with the sound recording companies to increase the commerciality. The licensing of a single song becomes costly because of its transaction costs. Therefore recording companies integrate the publishing function into the company’s structure.<sup>78</sup>

b. The recording contract

In a ‘standard’ record contract, a musician exclusively licenses all rights to a record label to fix the artist’s performance into all types of sound carriers. In this regard the transfer of rights includes three aspects:

- (i) The exploitation of the recording is given to the record label exclusively. Prohibition is imposed on the third party including the musician himself or herself;
- (ii) Only the record company has the right to authorise the usage of musician’s name, signature, likeness and biographical material related to the services of the artist under

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<sup>78</sup> Id. at p. 259.

the agreement. Privacy clause enables imposition of prohibition on the musician to make recording for others than the contracting party.

- (iii) It is guaranteed by the musician that he or she will not record and exploit the music title within the contractual terms even after the expiry of the agreement.<sup>79</sup>

The record companies monopolise the recorded music exploitation through the exclusivity clauses. This monopolistic competition results in high costs of investment and opportunity costs. Consequently there is a strong inclination towards tight market control. A music label can monopolise more and more music, if it is combined with a catalogue of publishing rights. The exclusive assignment of exploitation rights embodied in copyright law helps the record companies to monopolise the commercial exploitation of the creative works of authors and musicians.

### **I.3. Copyright infringement in the Indian music industry**

In order to ensure proper incentives to music industry and to the stakeholders involved in the same and to continue investing in the creation, production and marketing of sound recordings, the creators and producers of sound recordings are granted various rights. Under Copyright Act, 1957, among many other rights, ‘copyright’ includes the exclusive rights to commercially copy the recordings and to distribute or import or export those copies. Moreover, copyright owners get the right to authorise or prohibit broadcasting of the work or including it in a cable programme. Copyright infringement is an unauthorised act of imitation of the original work or its uses through reproduction, communication to the public, sale, offer for sale, etc. Sec. 2(m) of the Copyright Act, 1957 defines ‘infringing copy’ in terms of various works. In respect of musical work, infringing copy refers to reproduction of it other than in cinematograph film. In respect of ‘sound recording’, ‘infringing copy’ means copy of any other recording embodying it, made by any means.

If an individual without the consent or licence of the owner of copyright does or authorise the doing of an act to issue the copies of the work to the public not being already in circulation. Or distribute infringing copies either for the purpose of trade or to such an extent as to effect prejudicially the owner of the copyright or to reproduce the work in any material form including

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<sup>79</sup> Id. at p. 231.

the storing of it in any material form including the storing of it in any medium by electronic means he will be infringing the copyright work as per section 51 read with section 14(a) and section 14(b) of the Copyright Act.<sup>80</sup>

In *Sulamangalam R Jayalakshmi v. Meta Musicals, Chennai*<sup>81</sup> the Madras High Court observed that in order to constitute infringement of copyright two elements were considered to be essential. First, there must be sufficient objective similarity between the infringing work and the copyright work. Secondly, the copyright work must be the source from which the infringing work was derived. In *Bobbs-Merrill Company v. Isidor Straus and Nathan Straus*,<sup>82</sup> the Supreme Court of the United States held, "Infringement of copyright is a trespass on private domain owned and occupied by the owner of the copyright and therefore protected by law and infringement of copyright, or piracy which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright."

Indian music market is considerably smaller compared to \$2 billion film market. However, they are interlinked and approximately 70% of album sales are Indian movie soundtracks. The music industry in India found it quite difficult in speaking with a united voice on the issue of copyright infringement. 95% of the Indian physical music market is made up of Bollywood soundtracks, regional language soundtracks and local music, with 5% of sales coming from international repertoire. The physical market in India took off in the late 90s with cassettes sold at around US\$1 or less. The traditional CD format took nearly three years to become popular in major urban cities

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<sup>80</sup> Copyright Act, 1957 § 51: Infringement of copyright: Copyright in a work shall be deemed to be infringed- (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act- (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or (b) when any person- (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade exhibits in public, or (iv) imports into India, any infringing copies of the work Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer. Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

<sup>81</sup> (2000) PTC 681

<sup>82</sup> 210 US 339, (1907) 52 L Ed 1086



given its higher price (US\$2-10). Before the CD could reach its potential, a unique format of MP3 tracks on CDs stormed the market. Local estimates indicate that 200-250 million MP3 CDs and VCDs were being sold illegally annually. Legitimate MP3 CDs peaked at around 40 million units. As physical sales began to fall, India experienced a mobile revolution that saw the acquisition of more than 600 million mobile subscribers between 2006 and 2010. Therefore, it can be asserted that increasingly, the source of pirated CDs is not only CDs and Internet as well as cell-phone, equipped with 'mobile chips' pre-stocked with MP3 music files. It is observed that the pirated discs, that used to be sold for Rs. 50, had become a rarity. Music has become easily available by way of file sharing technologies with fast broadband connections. Moreover, acquisition of single musical tracks rather instead of the whole albums has immensely benefitted the pirated markets.

### **I.3.i. Declining Sales and Closure of “Music World”**

Music World was one of the first entrants into the specialty retail space opening its first store in 1997 and then taking the franchise route in 2003. It started its business through retailing audio CDs, DVDs, gaming consoles and software, besides other music accessories and home videos of leading brands. The company, which had some 40 shops across the country, has been scaling down its operations since the beginning of April 2012. Unfortunately, India's premier music retail franchisee, Music World's biggest outlet at Park Street had downed its shutters on July 1, 2013. Pirated sales of music products such as DVDs and CDs on streets and pavements is felt to be the main cause for this sudden collapse.

This popular music hub, owned by RP-Sanjiv Goenka Group, had been hit hard by “the onset of digitization of music and shift in consumer preferences towards music and video downloads and is quitting the music retail business forever.” according to Sanjay Gupta, the group's corporate head marketing.<sup>83</sup> He added, “Sales were hurtling down and there was no stopping the slide. Sales have been halved in a year and a half. While people were listening to music more than ever, they were obviously not willing to buy it.” In the same line the franchisee attributed the group's decision to exit the music retailing business to the constantly falling margins and sales of pre-recorded stored music due to a variety of factors including piracy, digitization in the industry and increasing

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<sup>83</sup> *Bengal music industry to protest Music World closure*, (Jun. 14, 2013, 10 AM), <http://www.firstpost.com/bollywood/bengal-music-industry-to-protest-music-world-closure-872709.html>.

option of being able to download music straight from the internet. The combination has sounded the death knell for CD shops and made the whole business model itself unviable.<sup>84</sup> Information trickling in suggests that the group felt the impact more strongly over the last six months to a year, with sales dropping over 50 per cent. In the financial year, 2011-2012, the economic loss extended up to Rs 258 crore and in 2012-2013, the loss reached Rs. 300 crore.<sup>85</sup>

A string of music shops have downed shutters in recent years, including Planet M that recognized the ominous signs early and exited the business. The latest to down the shutters was CC Saha on Lenin Sarani, Kolkata that has been retailing music for more than half a century. The store now retails premium luggage. Videocon Group-owned Planet M's share of music in its revenue has fallen from 40 per cent a few years ago to 25 per cent. The chain expects this to fall to 10 per cent by next year, said chief executive Sanjay Karwa. "Music retailing is seeing a lot of challenges from piracy, free download, etc. Today, nobody wants to listen to music released two to three months ago," he said.<sup>86</sup> Chief Manager of Saregama, S F Karim observed, "Almost 70% sales of Saregama have reduced. As a result, we remain fretful about the sales before releasing new music CDs. We have switched to release digital music."<sup>87</sup> Online retailer, Flipkart shut its music download service, owing to piracy issues.<sup>88</sup>

The term "*pirate*" is derived from the Latin term "*pirata*" and that from Greek "*peiratēs*". The *dictionary meaning*<sup>89</sup> of "pirate" is (a) someone who sails on the seas, attacking other boats and selling things from them; (b) someone who dishonestly copies and sells another person's works; (c) to illegally copy and sell another person's work, such as a book, video, or computer programme. Similarly, "piracy" refers to the crime of illegally copying and selling books, tapes, videos, computer programme, etc. and also the crime of making illegal television or radio broadcasts.

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<sup>84</sup> *Music World to shut all stores due to falling margins*, ET Bureau (Jun 16, 2013 5 PM) [http://articles.economictimes.indiatimes.com/2013-06-13/news/39952181\\_1\\_music-world-music-retailing-business-business-model](http://articles.economictimes.indiatimes.com/2013-06-13/news/39952181_1_music-world-music-retailing-business-business-model)

<sup>85</sup> "Surer Jale Chondopoton Music Worlder", Ekdin, Siliguri Edition, June 13, 2013, p. 1.

<sup>86</sup> Subhro Niyogi & Rohit Khanna Smart killer of good ol' music business, TNN Jun 16, 2013, 02.25AM IST, [http://articles.timesofindia.indiatimes.com/2013-06-16/kolkata/40005997\\_1\\_music-rights-music-retail-industry-music-world](http://articles.timesofindia.indiatimes.com/2013-06-16/kolkata/40005997_1_music-rights-music-retail-industry-music-world)

<sup>87</sup> "Interneter phanse hansphans CD-DVD", Anadabazar Patrika, Siliguri Edition, June 14, 2013, p. 4.

<sup>88</sup> *Lifestyle chains no longer hear rhythm in retail music*, (Apr. 17, 2013, 11 AM) [http://www.business-standard.com/article/companies/lifestyle-chains-no-longer-hear-rhythm-in-retail-music-113061301254\\_1.html](http://www.business-standard.com/article/companies/lifestyle-chains-no-longer-hear-rhythm-in-retail-music-113061301254_1.html)

<sup>89</sup> Longman Dictionary of Contemporary English (3<sup>rd</sup> ed. 1995).

Generally, pirates are rogue operators at sea—independent criminals who hijacked ships, stole their cargo, or committed violence against their crew. *Legally*, “Piracy” means the act of violence or depredation on the high seas; also, the theft of Intellectual Property, especially in electronic media. In other words, the term also means robbery, kidnapping, hijacking or other criminal activity at sea and from intellectual property perspective it means illegal and unauthorized copying or distributing materials protected under copyright, trademark, or patent law.

Piracy is a crime with ancient origins. As long as there have been ships at sea, pirates have sought to steal from them. Piracy is considered to be one of the oldest professions. It began soon after people first used water to carry trade goods from one place to another. Historians cannot pinpoint this to a precise period in time, but the earliest known records appeared in the fourteenth century B.C. Piracy is a war-like act committed by private parties who are not affiliated with any government that engage in acts of robbery and criminal violence at sea. The term can include acts committed in other major bodies of water or on a shore. It does not normally include crimes committed against persons travelling on the same vessel as the perpetrator (e.g. one passenger stealing from others on the same vessel). The term has been used to refer to raids across land borders by non-state agents.

In the late twentieth century, the term piracy grew to include copyright violations of intellectual property such as music, films, and computer software. From then onwards the term ‘piracy’ started to include the unauthorized storage, reproduction, distribution, or sale of intellectual property—for example, music CDs, movie videocassettes, and even fashion designs. The term has been applied, in particular, to the piracy of musical works, which is highly susceptible to theft because of its ease of duplication. A leading expert in the field of intellectual property has elaborated piracy in the following terms: "To some persons the term 'piracy' may have a slightly romantic connotation conjuring up visions of swashbuckling Caribbean buccaneers; but there is nothing romantic nor swashbuckling about the pirates of intellectual property. They are criminals, usually operating on a large and organised scale, engaged in the theft of the products of other peoples' talents, skills and investment."<sup>90</sup>

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<sup>90</sup> Darrell Panthiere, *Piracy of Intellectual Property and the Measures Needed to Counter It*, 26 UNESCO Copyright Bulletin, 7 (2005).

### **I.3.ii. Types of copyright infringement**

Generally, the expression 'piracy' is used to describe the deliberate infringement of copyright on a commercial basis. In other words, piracy is the unauthorized duplication of an original recording for commercial gain without the consent of the rights owner of the copyright protected work. Piracy is an illegal and criminal activity.<sup>91</sup> This may include downloading of music illegally from websites; duplication of audio CDs, conversion of music into MP3 files or other formats not offered by the music company and circulated in the markets for personal or commercial use comes within the purview of this form of piracy.<sup>92</sup> International Federation of Phonograph Industry stressed on CD piracy, cassette piracy, internet piracy and new forms of digital piracy, like, digital stream ripping and mobile piracy. CD and internet piracy are attributed to have the leading effect on legitimate CD sales. There are different ways in which copyright owners may find their copyright has been infringed. In relation to the sound recording industry the following types of infringement are observed:

- Physical music piracy

Physical music piracy is the making or distribution of copies of sound recordings on physical carriers without the permission of the rights owner. The term "piracy" refers to activities that are of a commercial nature, including activities that cause commercial harm. The packaging of pirate copies may or may not be different from the original. Pirate copies are often compilations, such as the "greatest hits" of a specific artist, or a collection of a specific genre, such as dance tracks. Songs from legitimate cassettes or CDs, owned by different right holders, are copied and put in a single cassette or CD. Then they are packaged in a different look from the original products and then sold in the market. Thus, downloading of songs of different artists from the internet, saves them on a CD and thereafter selling them in the market as a collection would be considered as copyright infringement in the sound recordings.<sup>93</sup> CD sales accounted for 86% of all the music sales in

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<sup>91</sup> Indian Music Industry <http://www.indianmi.org/operations.htm>, visited on 04.3.2010.

<sup>92</sup> Abhipsa Nayak and Satabdi Chatterjee, *Onset of Mobile Chip Piracy in the Domain of Copyright Infringement*, 15 *Journal of Intellectual Property Rights*, 118 (2010).

<sup>93</sup> FICCI, *Copyright Enforcement Tool Kit*, p. 16.

2004.<sup>94</sup> In 2005, it was estimated that the global value of traffic of pirated music products was USD 4.5 billion and 1.2 billion pirated CDs were reported to have been sold worldwide.<sup>95</sup>

- Counterfeits

Counterfeits are one type of physical piracy - These are recordings made without required permission. This is packaged to resemble the original as closely as possible. The original artwork is reproduced, as well as trademarks and logos in some cases to mislead the consumer into believing that they are buying a genuine legitimate product. In case of counterfeiting, the infringer infringes the sound recording as well as the artistic work on the CD cover. Two types of markets have been identified in respect of copyright infringing products – the primary and the secondary market. In the primary market, counterfeiters gain access to different distribute channels with the substandard products. The consumers deceptively purchase those products under the impression that they are genuine. In the secondary market, the consumer willingly purchase the counterfeited products, knowing that they are not genuine. In this market the consumers are also aware that the purchased counterfeited products are inadvertently they are supporting the parties (organised crime or terrorist operation), who are producing the counterfeited products, but may not acquainted with their true nature.<sup>96</sup>

Section 28 of the Indian Penal Code, 1860 defines ‘Counterfeit’. According to this provision, a person is said to “counterfeit” who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practised. Ordinarily, counterfeiting implies the idea of an exact imitation. But, under the Penal Code there may be counterfeiting even though the imitation may not be exact and there are differences in details between the original and the imitation so long as the resemblance is so close that deception may thereby be practised.<sup>97</sup> The followings are the main ingredients of counterfeiting: causing one thing to resemble another thing; (a) intending by means of that

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<sup>94</sup> International Federation of Phonographic Industry, *The Recording Industry: World Sales* (2005).

<sup>95</sup> International Federation of the Phonographic Industry, *Piracy Report Protecting Creativity in Music* (2006)

<sup>96</sup> Organisation for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy*, p. 10. (Sep. 14, 2013, 11 AM) <https://www.oecd.org/sti/38707619.pdf>,

<sup>97</sup> *State v. Hafiz Mohd. Ismail* AIR 1960 SC 669.

resemblance to practice deception; or (b) knowing it to be likely that deception will thereby be practiced.<sup>98</sup>

- Bootlegs

When a live performance or studio intakes are recorded without the consent of the performer or the recording company without the consent of the performer or the recording company, such activity is referred to as 'bootlegging'.<sup>99</sup> It is the commercial recording, reproduction and distribution of music, being not released by official record labels. These unauthorised recordings affect the rights of the performers and also the music industry adversely because of non-payment of the due royalties. It amounts to damaging the reputation for the reason of poor quality records of their work. Although, bootlegging does not come under the traditional copyright law violations, since it is not considered as an act of piracy in the legal sense. Section 14 of the Act provides the rights of performance and communication to the public. Section 2(q) defines 'performance' as any visual or acoustic presentation made live by one or more performers. According to section 38, the rights of the performers are violated when any person makes a sound or visual recording of his performance, reproduces such performance or broadcasts or otherwise communicates the performance to the public without the consent of the performance. However, 'bootlegging' or theatrical print theft is a common practise in India.

- Internet Piracy

"Internet piracy" is commonly used to refer to a variety of unauthorised uses of music or other creative content on the internet. In particular "Internet piracy" refers to acts of infringements on the internet that are of a commercial nature and it is not necessarily due to the motivation of the perpetrator. While some internet pirates generate income from their activity, many people engage in such acts for other, non-commercial reasons - and they all can cause enormous commercial damage. The term refers to any use of creative content on the Internet that violates copyright.<sup>100</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> Hima Lawrence, *Bootlegging – Its Impact on Sound Recording Industry and Legal Responses*, 11 Journal of Intellectual Property Rights, 424, 424-425 (2006).

<sup>100</sup> International Federation of the Phonographic Industry, *What is Piracy?* (Oct. 14, 2013, 10 AM) [http://www.ifpi.org/content/section\\_views/why\\_is\\_piracy\\_illegal.html](http://www.ifpi.org/content/section_views/why_is_piracy_illegal.html), visited on 04.3.2010.

There are various formats in which piracy takes place over internet. It includes making databases of music files available on websites or File Transfer Protocol (FTP) sites, uploading and downloading music files through internet newsgroups or sharing files via peer-to-peer network. Music industry has found causal relationship between increasing P2P networks and declining CD sales.<sup>101</sup> It is estimated that online file sharing reduced CD sales by almost 30%.<sup>102</sup> According to different reports<sup>103</sup>, global music sales started to decline from 2000, the same year when Napster was started by Shawn Finning. 70 million registered users are reported to have used P2P network. Music industry attributes the partial responsibility of decline in CD sales to P2P file sharing networks.<sup>104</sup>

#### **I.4. Estimation of loss of sales in the music industry**

Copyright infringement not only has a direct bearing on revenues, but also impacts employment in the sector, decreases sales volume, impacts production, and side-lines true creative talents. A study by US-India Business Council (2008) estimated the total losses to the creative industry due to piracy and lack of effective legal framework to be US \$ 4 billion and over 800,000 jobs.<sup>105</sup> A study by FICCI-KPMG estimated that the media and entertainment industry in India is expected to grow at a CAGR of 15% over the next 5 years to touch INR 1.4 trillion by 2016.<sup>106</sup> Any accurate measurement of the economic activity of this sector in India poses considerable obstacles. Absolute quantum of exports sometimes bears little relation to the volume distributed. For example, Indian films are typically exported to markets with considerable Indian population, but still the country is not considered among the top exporters, based on custom statistics.<sup>107</sup> This is because a single master copy is usually exported to destination markets for producing multiple copies of the movie. The case of the publishing industry is even more complicated as we do not

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<sup>101</sup> F.D. Sandulli, *CD Music Purchase Behaviour of the P2P Users*, 27 *Technovation*, 325, 326-27 (2007).

<sup>102</sup> S. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 29 *Journal of Law and Economics*, 1, 15-16 (2006).

<sup>103</sup> International Federation of the Phonographic Industry, *The Recording Industry 2006: Piracy Report Protecting Creativity in Music*, London, 2006.

<sup>104</sup> Jelle Janssens, Stijin Vandaele and Tom Vander Beken, *The Music Industry on (the) Line? Surviving Music Piracy in a Digital Era*, 17 *European Journal of Crime, Criminal Law and Criminal Justice*, 77, 83-84 (2009).

<sup>105</sup> US India Business Council, *Executive Mission to India*, New Delhi and Hyderabad, 23–25 September 2008

<sup>106</sup> KPMG and FICCI. *Digital Dawn: The Metamorphosis Begins*. FICCI-KPMG Indian Media and Entertainment Industry Report, 2012.

<sup>107</sup> UNESCO, *Understanding Creative Industries Cultural statistics for public-policy making*, (Sep. 17, 2013, 5 PM) [http://portal.unesco.org/culture/en/files/30297/11942616973cultural\\_stat\\_EN.pdf/cultural\\_stat\\_EN.pdf](http://portal.unesco.org/culture/en/files/30297/11942616973cultural_stat_EN.pdf/cultural_stat_EN.pdf)

have any reliable estimate of the industry's contribution to GDP. This becomes more complicated with the coming of the internet age.

Music's economic value is expressed in respect of 'market share'. However while describing the economic value of music in India, reliance is placed on the press statement and estimation made by the industry participants. In this respect actual revenue figures are non-existent or inaccessible. The distinction between legal and illegal revenue also posed a challenge to accurate assessment of value. Statements regarding music piracy assess its size relative to the legitimate market. The estimation was done based on reports regarding the total amount of music cassette or CD, produced in the country. The majority of the illegal cassettes or CDs were of current film songs. These songs represent the largest single sales category of Indian produced music. In any assessment of the economic value of Indian popular music, two types of estimation are considered: (1) estimation of the revenues from legitimate sales and (2) estimation of the ratio between legitimate published revenue and the unreported revenues from the sales of pirated products.

#### **I.4.i. Previous Studies on sales loss estimation in the Music Industry**

Presently in India there are no authentic estimates to ascertain the contribution of music copyright industries to the national economy. Moreover no significant studies have been made to study the phenomenon of declining physical music sales and its consequential damage on the music industry. However, few related literatures are available which provide insight to the present study. In 2005, *Lonnie K. Stevans* and *David N. Sessions* made an empirical investigation into the Effect of Music Downloading on the Consumer Expenditure of Recorded Music using a time series approach and found that the proliferation of peer-to-peer file sharing networks has led to a significant decline in music format sales and downloaded music has reduced spending on recorded music.<sup>108</sup> In 2006, *Alejandro Zenter* estimated the effect of music downloads on the probability of purchasing music using a European individual-level cross section of 15000 people from 2001. The results suggested that peer-to-peer usage reduces the probability of buying music by 30%. On the basis of estimation, back-of-the-envelope calculations indicated that without downloads sales would have been around

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<sup>108</sup> Lonnie K. Stevans and David N. Sessions, *An Empirical Investigation into the Effect of Music Downloading on the Consumer Expenditure of Recorded Music: A Time Series Approach*, 28 *Journal of Consumer Policy*, 311 (2005).



7.8% higher.<sup>109</sup> In 2010, the study made by *Byungwah Koh, B.P.S. Murthi and Srinivisan Raghunathan* showed that availability of iTunes like legal channels for digital music has blunted the effect of online music piracy on physical album sales and in the presence of those legal channels for digital music, digital music, not online music piracy substitutes for physical album sales.<sup>110</sup>

*David Blackburn* investigated the effects of file sharing on the sales of recorded music in the United States. He found that file sharing had strong effects on the sales of music. The study estimated that if files available online were reduced across the board by 30%, industry sales would have been approximately 10% higher in 2003.<sup>111</sup> *Martin Peitz and Patrick Waelbrock* analyzed the role of music downloading on the current downturn in CD sales. They provided 2000-01 cross-country evidence in support of the claim of losses due to internet piracy made by the industry. For the United States they assessed the potential loss from internet piracy. They concluded the empirical analysis by forecasting CD sales for 2002. The results suggested that internet piracy played a significant role in the decline in the CD sales.<sup>112</sup> *Siwat Auampradit* attempted to measure the effect of music piracy on CDs purchases in Thailand. The econometric result showed that expected quantity of the original CDs individual purchased decreases by 0.001 albums when the quantity of pirated albums individual consumers increased by one album. *Duchene and Waelbrock* claimed that internet piracy has reduced sales of original CDs and that illegal MP3 files have become a substitute to legal CDs purchases.<sup>113</sup> *N. J. Michel* specifically observed that the relationship between computer ownership and music purchases weakened due to piracy, reducing CD sales by 13%.<sup>114</sup>

Interpreting the 1994-1998 IFPI report on worldwide CD sales and physical piracy rates, *Kai-Lung Hui and Ivan Png* found that the demand for music CDs decreased with piracy and opined that this

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<sup>109</sup> Alejandro Zenter, *Measuring the Effect of File Sharing on Music Purchases*, 49 *Journal of Law and Economics*, 63, 66-67 (2006).

<sup>110</sup> Byungwan Koh, B.P.S. Murthi and Srinivasan Raghunathan, *Shift in Demand for Music: Causal Effect of Online Music Piracy and Digital Music on Album Sales*, Management Information Systems Research Center, 1, 5-6 (2010).

<sup>111</sup> David Blackburn, *Online Piracy and Recorded Music Sales*, (Aug. 15, 2013, 6 PM) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.117.2922&rep=rep1&type=pdf>

<sup>112</sup> Martin Peitz and Patrick Waelbroeck, *The Effect of Internet piracy on CD Sales: Cross-Section Evidence*, 1 *Review of Economic Research on Copyright Issues*, 71, 73-74 (2004).

<sup>113</sup> DUCHENE ANNE AND PATRICK WAELBROECK, *DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT*, 63 (1st ed, 2005).

<sup>114</sup> N.J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*, 6 *Topics in Economic Analysis & Policy*, 1, 15-16 (2006).

‘theft’ has overshadowed the positive effects of piracy.<sup>115</sup> Alejandro Zentner observed that “Piracy may explain a 30% reduction in the probability of buying music.”<sup>116</sup> This observation was based on 2001 survey of European music purchase and piracy behaviour. According to a study made by S.R. Bhattacharjee, K. Gopal, J Lertwarchara, R Marsden and Telang, P2P file sharing technologies have resulted in “significantly reduced chart survival except for those albums that debut high on the charts.”<sup>117</sup> Based on 2005 survey of University of Penn Sylvia students’ piracy behaviour, R. Rob and J. Waldfogel observed that “unpaid piracy consumption reduces paid consumption by about 1 unit.”<sup>118</sup> In a different study J. Waldfogel concluded that “An additional song stolen reduces paid consumption by between a third and sixth of a song.”<sup>119</sup>

Although, the academic literature is not uniform in measuring the harm caused due to piracy, the vast majority of papers published in different peer-reviewed journals found that piracy causes a statistically significant decrease in sales, especially in respect of emerging digital sales. The standard economic theories suggest that if piracy reduces revenue to content creators, it will also reduce the incentives to create new high quality content. Furthermore, reduction in the creative content supply could affect social welfare significantly.

#### **I.4.ii. Declining physical music album sales - Global Overview**

The global music industry was quite successful during the 1990s. According to IFPI, album sales grew from US\$24.1 billion in 1990 to US\$39.4 billion in 1996 and remained at a high level until 1999. Those days are over and now the industry is struggling. Global music sales have been falling for approximately the last 10 years. Global sales (units) of CDs – the most popular format – fell in

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<sup>115</sup> Kai-Lung Hui and Ivan Png, *Piracy and the Legitimate Demand for Recorded Music*, 2 Contributions in Economic Analysis and Policy, 1, 2-3 (2003).

<sup>116</sup> Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 Journal of Law and Economics, 63, 66-67 (2006).

<sup>117</sup> S.R. Bhattacharjee, K. Gopal, J Lertwarchara, R Marsden and Telang, *The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Album on Ranking Charts*, 53 Management Science, 1359, 1364-65 (2007).

<sup>118</sup> R. Rob and Waldfogel, *Piracy on the High C’s: Music Downloading, Sales Displacement and Social Welfare in a Sample of College Students*, 49 Journal of Law and Economics, 29, 35-36 (2006).

<sup>119</sup> J Waldfogel, *Music File Sharing and Sales Displacement in the iTunes Era*, 22 Information Economics and Policy, 306, 309-10 (2010).

2001 for the first time since its introduction in 1983.<sup>120</sup> This downturn coincides with the proliferation of online music file sharing.

The major setback in physical music album sales started to take a grave form in 2005, when IFPI found that more than one in three of all music discs purchased around the world is thought to be an illegal copy. It is estimated that some 37% of all CDs purchased (legally or otherwise) in 2005 were pirate – 1.2 billion pirate CDs in total. Pirate CD sales outnumbered legitimate sales in 2005 in a total of 30 markets. The majority of pirate discs sold are CD-Rs copied on highly efficient burner machines in small commercial labs. DVD music video piracy also started expanding, affecting the format's growth in many markets. 1 in every 3 CDs sold was an illegal copy (IFPI 2007).<sup>121</sup>

Global overcapacity in the optical disc industry remains a major contributor to music piracy. Global disc capacity totaled 60 billion units in 2005, compared to a legitimate demand of only 20 billion units, according to research firm Undertaking and Solutions. Taiwan remains the largest supplier of blank CD-Rs, accounting for just over a third of global supply. Back in 2005 IFPI estimated that the global traffic of pirate product was worth US\$4.5 billion based on pirate prices.<sup>122</sup>

In the United States of America, physical sales suffered a decline by -17% in 2012. In Europe music sales fell by 4.1% to US\$ 5.2 billion (€4.1 billion) in 2012. Physical formats continued to drag down the region's performance, falling by 14% while still accounting for 60% of all revenues. Music sales in France fell by 2.9% in 2012, reflecting a less negative result compared to 2011. The physical decline (-11%) continued to impact overall sales. In Italy, music sales fell by 1.8% in 2012 driven by a speed drop in physical sales. The market in Germany saw acceleration in the rate of decline in 2012, falling by 4.6%. Impacting the results was an 8% decline. In China there was a fall of 17% in physical sales.<sup>123</sup> According to the report published by IFPI in 2016, the global physical revenue have gone down by 4.5%. However in 2015, recorded music revenues was at the tune of \$15 billion. This was

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<sup>120</sup> Alejandro Zenter, *Measuring the Effect of File Sharing on Music Purchases*, 49 *Journal of Law and Economics*, 63, 64-65 (2006).

<sup>121</sup> Matthias Duenner, *The Impact of Legal and Illegal Downloading of Music on the Financial Performance of the Recording Companies*, California State University (2010).

<sup>122</sup> International Federation of Phonographic Industry, *Recording Industry Piracy Report*, 2006.

<sup>123</sup> International Federation of Phonographic Industry, *Record Industry in Numbers*, 2013.

considered to be the most significant growth since 1998. Physical format revenues declined. There was a 10.2% increase in digital revenue.

Sector	2011	2012	%change
Physical	9,893	9,403	-5.0%
Digital	5,371	5,798	+8.0%
Performance Rights	862	943	+9.4%
Synchronization	330	337	+2.1%
Total market	16,456	16,481	+0.2%

Figure : Global Recorded Music Trade Revenues (US\$ Millions); Source: IFPI, 2013.

#### **I.4.iii. Diminishing physical music sales – Indian scenario**

Music industry revenues from digital platforms have grown from 4.5 billion INR in 2010 to 7 billion INR in 2011 registering a whopping growth of 60 & year-on-year. The overall Indian music industry has grown to 12 billion INR in 2011 from 10 billion INR in 2010 with physical sales of music being stagnant at 3 billion INR.<sup>124</sup>

In India, digital sales are overtaking physical sales. Physical sales of audio cassettes and CDs have been on a downward path. Physical sales were estimated to be INR 3.3 billion in 2010 as compared to INR 4.0 billion in 2009 showing a decline of 17.5%. While in previous years, piracy in cassettes and CDs was a major issue for physical sales, the challenge now has been easy availability of music online, be it legal or illegal. This provides users with the convenience of selection. Moreover, the next generation also believes in sharing music content among the peer group and this again results in consumers preferring music in the digital formats.<sup>125</sup> Consumers are preferring music in the digital formats.<sup>126</sup>

<sup>124</sup> India Entertainment and Media Outlook 2012, PWC Report.

<sup>125</sup> India Entertainment and Media Outlook 2011, PWC Report.

<sup>126</sup> India Entertainment and Media Outlook 2011, PWC Report.

India is replicating world music industry trends. Music delivery and consumption are fast evolving on digital platforms as revenues from physical sales are fading.<sup>127</sup> The online delivery of purchased music in digital format – as opposed to sales of physical CDs online – became available in 2001.<sup>128</sup> Globally, there are over 100 companies selling digital music. Among the biggest companies are iTunes, Spotify, Napster, Rhapsody and Musicmatch. In India, online music stores, such as Flipkart, Music Today, Infibeam and legal music streaming services, such as, Gaana, Dhingana, Saavn and other download stores have begun their operation. Sales of digital singles are outselling physical singles by three to one in the second half of 2003 (IFPI, 2004).

Country	Physical sales (USD million)	Digital sales (USD million)	Physical : Digital Sales Ratio
US	3,649	2,976	55:45
UK	1,390	636	67:33
Germany	1,789	220	89:11
China	40	125	24:76
Japan	4,190	1,270	77:23
India	73	100	42:58

Figure 5: Physical sales v. digital sales across the world.

Online sales of CDs and both legitimate and illegitimate downloads may render traditional music specialty stores obsolete. Low search and distribution costs, tax advantages, low start-up costs and no monetary price for illegal downloads are factors altering the landscape of the retail music business.

#### **I.4.iv. Factors responsible for declining music sales**

From different reports, as discussed earlier, it is apparent that audio CDs sales are in steep decline. Possessing the CDs, carrying an hour of tunes, seemingly becoming prehistoric with the availability of various devices, for instance, iPod, satellite radio stations, high speed internet. Beyond sharing music through P2P, there are several other reasons which can be attributed towards declining music sales. They are as follows:

<sup>127</sup> FICCI-KPMG, Indian Media and Entertainment Industry Report 2013.

<sup>128</sup> Alejandro Zentner, *Online Sales, Music Downloads and the Decline of Retail Music Specialty Stores*, 20 Centre for 288 (2008).

#### **I.4.iv.a. Digital technologies and decreasing costs**

Prior to digital technology, music was produced and distributed using magnetically encoded tape. Compact disks, introduced to consumers in the 1980s, were the first element in the industry's shift to digital technology. Compact digital disc, or CD, was developed in 1979 and reached Asia market in 1982. Technology improvement reducing price of CD player and the convenience in consumption make CD more popular and replace cassette tape. The development of recordable CD (CD-R) and CD burner make it easy to duplicate music.<sup>129</sup> As a result many consumers were able to use computers to play compact disks for storage and replay on their computers.

Development of MP3 file format<sup>130</sup> dramatically changed the storage and bandwidth requirements. MP3 is an audio compression format that generates near compact disk quality sound at approximately 1/10 to 1/20 the size. To give a practical example of the compression savings achieved by MP3, consider that Brian Adam's "Please Forgive Me" on compact disk requires 24 megabytes of hard disk space, but when converted to MP3 the storage requirement falls to 2 megabytes.

On a 28.8 kilobit per second modem, the compact disk version of "Please Forgive Me" would take at least one and one-half hours to download from another computer. On the other hand, if the file were first converted to MP3, it would take approximately eight and one-half minutes. The transition from analog to digital production and reproduction has had a potentially significant effect on costs within the industry. With digital products the cost of reproducing and distributing perfect copies is functionally zero. Unlike the case where the tape player made production cheaper but did not alter the costs of distribution, digital technology has reduced both reproduction and distribution costs.

In US the average cost for a physical CD is \$ 15.98. The average cost for a downloaded album is \$ 10.00. In India, the price of a very recently released physical audio CD of nine Hindi film songs, "Yeh Jawani Hai Deewani", published by T-Series is Rs. 199/-. However, the official website of T-Series also offers to download all the nine songs of the same album at the rate of Rs. 10/- per song. So, the entire album can be purchased at Rs. 90/-. It is needless to state the difference of price

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<sup>129</sup> Siwat Auampradit, *The Effect of Music Piracy on CDs Purchases*, Faculty of Economics, Thammasat University (2007).

<sup>130</sup> MP3 is created by engineers at the German company Fraunhofer Gesellschaft. It is an abbreviation for Motion Picture Expert Group- Layer 3.

in online and physical mode of purchase and also not necessary to assume the medium towards which consumers will be inclined.

#### **I.4.iv.b. Illegal downloading**

The music industry is directly affected by the online music piracy. It goes without saying that the music companies' sales will decline when consumers stop buying music. Acquiring a pirated song over the internet has become much easier and faster with the easy availability of broadband internet connectivity. The music which otherwise would have generated revenue to the music companies is lost due to the illegal downloading of music. In this juncture two different types of lost sales are observed. On the one hand there is actual loss incurring from illegal download of music, which would have been purchased otherwise. These consumers were able but willing to pay for music or were able and willing to pay but did not download legally. The other group includes consumers that are willing or unwilling but unable to pay for downloaded music. Since these consumers do not have the money to buy music there would be no revenue to be made from these consumers. Illegal downloading causes decline in sales revenue and income of record companies.<sup>131</sup>

#### **I.4.iv.c. Album prices and consumer income**

It is argued that the music industry is getting affected since CD prices are too high. This argument is made considering the nominal price instead of the real prices. Record shipping prices have remained nearly constant for the past two decades.

#### **I.4.iv.d. Population age**

It is observed that different age groups buy different amounts of records per capita. For the reason of having no time constraints and musical culture, youths aged 15 to 19 have long been the most consistent purchasers of records, while people over 45 have been the lightest purchasers. If the age distribution has been changing in recent years, it is possible that the current decline in music sales could be a result of the population leaving the high-purchase groups and entering the low-purchase groups.

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<sup>131</sup> Matthias Duenner, *The Impact of Legal and Illegal Downloading of Music on the Financial Performance of the Recording Companies*, California State University (2010).

#### **I.4.v. Specific effects of declining music sales**

The contribution of the copyright based industries in respect of the economic and cultural development of any nation is significant and they add to the national wealth substantially. Hence decreasing sales of music is considered to have a corresponding negative effect on the national exchequer. Counterfeiting has negative effects on the economy of developing countries economically. Many jobs and investments are lost. The specific effects in this regard are discussed below.

##### **I.4.v.a. Effects on developing countries**

If pirated or counterfeited products are sold in local markets with ease, then all the opportunities for a national recording industry to develop get eliminated. The major interests of pirates are in dealing with a small range of the most popular recording artists. More particularly in demand entertainment products are generally sought after and can be easily sold. They have no concern in making the words widely available. As a result, in this circumstances independent producers become unable to compete with the pirated product. It is quite obvious that pirates have no concern in giving advances to the performers. Consequently, no royalties are derived from the sales, composers, song-writers and music publishers could not be provided with the licensing fees; the graphic artists and photographers could not get their fees and moreover the tax revenues on the sales are lost. Therefore a legitimate enterprise cannot contest with the market of pirate CDs as these enterprises had to sustain all the required costs of production. If the best of a nation's performers are not preserved properly or commercially recorded, incalculable losses to the local culture is very much evident. This would lead to the loss of the key element of the historical memory of the nation.

##### **I.4.v.b. Effects on creative industries and local economies**

With the development of pirated music, it becomes almost impossible for local music to contest, grow, to develop in emerging economies. All the industries require significant investment. Piracy involves a considerable risk for the investors considering the highly competitive markets for these works. Difficulty in predicting the consumer tastes and desires is also responsible for this. Consequently, investors leave the market, new works are not produced, CDs are not recorded and all investments go away resulting into loss of employment and trade opportunities.



#### **I.4.v.c. Effects on sustainable development**

If the investors can be assured of an adequate legal framework for the protection of intellectual property rights and effective enforcement of those rights will increase investment in the cultural sector of the nation significantly. For the reason of decline in sales of music CDs or DVDs, the music retailing stores as well as the music recording studios get affected. The artists back off from recording new songs and also cancelling lots of recording contracts and recordings. Futures of all the persons connected with recording studios, fellow artists, musicians, music stores, owners of music recording studios are at stake now. Their livelihood is in front of a big question. The music stores are saying that they have not anticipated such decline in sales. Previously 250-300 CDs are sold per day, but now-a-days only 50-60 CDs are sold. Not only Bengali music, but also sale of Hindi music is also severely hampered. The owners of recording studios fear that they have no idea how many recording contracts are going to be cancelled in future days.

Approximately 3000 musicians are proximately associated with the studios in Bengal music industry. With them other persons like the people working in press preparing CD inlay cards, people working in canteen and other supporting staffs are also involved in the functioning of recording studios. The manner in which recordings of new songs are being cancelled they have started to fear that their livelihood will be in deep trouble in the coming days. An atmosphere of uncertainty regarding their sustainability is created in the recording studios due to the “recession” in music sales. Their anxiety is rising day-by-day. Many of the owners of recording studios started business by taking loan. Due to loss in business they are not being able to repay the loan. Their business has started to shrink down in an alarming manner and the income and professions of lots of persons are at stake.

#### **I.5. Chapter conclusion**

The future of music industry is looking miserable with the advent of 3G and 4G technology. The mushrooming of illegal websites has been a dominant trend and is likely continue to dominate the music download business because there are no proper measures to check operations. Retrenchment has set into the music business triggering unemployment. The handfuls of audio companies who are

still around are there more out of love and passion than out of pure business interest. But even they are finding it difficult to survive in the current market scenario.

The national exchequer is losing huge revenue that can be earned from legal sale of music. The shutting down of iconic music stores because of non-existent physical sales is caused mainly because of piracy and unethical downloads from illegal websites that enjoy the liberty and freedom to carry on with their illegal and unethical business in the absence of stringent laws on the one hand and the absence of application of available laws on the other. Music Labels show little or no interest in recording new music and talents. The morale of many artists is also at an all-time low. This will affect the listeners who will be denied the privilege of listening to new generation of talents and to their favourite singers and music makers.

## **CHAPTER II**

# **COPYRIGHT-BASED INDUSTRIES AND NATIONAL ECONOMY: AN ANALYSIS**

### **THE FRAME**