

the architecture of the internet.<sup>356</sup> The music industry has emphasised that the purpose of the litigation is not to discard the use of MP3 technology, but to promote the operation of digital music over the internet. On the basis of the rights granted under the copyright law the recording industry, sought to regulate the use of the MP3 technology in the internet. The failure of creating and establishing an MP3 industry online justifies the reactions of the record industry towards MP3 technology.

The music industry is going through a transition. Over the internet the consumer-user perceive the music in MP3 format as a commodity, available free of charge. The recording industry is in a powerful position considering the most important asset, they own. At the same time demands of the consumer-users should be given due consideration, since the increasing importance MP3 technology indicates a rising demand for free music and overall there is a general inclination for demand of digital music. Moreover, the music industry has to take into consideration that many artists are positive for the distribution of music online.<sup>357</sup>

## **CHAPTER IV**

# **CHALLENGES IN ENFORCEMENT OF COPYRIGHT LAW IN INDIA: A STATUS REPORT**

### **THE FRAME**

Mere guaranteeing of certain rights through statutory enactments does not lead to effective protection of the rights holders. Effective enforcement of the rights becomes *sine qua non* for the successful application of any legislation. It is contextual to maintain that enforcement of

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<sup>356</sup> Sony Corp. v. Universal Studios, 464 U.S. (1984).

<sup>357</sup> Maria Anestopoulo, *Challenging Intellectual Property Law in the Internet: An Overview of the Legal Implications of the MP3 Technology*, 10 Information and Communication Technology Law, 320, 328-29 (2001).

fundamental rights is itself considered to be a fundamental right under the provisions of the Constitution of India. Effective enforcement is not an exception for copyright law as well. The rights guaranteed by section 14 of the Copyright Act, 1957 to the copyright owners remains meaningless, unless the remedies provided under the Act are secured to the right holders effectively in case of their infringement. If the instances of counterfeiting and piracy of protected works go without proper check, the creative industries will be suffering from the loss of revenue due to 'lost sales' of licensed music recordings and also the economic capability of the concerned industries will not be appropriated to its fullest extent.

It should be kept in mind that enforcement of intellectual property rights lies at a different plane, comparing enforcement of other property rights. Since, intellectual property has 'public goods' aspects, it gives rise to 'free rider' problem in respect of those property. Therefore intellectual property rights enforcement take a different dimension. The Copyright Act, 1957 contains detailed provisions related to both civil and criminal remedies. However, the actual enforcement of them has remained minimal. This has encouraged the counterfeiters or pirates to make unauthorised copies of the copyrighted material since they remain under the impression that their activities will not come under the scanner of the enforcement agencies. Consequently, the deterrence level goes down and the instances of pirating goes up. Moreover, in many cases, enforcement of copyright laws has been regarded as a 'peripheral issue' by the law enforcement agencies. Since the nature of intellectual property infringement is different from other violations of law, the enforcement agencies have been found to be lacking specific expertise in this regard. All these factors contribute to ineffective enforcement of the rights guaranteed to the copyright owners, leading to economic losses to the industry of which they are part of.

## **THE FOCUS**

The present discourse asserts that the Indian law enforcement mechanism is inadequate to protect and uphold the rights of the copyright holders in the film music industry. Therefore, this chapter focuses on examining the different remedies provided under the Copyright Act, 1957 for the enforcement of copyright law in the entertainment industry. It will delve with the various concerns faced by the law enforcement agencies in enforcing the civil and criminal remedies against the copyright infringement of the music recordings.

## THE OBJECTIVE

Firstly, this chapter seeks to give an overview regarding the different civil and criminal remedies provided by the Copyright Act, 1957. Then, it intends to trace the major pirated rackets in India and highlight how inadequate enforcement of copyright law has flourished the same. Different reports will be referred to comprehend the loss caused to the media and entertainment industry because of piracy, for which the major reason is attributed to inadequate enforcement of copyright law. By making an attempt to find out the reasons for the counterfeiting and piracy, the chapter seeks to explain the consequences brought by the same. Further, it attempts to throw light on the uncertainty regarding whether copyright offence is bailable or non-bailable. The main concern of this chapter will be to identify the major concerns, which are leading to inadequate enforcement of the statutory remedies. Lastly, it will make an attempt to suggest the necessary reforms in this regard.

The common law maxim, “ubi jus ibi remedium” means ‘where there is a right, there is a remedy’. This maxim can be well applied in the context of enforcement of intellectual property rights. The rights and remedies guaranteed by different legislations and treaties will be totally negated if there is a failure in the enforcement of those rights, interests and remedies. When the counterfeited products occupy the market share and when recovering the investment is prohibited by intervening infringing activity, enforcement mechanisms are required to protect the vital interests.<sup>358</sup>

An effective intellectual property system presupposes adequately funded arrangements for the protection of rights.<sup>359</sup> Where mounting technologies have enabled infringement of protected rights in an exceptional manner, the rights owners should be able to take action against infringers to prevent infringement and recoup the losses suffered from any actual infringement. State authorities should have effective infrastructure to deal with the counterfeits. A strong judicial system with adequate background and experience will further enhance the enforcement mechanism.<sup>360</sup>

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<sup>358</sup> KAMIL IDRIS, *INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS* 310 (1st ed. 2003).

<sup>359</sup> WORLD INTELLECTUAL PROPERTY ORGANISATION, *WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS* 207 (1st ed. 2004).

<sup>360</sup> *Ibid.*

Copyright offers the foundation for the uninterrupted flow of new films, music, software, books, magazines, games, photography and other related activities. However, creative industries are not able to realise their full potential and lead to underinvestment in production of creative content because of increased piracy rates, inadequate legal remedy for redressing internet piracy, poor enforcement procedures and ineffective management of intellectual property rights.

Any efficient mechanism for the copyright enforcement requires the availability of suitable provisional measures.<sup>361</sup> The aims of such measures are stoppage of infringing copies and the seizure of infringing copies, providing equipment that could be used for additional infringement, establish essential evidence and could disappear if not brought within the purview of court.

#### **IV.1. Reasons for increasing counterfeiting and piracy**

Developments in digital and computer related technologies have generated products and services that make our life more convenient and more interesting. Cultural activities are boosted on almost daily basis. Manufactures of creative works are creating new contents and this in turn produces market demand. Manufacturers create a market for pirated products by increasing market demand for their products. In this way manufacturers suffer loss of their own success. Price differences between different markets, tactically segment by manufacturers and distributors gets echoed in pricing policy, highlighting a substantial gap in consumer purchasing power in different countries.<sup>362</sup> This policy often makes people to produce and distribute counterfeit goods in the local markets. After counterfeiting activities become rampant, counterfeiters establish an economic presence in the society by creating different distribution channels.

In this way, emerging market produce an increasing demand for well-known products. Legitimate manufacturers becomes unable to satisfy this demand and this increasing demand for goods and products has outdone the capabilities of the enforcement agencies to offer protection against pirated products. New technologies have facilitated easy reproduction of cultural products, such as music, films, etc. These technologies has made convenient reproduction of IPR bearing goods and products in every sector where there are enthusiastic purchasers and market demand for the

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<sup>361</sup> Id. at p. 215.

<sup>362</sup> KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 308 (1st ed. 2003).

legitimate products. Increased demands for these cultural goods and a lack of proportional enhancement of enforcement mechanism required to support that demand and production, allow for cracks and niches in the system.<sup>363</sup>

## **IV.2. Organised criminal involvement**

Generally, piracy is the production of infringing copies for sale within a country. At the same time it is also an international activity with massive amount of infringing copies which is produced in one country and transported to other countries. The purpose is to weaken legitimate business to the extent that international companies extract from market and investment in recording and producing and consequently local talent dries up. The market for music recording is exploited by the criminal groups by producing counterfeited copies of the work of popular artists. From the illegal production of “music carriers”<sup>364</sup>, huge profits are earned.

The production and distribution of illegal music carriers is an “enterprise... Engaged in continuing illegal activities, which has as its primary purpose the generation of profits.”<sup>365</sup> Today organised criminal elements are increasingly becoming a part of counterfeiting and piracy for the reason of high-profit potential and relatively low risk. Profits derived from counterfeiting and piracy are utilised to fund other criminal activities.<sup>366</sup> Organised crime is operating in counterfeiting and piracy operations and the profits from the same are routed into other criminal actions. International criminal organisations produce, distribute, sell and traffic in counterfeited goods, since it is lucrative, a low-risk activity and it funds other activities where the risk and rewards are much greater.

The chance of huge profits for a small capital and very less penalties in an ineffectively regulated environment attracts the criminal in an organised and structured fashion. This lack of risk is a prime encouragement for criminal gangs whose only intention is profit. Therefore the production and traffic of illegal music products results in an organised crime activity. Groups engaged in these

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<sup>363</sup> Ibid.

<sup>364</sup> Tape cassettes, CDs, VCDs and DVDs

<sup>365</sup> International Federation Phonographic Industry, *Serious, Violent and Organised Crimes, Music Piracy*, (Jan 14 2014 10 AM) <http://www.ifpi.org/content/library/music-piracy-organised-crime.pdf>.

<sup>366</sup> KAMIL IDRIS, *INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS* 309 (1st ed. 2003).

activities may be established hierarchical criminal organisations, such as the Mafia or they may be less formalised and only associate for the duration of a particular enterprise.

Terrorism is the most severe form of organised crime affecting society today. As discussed above, music piracy has become the latest goldmine for the terrorist organisation. After drug trafficking, music piracy has become the next major source of funds for fuelling terrorist outfits.

Investigation and evidence show that these groups are involved in the fabrication and distribution of pirated music and other intellectual property infringing material to generate funds for their operations. International Federation of Phonographic Industry has conducted investigation which establishes the link between organised crime gangs involved in music piracy and terrorist organisations. IFPI has showed instances of CDs carrying propaganda messages from extremists groups have been traced in Argentina, Mauritius, Pakistan and Uruguay. It is found that these discs originated from the same source as much illegal music in those regions.

The arrival of the optical disc (CD, DVD) has drastically changed the facet of music piracy. There is substantial manufacture and international traffic of counterfeited optical discs. Annually sales of pirated products in respect of sound recordings worth an estimated US \$4 to \$5 billion. Globally two in five recordings are pirated copies. Total optical disc manufacturing size is assessed approximately to be 30 billion units. Manufacturing capacity immensely go beyond the legitimate demand. This helps criminal organizations to create a business environment suitable for illegal exploitation. Production costs may be as little as US \$0.25 cents, while retail value normally exceeds US \$2.50 and can reach US \$15.00. The profit margin remains substantial since the pirate producer has no expenditures associated with genuine production.

Chief coordinator of Intellectual Property Rights (IPR), Indian Music Industry, Julio F. Riberio in CII seminar on 'Intellectual Property in Entertainment and Music Industry' observed that, "there is a growing evidence to suggest that terrorists are now getting their funds from pirated music industry." In support of this statement, he said that the situation is disturbing in India particularly because Pakistan has a thriving pirated music industry. He said, "There are about seven companies in Karachi which churn out pirated CDs. These pirated CDs are sold in the US, UK, Canada, Mauritius and Australia." He added, "the piracy industry cannot carry on its business without the active support of the establishment. Our fear is that a part of these spoils is going to the Inter-

Services Intelligence (ISI). In addition to this, IFPI has established connection between LTTE and the pirated Tamil music in Europe and Canada.

### **IV.3. Economic consequences**

The effect of counterfeiting and piracy on society are of various dimensions since the society gets deprived of the benefit at different levels. The first visible result is loss of direct sales revenues which is faced by legitimate manufacturers. Evidently the size of such loss is enormous, far beyond anyone's understanding.<sup>367</sup> Counterfeit or the so called duplicate goods are always of sub-standard in quality to the originals. Enterprises lose future sales as a result. The prices which are paid for this sub-standard counterfeited goods are extreme when compared with in respect of the quality.

#### **IV.3.i. Negative Impact on Local Industries**

The countries in which counterfeiting and piracy take place, has to suffer both tangible and intangible losses. When traces are produced which shows that sale of pirated goods are widespread in a country and there is little government effort to prohibit such activities, the resultant detrimental reputation disappoints producers of legitimate goods from establishing their facilities in those countries. This further results in loss of FDI and the technology transfer and foreign know-how accompanying FDI.<sup>368</sup> Loss of FDI brings loss of foreign income, and ultimately undercuts a country's balance of payments.

This chain effect not only injures foreign manufacturers but a country's local industry. Local creators, inventors and small scale enterprises gets demotivated because of the inevitability that their products will be illegally exploited and it further excludes a return on investment and future growth and the spirit and energy forming the core part of the creativity process in the direction of a knowledge-based economy.

#### **IV.3.ii. Social Consequences**

These consequences are experienced most by the artists and entrepreneurs who compete directly against the illegal products. Local musicians, music groups, record companies and distributors

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<sup>367</sup> KAMIL IDRIS, *INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS* 310 (1st ed. 2003).

<sup>368</sup> *Ibid.*

cannot publish a record or CD and their legal products are ousted out of the market by the counterfeit copies. These illegal copies are distributed at a lesser price and with none of the artwork, lyrics or printed material. In this way local creativity and culture get stifled by counterfeiting and piracy. The ultimate losers in this case are the nation and its citizens. No respect for culture work and heritage undermines national measures to uplift indigenous identity and culture.<sup>369</sup>

#### **IV.4. Remedies for copyright infringement under international legal framework**

The Berne Convention for the Protection of Literary and Artistic Works, 1886 did not provided any specific remedies related to counterfeit and pirated goods, except to the extent of leaving the remedies to the “laws of the country where protection is claimed”<sup>370</sup>. Articles 13 and 16 provided for seizure of infringing copies of a copyrighted work.

Part III of the TRIPS Agreement specifies certain minimum standards for IPR enforcement. All members are obligated to implement these standards, which include civil and administrative procedures and remedies, provisional measures, special measures related to border measures and criminal procedures. For the first time an international instrument provided for certain measures which made an obligation for the signatories to provide an effective mechanism for the IPR holders for effective assertion of their rights, seizing infringing goods, seeking remedies against criminal enterprises and infringing goods and asking for the assistance of the government agencies,

Article 44 authorises the judicial authorities in Member States to pass orders of injunction, restraining parties from committing acts of infringement, including importation of infringing goods, such that the channels of commerce are kept free of these goods. Article 45 authorises these authorities to order the payment of damages. Article 46 authorises judicial authorities to order the destruction of infringing goods as well as materials and implements used to create them, without payment of any compensation. Article 51 of TRIPS provides that Member States shall adopt procedures enabling a right holder to apply to the customs authorities for the suspension of imports

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<sup>369</sup> Id., at p. 311.

<sup>370</sup> Berne Convention for the Protection of Literary and Artistic Works, 1866 §. 5 (2).



that he suspects would infringe his intellectual property rights. Art. 61 of the TRIPs deal with criminal remedies.<sup>371</sup>

To counter the growing threat of online abuse and infringement created by advanced digital technology and global telecommunication capacities, the world copyright community came together in December 1996 at diplomatic conference, organised by WIPO. This conference led to the adoption of WCT and WPPT which upgraded and clarified international standards for copyright enforcement. The significant outcome of this deliberation was the obligations concerning technological protection measures of protection.

General enforcement of IPRs takes four basic forms:

- Administrative enforcement, such as customs office seizing infringing goods;
- Criminal enforcement, initiating criminal action against the wrong doer by the state, generally through police;
- Civil enforcement, through which a civil action is taken against an infringer in which the right holder enforced the sanctioned legal action by way of either seeking injunction or monetary damages.
- Technological enforcement, in which technological means (e.g., encryption of digital copyright works) are employed by producers of products against IPR infringement.

Comparison of various enforcement measures<sup>372</sup>

Measures	Moving Party	Relevant IPR	Advantages	Disadvantages	Emerging Trends
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<sup>371</sup> *Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.*

<sup>372</sup> KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 314 (1st ed. 2003).

Administrative	Customs office	Trademark, Copyright	Relatively expeditious	Effective only in obvious cases	Regional cooperation on border control
Criminal	Police	Trademark, Copyright	Effective, relatively expeditious	Limited to serious case	Increase of fines, more raids for educational effect
Civil	IPR holder	All IPRSs	Reasonable remedies	Time consuming and expensive	IPR special court, ADR
Technological	Producer of IPR works	Copyright, Trademark, Patent	Practical, speedy	Vulnerable to hacking	Standardisation efforts for watermarking

#### IV.5. Previous studies of piracy in India – At a glance

Globalisation has led Indian cities to see infinite waves of new technological objects entering markets, homes and offices.<sup>373</sup> Counterfeited production and circulation occupied publicly perceived sphere of this novel world of goods. This consumer goods, especially media goods became all pervasive on life as counterfeits, fakes or copies or as ‘pirated’ or ‘local’ or ‘duplicate’ in general parlance.

Along with terrorism, the term ‘piracy’ has become a synonym for global fear with its consequent “destructive semantic overflow”.<sup>374</sup> Piracy has brought worries to states, world-wide capital and media industries. Piracy had occupied technology’s cultural kingdom by mid 1980s.<sup>375</sup> This scenario has been augmented speedily with the emergence of the digital period and high-quality

<sup>373</sup> RAVI SUNDARAM, PIRATE MODERNITY – DELHI’S MEDIA URBANISM 106 (1st ed. 2010).

<sup>374</sup> Ibid.

<sup>375</sup> RAVI SUNDARAM, REVISITING THE PIRATE KINGDOM IN LARS ECKSTEIN AND ANJA SCHWARZ (EDS.), POST-COLONIAL PIRACY 32 (1st ed. 2014).

reproductions. From 1990s, piracy has been moulded by global transformations in the production, circulation and regulation of media and culture. In India, the domestic firms dominate the film and music market and they have to contest aggressively on price and services. Indian companies fill the difference between international goods and very low-priced pirated goods.

Today the major frightening problem in Bollywood is people in by-lanes throughout India who ask every bystander, “CD? DVD? Games? You want?”<sup>376</sup> Through their wooden handcrafts they display a range of covers of the latest Indian movies and film music. The temporary shops line in downtown Mumbai’s busy business district. When an interested probable purchaser asks about any movie or a collection film music, the vendor rushes away and returns with the required CDs or DVDs.<sup>377</sup>

The 2015 Special 301 Report of IIPA on Copyright Protection and Enforcement states that growing online and mobile piracy, unauthorised camcording of movies in the theatres, hard goods piracy including the unauthorised use of published materials and signal piracy involving unauthorised distribution and/or receipt of pay-TV content, all harm creators in the Indian market. The 2007 reports of the International Intellectual Property Alliance on India documented that India suffered trade losses worth 496.3 million US dollars due to copyright piracy. The U.S. Trade Representative’s Special 301 Priority Watch List has mentioned India primarily for a long time.<sup>378</sup> Weak IPR enforcement has been cited as a reason for this. It affects negatively the copyright industry. The latest Watch List reports, “Despite the opportunities, evidenced by the launch of many legitimate services in India, copyright piracy, regulatory barriers and market access barriers inhibit the continued growth of domestic and foreign copyright stakeholders in India. Pirate online services undermine not only the local Indian market but also the vast potential export market for the Indian creative industries. Indian content is often exported or licensed via global deals, reflecting the considerable demand internationally for accessing Indian creative works and yet the value of licensing remains negatively affected by the availability of the same content via pirate sources.”

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<sup>376</sup> Ramola Talwar Badam, *Piracy gnaws at Indian movie profits, leaves filmmakers anxious*, Bollywood Pirates, SPAN, July/August 2005, p. 46

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

The major form of piracy in India are found as burned optical discs containing musical files in MP3 formats, pre-released music and motion pictures on CDs, VCDs or DVDs. It is reported that only music industry suffered a loss of Rs. 300 crore as hard goods piracy. In all metropolitan areas like, Mumbai, Delhi, Chennai, Kolkata and Ahmedabad, street vendors are found selling counterfeited hard goods openly. In India pirated discs are usually identified as 'maal' which is an informal and conversational expression to mean 'goods'. However, this expression is used in respect of illegitimate or pirated goods. 'Blue' and 'silver' are the two types of 'maal' in circulation. The 'blue maal' used to be of an inferior type. Generally it is a locally manufactured replica of a Bollywood film. In Mumbai, their price is found to be between Rs.40 and Rs.50. On the other hand, better quality 'silver maal' are those discs replicated from DVD masters and they are the imported one. These 'silver' types are accessible at the price of Rs. 100.<sup>379</sup>

Both physical and online piracy has threatened the existence of Indian film music industry. Several reports clearly point that. The portion of counterfeited music CDs/DVDs is estimated as 40% as per a report published by FICCI-National Initiative against Piracy and Counterfeiting (FICCI-NIAPC).<sup>380</sup>

The 'Bollywood-Hollywood Initiative' launched by the US-India Business Council with the FICCI has estimated that the Indian entertainment industry is losing approximately 80% of its revenue to counterfeiting (and piracy)<sup>381</sup>. According to a 2008 report by the US India Business Council and Ernst & Young, the revenue losses to the industry due to piracy are estimated to be US\$ 4 billion per year.<sup>382</sup> The total estimated loss of employment to the industry is estimated to be 819, 712.<sup>383</sup> Another report by the US-India Business Council and the US Chamber of Commerce's Global Intellectual Property Centre reveals that losses to the industry from trade in illegal CDs, DVDs, music downloads and cable television account for 38% of potential sales or approximately US \$4

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<sup>379</sup> LAWRENCE LIANG AND RAVI SUNDARAM, MEDIA PIRACY IN EMERGING ECONOMIES 339 (Joe Karaganis et al. eds., 1st ed. 2011)

<sup>380</sup> FICCI-NIAPC, Approach for Countering the Growing menace of smuggling and counterfeiting.

<sup>381</sup> Ernst & Young, The Effects of Counterfeiting and Piracy on India's Entertainment Industry (Piracy Estimation Study) (2008).

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.

billion.<sup>384</sup> According to studies commissioned by the Motion Picture Distributors' Association (MDPA), the local office of the Hollywood Motion Picture Association (MPA), India is the fourth largest downloader of films after the US, the UK and Canada. In a report by Internet Company, Envisional, it was found that online piracy of film and television content in India is carried out primarily through file-sharing networks like BitTorrent and cyberlockers or web-based file hosts such as, RapidShare or Hotfile. Illegal camcording on the day of film release in multiplexes/theatres further adds to the existing problem.

Loss due to piracy for the M & E industry in India:<sup>385</sup>

Industry	Size of the Industry (US\$ mn)	Value loss due to piracy (US\$ mn)	Estimated Piracy (% of total market)
Film	2095	959	31%
Music	183	325	64%
Gaming	24	40	63%
Television	4263	2682	39%
	6565	4005	38%

Employment loss due to piracy for the M & E industry in India:<sup>386</sup>

Market	Total size of the Market	Total People employed (nos)	Revenue per employee (US\$ mn)	Total Loss to the market	Factor of Loss	Loss of Employment	% Loss

<sup>384</sup> International Chamber of Commerce, Business Action to Stop Counterfeiting and Piracy, *FICCI Report on Counterfeiting, Piracy and Smuggling in India –Effects and Potential Solutions*, (Dec. 17, 2014, 10 AM) [http://Initiatives/India/Counterfeiting,-piracy,-smuggling-in-India---Effects-and-possible-solutions-\(low-resolution\)/](http://Initiatives/India/Counterfeiting,-piracy,-smuggling-in-India---Effects-and-possible-solutions-(low-resolution)/).

<sup>385</sup> Ernst & Young, *The Effects of Counterfeiting and Piracy on India's Entertainment Industry (Piracy Estimation Study)* (2008).

<sup>386</sup> *Id.*, at p.4

	(US\$ mn)			(US\$ mn)				
Gaming	24	3500	0.0068	40	50%	2927	84%	
Television	4263	506290	0.0084	2683	35%	111530	22%	
Films	2095	5000000	0.0004	959	25%	571896	11%	
Music Industry	183	150000	0.0012	325	50%	133434	89%	
						5659790	819786	14%

As per report the second largest Internet market in the world, with an estimated 302 million users as of December 2014, surpassing the United States.<sup>387</sup> India boasted over 900 million mobile subscribers (nearly 75% penetration) as of the end of 2012 according to the Telecom Regulatory Authority of India (TRAI), with increasing 3G capabilities (according to IMRB- 2012 and Nielsen-2013, India had over 100 million mobile Internet users, with 25 million from rural areas), and a “mobile first” approach that is coming to fruition.<sup>388</sup>

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With these increasing opportunities, however, come enormous challenges, including online and mobile piracy. Per indicators from Comscore’s analyses of the top 200 sites in India for copyright piracy, 21% are direct download sites, 21% are torrent sites, 17% are social networking sites, 13% are streaming/direct download sites, 8% are cyberlocker sites, 8% are streaming only sites, 4% are radio sites, 4% are blog sites, and 4% are wireless access protocol (WAP) sites.<sup>389</sup> As of this writing, notorious piracy sites most accessed in India include kickass.so (26th most accessed site in India), torrentz.eu (51st), extratorrent.cc (66th, and linked with desitorrents.com), and

<sup>387</sup> See, e.g., India to Have More Internet Users than US by December End: IAMAI, The Times of India, November 19, 2014, at <http://timesofindia.indiatimes.com/tech/tech-news/India-to-have-more-internet-users-than-US-by-December-end-IAMAI/articleshow/45205187.cms>.

<sup>388</sup> International Intellectual Property Alliance 2015 Special 301, Report on Copyright Protection and Enforcement, 2015.

<sup>389</sup> 2013 study tracking IP-addresses using P2P networks to download films and television content found India to be in the top ten Internet piracy countries in the world. Utpal Borpujari, India Major Online Film Piracy Hub, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.

tamilrockers.com (616th). Mobile phone downloading on memory cards and mobile apps for downloading and streaming are also on the rise, for tablets, smart phones, and other devices. In 2014, the Entertainment Software Association (ESA) reports that India placed fifth in the world (up from sixth in 2013) in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.<sup>390</sup>

Both USTR and International Intellectual Property Alliance members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.<sup>391</sup> In 2014, the United States Trade Representative report and IIPA members noted the following physical marketplaces in India as “notorious” for the availability of pirated/illegal materials:<sup>392</sup> Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika Bazaar, and Sarojini Nagar Market (New Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallupur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Since much pirate material is “pre-release” (for example, Indian and international music records or motion pictures, available on the streets before they are released legitimately to the public), the Indian government should establish enhanced penalties for dealing in pre-release piracy. Police raids taken on the basis of suo moto cognizance raids continue to be the most effective enforcement against these markets, and authorities ran in the range of 2,700 raids in India in 2014. Still, the noted lack of criminal deterrence, along with physical pirated material being sourced from several locations (detected in recent years from China, Pakistan, Bangladesh, and Nepal), make physical piracy difficult to eradicate.<sup>393</sup> USTR expressed serious concern over India's inadequate legal framework and ineffective enforcement.<sup>394</sup>

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<sup>390</sup> International Intellectual Property Alliance 2015 Special 301, Report on Copyright Protection and Enforcement, 2015.

<sup>391</sup> International Intellectual Property Alliance Submission for the Record Hearing on U.S. – India Trade Relations: Opportunities and Challenges, 2013.

<sup>392</sup> International Intellectual Property Alliance 2015 Special 301, Report on Copyright Protection and Enforcement, 2015.

<sup>393</sup> Id. at p 32.

<sup>394</sup> Joe C Mathew, Counterfeit goods growing problem in India: USTR, (Jan. 5, 2015, 11 AM) [http://www.business-standard.com/article/economy-policy/counterfeit-goods-growing-problem-in-india-ustr-110050200042\\_1.html](http://www.business-standard.com/article/economy-policy/counterfeit-goods-growing-problem-in-india-ustr-110050200042_1.html)

#### **IV.5.i. Major Pirated Rackets in West Bengal**

On August 18, in Chandni Chowk 350 DVDs and 95 VCDs, worth Rs 68,000, were seized. Another 499 DVDs and 232 VCDs, worth Rs 98,500 were seized. Pirated DVDs, VCDs and MP3 discs, worth Rs 2,77,000, were seized in BBD Bag and Chandni Chowk. In the same area 1,115 pirated MP3 CDs of Hindi, English and Bengali songs were confiscated.

In 2008, 367 MP3 CDs, 370 pirated VCDs and 202 pirated DVDs were seized from a vendor at M.G. Road, Kolkata on 15th April 2008. Owner Raja Gupta was arrested. 525 MP3 CDs and 272 pirated DVDs were seized from a vendor at J.L. Nehru Road, Kolkata on 30th April, 2008.<sup>395</sup>

In 2007, 625 MP3 CDs, 458 pirated VCDs and 452 pirated DVDs were seized from a vendor in AJC Bose Road, Kolkata on 3rd May 2007. 1619 MP3 CDs, 3230 pirated VCDs and 840 pirated DVDs were seized from 3 vendors in Brabourne Road on 7th May. 500 pirated VCDs, 225 pirated DVDs and 600 MP3 CDs were seized from 2 vendors in Narkeldanga, Kolkata on 9th May. 4900 MP3 CDs, 1914 pirated VCDs and 4200 pirated DVDs were seized from a shop in Chandni Chowk Street, Kolkata on 17th May. 3525 MP3 CDs, 715 pirated DVDs and 8655 pirated VCDs were seized from a shop in Niamatpur, Dist. Burdwan on 23rd May). 34 CD Writers, 1 Computer, 7329 MP3 CDs, 1245 blank CDRs, 270 pirated VCDs and 6725 inlay cards were seized from a unit in Mukherjee Lane, Dist. Hooghly on 10th May. 6 CD Writers, 650 MP3 CDs, 1550 pirated DVDs, 450 pirated VCDs and 15000 inlay cards were seized from a unit in Siliguri on 22nd May (Value app. 2.7 lakhs). 6 CD Writers, 650 MP3 CDs, 450 pirated VCDs and 1550 pirated DVDs were seized from a shop in Siliguri, Dist. Darjeeling on 22nd May (Value app. 2.7lakhs).<sup>396</sup>

In 2006, a vendor was searched in A.J.U.C. Bose Road, Kolkata on 3rd November. 859 MP3 CDs and 260 pirated VCDs were seized. 2 persons, Shaikh Kutub and Moni Khan were arrested. 475 MP3 CDs and 672 pirated VCDs were recovered from a vendor at Narkeldanga Road, Kolkata on 6th November. Owner Mohd. Azhar was arrested. In a raid conducted on a vendor in Hazra Road,

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<sup>395</sup> April 2008 State wise raid reports published by Indian Music Industry in its official website of Indian Music Industry, (Feb. 18, 2014 11 AM) <http://www.indianmi.org/newsletter/Apr108/StatewideReports.html#WestBengal>

<sup>396</sup> April 2007 State wise raid reports published by Indian Music Industry.



Kolkata 365 MP3 CDs and 790 pirated VCDs were seized. Owner Raju Moni was arrested. 222 MP3 CDs and 250 pirated VCDs were seized from a vendor in Maniktala Road on 10th November. A shop called Uttam Variety Stores was raided in Asansole, Dist. Burdwan on 23rd November. 2517 MP3 CDs and 4772 pirated VCDs were seized. Another raid conducted in Asansole, Dist. Burdwan on 8th November, on a shop called Music Center and a vendor yielded 3158 MP3 CDs and 5505 pirated VCDs. Owner Imtiaz Khan was arrested. 316 MP3 CDs and 2115 pirated VCDs were recovered from 2 vendors in Durgapore on 9th November.<sup>397</sup>

Vijay Market in Kidderpore is one of the hubs of pirated DVDs. Chandni Chowk market is another hub of pirated DVDs. There are proper offices in city where hi-tech set-ups exist for making multiple copies of a single DVD. In a recent raid, pirated DVDs, VCDs and MP3 discs, worth Rs. 2,77,000 were seized in BBD Bag and Chandni Chowk. Lot of raids were done by the police in this locality. In an action the detective department seized 520 DVDs including 33 of Chak De India, which was released the week before and 623 MP3 discs, worth Rs. 1,11,000 from BBD Bag. The kingpins were arrested and 1,115 more pirated MP3 CDs of English, Hindi and Bengali songs. In further raids 849 DVDs, 327 VCDs worth approximately Rs. 16,65,000 were seized. Approximately police have seized more than 40,000 pirated discs and arrested over 65 people in the recent times. However, the problem is not restricted to pockets like Fancy Market and Chandni Chowk. Hawkers sell pirated discs in the open on major thoroughfares.

According to a newspaper report published in March 14, 2013,<sup>398</sup> police arrested a businessman in Haldia for commercially selling copyright protected songs after illegally downloading them from internet. According to the reports of police, songs were alleged to be downloaded from internet in that shop and were sold through CDs and Memory cards in Mobile phones. Hearing this incident representatives from Indian Music Industry, Salt Lake Branch went to that place. After getting evidence, they filed a complaint in Durgachak police station, Haldia. On the basis of this complaint, police raided the shop and seized a computer and a card-reader.<sup>399</sup>

#### **IV.5.ii. Major Pirated Rackets in Delhi**

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<sup>397</sup> April 2006 State wise raid reports published by Indian Music Industry.

<sup>398</sup> Anandabazar Patrika, Siliguri Edition, March 14, 2013.

<sup>399</sup> Ibid.

The United States has named New Delhi's popular Nehru Place as among the world's notorious markets for pirated and counterfeited goods and services that infringe on intellectual property rights. 'Notorious Markets List' prepared by the Office of the US Trade Representative (USTR) has named numerous physical markets that are trading in pirated products. 'Nehru Place is reportedly one of the many markets in major cities throughout India that are known for dealing in large volumes of optical media and counterfeit goods, containing movies and music.' The USPTR report showed that Nehru Place hosts Asia's largest second hand computer market, India's largest garment-export centre and a large pirated software market. It is a prime example of commercial rejuvenation associated primarily with the establishment of the 'second-hand hardware' market in the area which sells refurbished computers, software and a variety of support services. The majority of the goods in the second-hand hardware market are discarded computers shipped from Southeast Asia which are disassembled and then reassembled for local reuse. Pirated software is widely sold at Nehru Place and often comes pre-installed on second-hand machines.

Besides Nehru Place, Palika Bazaar also has a reputation for a wide availability of illegal products such as and pirated music CDs and movies. Palika Bazaar in Delhi's central district, Connaught place is an enclosed underground market. Palika's great notoriety came with the video-boom. For many years Palika Bazaar was the main place for sourcing the latest movies for neighborhood cable video. Early on the cassette and video years of the 1980s, Palika emerged as one of Northern India's major suppliers of music, video products, recorded tapes, etc. Every major new audio and video company had shop outlets in Palika, ranging from T-Series to regional productions from other states. As video and electronic shops increased in number and influence, Palika became main hub for circulation of printed music and videos, both Hindi and international, a feature that remains to this day. For enforcement anti-piracy detectives, Palika became a den of vice, a free zone of piracy. By the late 1990s Palika became a site of violent clashes between detectives and shopkeepers. When raids used to begin, shopkeepers rapidly closed down shops and counters and the fragmented structure of Palika made recovery of pirated materials difficult.<sup>400</sup>

Apart from these places Lajpat Rai market also deserve mention, which is linked to the electrical market in Bhagirath Place and electronic factories in Angoori Bagh and Shahadra. Angoori Bagh

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<sup>400</sup> RAVI SUNDARAM, REVISITING THE PIRATE KINGDOM IN LARS ECKSTEIN AND ANJA SCHWARZ (EDS.), POST-COLONIAL PIRACY 97 (1st ed. 2014).

is hidden away outside the western corner of Delhi's Red Fort close to the high security pedestal zone from which the Indian prime minister addresses the country on August 15, Independence Day. Just across the Lajpat Rai market and Bhagirath Place, the neighborhood is perfectly located to supply components and finished electronic products. Small workshops turn out TVs, CD, VCD and DVD players, audio goods and surgical components. The small streets are stacked with packaged televisions and DVD players with labels entirely unfamiliar to middle class buyers used to large brand.

As optical disc piracy became commonplace in the 1990s, markets and street spaces emerged as semi-permanent points of sale. Places like National Market and SP Road have achieved an iconic status as the pirate centers of Bengaluru, home to wholesalers of an assortment of counterfeit and pirated products: DVDs and DVD players, Chinese made mobile phones, MP3 players, jukeboxes and gaming consoles. Vendors know their customer base and vary their goods accordingly. On a cart outside the Ayyappan Temple on Millers Road. Tamil films make up the bulk of vendor stock, followed by Hindi movies, English-language films sit in a single pile, mostly undisturbed by customers. On MG Road, a major office corridor, pirates cater to young professionals looking for after-work entertainment. Here, stock tends towards a mix of Hindi, English and regional Indian cinema.

Street pirates also offer different types of goods, reflecting the changing availability of higher or lower quality copies of new films and the perceived market for supplementary materials such as liner notes. At the end of the market are the high-definition releases of new films, generally compressed from Blu-ray masters down to 720p MP4 files or similar formats capable of being burned onto a DVD. At the low end are compilation discs of Hollywood and Bollywood films, usually with three to five films per disc, but sometimes with upto ten or more.

In 2006 in an excellent raid conducted by the IMI team and the local police officials, a CD replicating unit called 'Dugobh Replication India Ltd.' was raided in Delhi on 9th November. A whopping 80000 pirated CDs, 9.5 lakhs inlay cards, 1 CD replicating unit, 1 moulding unit, 1 printing unit, 1 lamination machine and 1 packing unit were seized. Moreover, shop no. 264 was raided in Palika Bazaar, Delhi on 15th November. 300 MP3 CDs and 1102 pirated VCDs were seized and 2 shops and a store house were searched in Karol Bagh area of Delhi on 16th

November. 230 MP3 CDs and 2811 pirated VCDs were seized. 548 MP3 CDs and 1885 pirated VCDs were seized from a shop at Patel Nagar on 17th November. Shop no. 478 was searched in Old L.T. Market, Delhi on 18th November. Furthermore, 1362 MP3 CDs and 2703 pirated VCDs were seized. 1628 MP3 CDs and 902 pirated VCDs were recovered from a premise in Sultanpuri Colony, Delhi on 27th November.

In 2007, 1415 MP3 CDs, 600 pirated DVDs and 129 pirated VCDs were seized from 3 vendors in Lajpat Rai market, Delhi on 19th and 20th May. In 2008, 9 CD Writers, 634 MP3 CDs, 577 pirated VCDs and 450 inlay cards were seized from a premise in Uttam Nagar, Delhi on 23rd April. 626 pirated VCDs and 378 MP3 CDs were seized from a unit at Prem Nagar, Delhi on 18th May.

The music and home video industry in West Bengal is going through its toughest time and striving for survival owing to the onslaught music piracy, inadequate revenue sharing model by the FM channels and high amount of taxes levied on the hapless music companies. Today the buyers of audio CDs and movie VCDs/DVDs experience closure of music shops, big and small, which used to do roaring business a few years ago. Under the harsh glare of halogen bulbs, cheaply packaged DVDs sell briskly. It can be blockbusters released a day ago or a classic from the '50s, Satyajit Ray or Hritwik Ghatak masterpiece or Hollywood best-sellers and even movies that only have been released at film festivals.

The piracy that ends up with a street-smart peddler in a dingy lane begins with the highest echelons of the film industry with links to Mumbai, Singapore and Dubai. The issue is how these DVDs come to the market. Sources involved in the trade said that there may be insiders in the censor board and distribution houses who sell these copies for up to Rs. 5 lakhs to a few shady dealers. The copies are then uploaded on certain private portals that have dedicated passkeys that have to be bought. Once the passkey is bought for a few lakhs, the film can be downloaded and copies can be made on DVD. Once downloaded a few copies are made which are sold to distributors and more copies are made in dingy, but well-equipped warehouses. Finally cheap DVDs worth 40 bucks hit the street side stalls.

Vijay Market in Kidderpore is one of the hubs of pirated DVDs. Chandni Chowk market is another hub of pirated DVDs. There are proper offices in city where hi-tech set-ups exist for making multiple copies of a single DVD. In a recent raid, pirated DVDs, VCDs and MP3 discs, worth Rs.

2,77,000 were seized in BBD Bag and Chandni Chowk. Lot of raids were done by the police in this locality. In an action the detective department seized 520 DVDs including 33 of Chak De India, which was released the week before and 623 MP3 discs, worth Rs. 1,11,000 from BBD Bag. The kingpins were arrested and 1,115 more pirated MP3 CDs of English, Hindi and Bengali songs. In further raids 849 DVDs, 327 VCDs worth approximately Rs. 16,65,000 were seized. Approximately police have seized more than 40,000 pirated discs and arrested over 65 people in the recent times. However, the problem is not restricted to pockets like Fancy Market and Chandni Chowk. Hawkers sell pirated discs in the open on major thoroughfares.

#### **IV.6. Remedies for infringement of copyright**

Remedy is all those curative treatment, which court provide for a litigant who has been wronged or is about to be wronged. The most known form of remedies are judgements that plaintiff are entitled to collect money from the wrong-doer and order him/her to restrain them from the offending conduct or to undo its consequences. The courts adjudicate whether the claimant has suffered the wrong under the legal framework; it inquires as per the procedural law. Thus it can be asserted that the law of remedies stands between substantive and procedural law. The important form of remedies are: (1) Compensatory remedies; (2) Preventive remedies; (3) Restitutionary remedies; (4) Punitive remedies; (5) Ancillary remedies.

Copyright infringement is defended by civil, criminal and administrative remedies. Civil remedies refer to injunction, damages or account of profits, delivery-up of infringing copies and damages for conversion. Criminal remedies provide imprisonment of the accused or imposition of fine or both, seizure of infringing copies and delivery-up of infringing copies to the owner of the copyright. Administrative remedies consist of moving the Registrar of Copyright to ban the import of infringing copies into India and the delivery of infringing copies confiscated to the owner of the copyright. The Copyright Act, 1957 of India provides for both civil and criminal remedies for infringement of copyright.

##### **IV.6.i. Civil Remedies**

Sec. 55 provides for various civil remedies for infringement of copyright by way of injunction, damages and accounts. The proviso to Sec. 55(1) makes it clear that if the defendant is able to

prove that he was not aware or had no reasonable ground for believing that copyright subsisted in the plaintiff's work as on the date of the infringement, the plaintiff would not be entitled to remedies other than injunction and a decree for the whole or part of the profits made by the defendants through sale of infringing copies. Section 55(2) provides that the author of a literary, dramatic, musical, artistic work, cinematograph film or sound recording, shall be entitled to institute infringement proceedings so long as his name appears on the work in the usual manner, unless proof to the contrary is led by the defendant.

Moreover, under sec. 58, all infringing copies in cases of piracy and any plates to be used for the production of such infringing copies is deemed to be the property of the copyright owner, who can take proceedings for the recovery of possession thereof. Section 62 empowers the copyright owner to file a suit in the district court within the local limits of whose jurisdiction, the plaintiff resides, or has a place of business or personally works for gain. This jurisdiction is in surplus of the jurisdiction conferred by the Code of Civil Procedure. Thus, as per the Copyright Act, any suit for copyright infringement has to be instituted before the District Court, which in the context of the Chartered High Courts of Madras, Bombay and Calcutta would mean the High Court which has been conferred with original jurisdiction.<sup>401</sup> Even if a dispute arising out of an assignment, if in essence it is related to copyright infringement, the case will be heard by the District Court.<sup>402</sup> The civil remedies limit the infringer instantly from further dealing with the infringing products.<sup>403</sup> The remedies can be enforced provisionally till the disposal of suit and can be finalised after the establishment of plaintiff's claim.

#### **IV.6.i a. Injunction as a form of relief**

Preventive remedies are meant to avert the injury before it occurs, so that the issue of compensatory remedies does not arise. Preventive remedies are coercive and declaratory in nature. Injunction is the most significant coercive remedy. 'Injunction is a personal demand from a court to litigants,

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<sup>401</sup> The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern AIR 1967 Mad 381; Mohan Meakin Limited, Bombay v. The Pravara Sahakari Sakhar Karkhana Ltd. 1987 MhLj 503.

<sup>402</sup> Saregama India Ltd. Mahal Pictures Pvt. Ltd. 2011 (113) Bom LR, as cited in ANANTH PADMANABHAN, INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS AND REMEDIES, 431 (1st ed. 2012).

<sup>403</sup> Tanushree Sangal, *Piracy in the Media and Entertainment Industry in India*, 20 Entertainment Law Review, 85, 85-86 (2009).

ordering them to do or refrain from doing some specific thing.’<sup>404</sup> Injunctions are meant to restrain the unlawful use of a copyrighted work and they can be temporary or perpetual. The injunctive relief available includes temporary restraining orders, preliminary injunctions and permanent injunctions. Injunction is defined as ‘a judicial process by which one who is threatening to invade or has invaded the legal or equitable rights of another is restrained from commencing or continuing such wrongful act, or is commanded to restore matters to the position in which they stood previously to his action.’ It has twofold purpose: restrictive or mandatory and from the point of view of force, it is either temporary or perpetual.

In *Time Warner Entertainment v. RPG Netcom Ltd.*<sup>405</sup>, the plaintiff alleged that defendant was exhibiting the movies of the plaintiff in their cable television network without the plaintiff’s consent. The plaintiff asked for a perpetual injunction against the defendant from Delhi High Court to restrain the defendant from continuing infringement. The court granted permanent injunctions restraining the defendants to stop copyright infringement in the plaintiff’s work. Though in respect of request for injunction against defendant for future works of the plaintiff, the court observed that such relief can be based on assumption of future violation by the defendants. Moreover, there was no evidence to establish that the defendant’s business was an impending risk of infringement and the plaintiff could not prove how injunctions can be legitimately granted for likely threats to future properties.

#### **IV.6.i.b. Interlocutory Injunction**

A claimant may apply for an interlocutory injunction pending the trials of the action or further order to secure immediate protection from an infringement. In *Time Warner Entertainment v. RPG Netcom Ltd.*<sup>406</sup> the principles for granting interlocutory injunction was deliberated upon. For obtaining an interlocutory injunction the plaintiff has to establish that (a) there is a prima facie case; (b) that the balance of convenience is in his favour and (c) that if the interim order is not granted it will cause irreparable injury to the plaintiff.

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<sup>404</sup> DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES - CASES AND MATERIALS*, 3 (4th ed. 2010).

<sup>405</sup> 2007 (34) PTC 668 Del.

<sup>406</sup> [1975] AC 368

However, after this case, these classic requirements for the grant of interim injunction had been modified. In *Series 5 Software Ltd. v. Philip Clarke & others*<sup>407</sup>, Laddie J re-examined the principles. The learned judge held: (a) the grant of an interlocutory injunction was a matter of discretion and depended on all the facts of the case; (b) there were no fixed rules; (c) the court should rarely attempt to resolve issues of disputed fact or law; (d) major factors the court should bear in mind were (i) the extent to which damages were likely to be an adequate remedy and that the ability of the other party to pay, (ii) the balance of convenience (iii) the maintenance of the status quo, and (iv) any clear view the court may reach as to the relative strength of the parties' case.

To obtain an injunction, the aggrieved party should be diligent and not wait too long to seek relief. Delay in plaintiff's attempt to obtain preliminary relief may defeat the injunction.<sup>408</sup> The defendant if injured as a result of the injunction will be entitled to compensation by virtue of an undertaking as to damages by the plaintiff which is an invariable condition of the granting of such an injunction. While granting an interlocutory injunction the court must look at the case as a whole. Consideration has to be given not only to the strength of the claim but also to the strength of the defence and then take the appropriate decision.<sup>409</sup>

#### **IV.6.i.c. Anton Piller Orders**

The Anton Piller order is a mandatory order given by the courts to the defendants on an ex parte application without giving any previous intimation to them. The order consists of an injunction to stop infringement, authorisation to go in defendant's premise for confiscating allegedly infringing goods<sup>410</sup>. Main aim of the order is to avert the threat of damage of evidence. This is an extraordinary relief where there is no other means of safeguarding justice. The order includes both 'inspection' and 'removal of documents and other properties'.<sup>411</sup>

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<sup>407</sup> [1996] FSR 273; See

<sup>408</sup> See *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.* 335 F. Supp. 278 (S.D.N.Y. 1971) ["by sleeping on its rights a plaintiff demonstrates the lack of need for speedy action and cannot complain of the delay involved pending any trial"]

<sup>409</sup> *R.M. Subbiah and another v. N. Sankaran Nair and another* AIR 1979 Mad 56.

<sup>410</sup> *Souvik Bhadra and Arka Majumdar, Anton Piller Order in UK and its Possible Implications in India*, 12 *Journal of Intellectual Property Rights*, 488, 490-91 (2007).

<sup>411</sup> *Id.*, at p. 489.



In *Anton Piller KG v. Manufacturing Process*<sup>412</sup>, Anton piller order got recognition and both the substantive standards and service requirements of such orders were laid down. In this case the plaintiff provided drawings and confidential information to the defendants, who communicated the same to the third parties in order to enable the third parties to manufacture components identical to the plaintiff. The plaintiffs asked for ex parte order allowing them get into the defendant's premise to inspect the documents and to remove them. The plaintiffs contended that if the defendants were given adequate intimation of the application, there is every possible chance that the defendants would remove relevant documents. Court of first instance denied such relief considering the claim to be an extreme one and consequently plaintiffs preferred the appeal.

Lord Denning held that such orders could be passed ex parte, but only where (i) it was essential that the plaintiff should have inspection so that justice can be done between parties, (ii) if the defendant were forewarned, there was a grave danger that vital evidence would be destroyed, concealed or taken beyond the Court's jurisdiction thus defeating the ends of justice and, (iii) the inspection would do no real harm to the defendant or his case. Lord Omrod agreed with Lord Denning. Lord Denning relied on the inherent jurisdiction of the court while granting such an order. Bona fide interest of the plaintiff and justice are considered to be of supreme importance in this regard and this was stressed in *Universal City Studios Inc. v. Mukhtar & Sons*.<sup>413</sup>

- Grant of Anton Piller orders under Code of Civil Procedure in India

Order XXXIX, Rule 3 of the CPC requires the court to provide direct notice of the injunction application to be given to the opposite party except where it appears that object of granting the injunction would be defeated by the delay. However, the proviso to Order XXXIX, Rule 3 enables the grant of ex parte injunctions. Order XXVI, Rules 9 and 10 permits the appointment of a commission for local investigation and provides for their powers, but, the provision is silent in respect of whether such commission can be appointed at the first ex parte hearing. The relief sought at the *ex parte* stage is normally drafted as seeking an "An order appointing an advocate commissioner to visit the premises of the defendants and to make out an inventory of the

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<sup>412</sup> [1976] FSR 129.

<sup>413</sup> (1976) 2 All ER 330.

unlicensed/infringing products belonging to the plaintiff that are found to be in use by the respondent.”<sup>414</sup>

In *Autodesk Inc. v. A.V.T. Shankardass*<sup>415</sup>, the plaintiff sought for an interim injunction and appointment of a local commissioner to visit the defendant’s premise ex parte. Single Bench of Delhi High Court rejected the request, since the plaintiff was depending chiefly on the report of the private investigator and because of lack of strong prima facie case. Subsequently, there was an appeal to the Division Bench of the High Court, which appointed a Local Commissioner to visit the premises of the defendant and to collect evidence. The report of the Local Commissioner indicated strong evidences against the defendant. Although the parties by themselves reached to a settlement, the Division Bench of the Delhi High Court has enumerated the relevant factors and guidelines which the Court may take into consideration on the question of appointment of a Local Commissioner in the matters of infringement and piracy. The court observed that, any application for ex parte appointment in such matters is usual and is supposed to meet the ends of justice. The test of reasonable and credible information regarding existence of pirated goods or incriminating evidence should not be subjected to strict proof or a requirement to demonstrate or part of the pirated goods or incriminating evidence at the initial stage itself. The court held that the normal and natural course of conduct and practice in trade should be given due consideration

Such orders are granted by Indian Courts as well as the ex parte stage and are popularly sought relief in copyright infringement cases. In *Bucyrus Europe Limited v. Vulcan Industries Engineering Company Private Limited*<sup>416</sup>, the Calcutta High Court has discussed the principles governing Anton Piller orders in the context of a copyright infringement action as follows: (i) where the plaintiff has an extremely strong prima facie case; (ii) where the actual or potential damage to the plaintiff is very serious; (iii) where it was clear that the defendant possessed vital evidence; (iv) there was a real possibility that the defendant might destroy or dispose of such material so as to defeat the ends of justice; (v) the purpose of Anton Piller order is the preservation of evidence.

Before passing an Anton Piller order some safeguards are also to be observed like asking the plaintiff to give an undertaking in damages in case the plaintiff is wrong and the defendant suffers

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<sup>414</sup> ANANTH PADMANABHAN, *INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS AND REMEDIES*, 439 (1st ed. 2012).

<sup>415</sup> 2008 (37) PTC 58.

<sup>416</sup> 2005 (30) PTC 279.

damages as a result of the execution of the order. However, before the Court will grant an Anton pillar order, some safeguards are also to be observed like asking the plaintiff to give an undertaking in damage in case the plaintiff is wrong and the defendant suffers damages as a result of the execution of the order. However, before the Court will grant an Anton Piller order, the plaintiff must be able to convince the Court that he has a strong case and that the order is indeed essential to the ends of justice.

However, the real implementation of these orders exhibited that Anton Piller order can be abused and it has the probability to disrupt the business of victim or impede his privacy. Thus, the Anton pillar orders are often labelled as ‘the nuclear weapons’ of the law. Scott J. noted the potential abuse of Anton pillar orders in *Columbia Picture Industries v. Robinson*<sup>417</sup>. Such order often produces detrimental and irreparable concerns, mainly because without giving the defendant the chance of contesting by giving adequate opportunity of hearing. Therefore, in *Columbia Pictures* case as well as *Universal Thermosensors Ltd. v. Hibben*<sup>418</sup>, certain safeguards were prescribed by the courts. While asking for Anton pillar order, the plaintiff has an obligation to give cross undertaking so that if there are unwanted damages done to the defendant, he can be recompensed and an undertaking for the safe custody of the materials till the matter is disposed.

In *Bengal Club Ltd. v. Susanta Kr. Chowdhury*, the Calcutta High court highlighted the significance of ‘good faith’ in the pleadings in respect of an ex parte injunction application, because in the absence of contested hearing the judge has to depend on the plaintiff’s submission. The court observed that highest good faith of the plaintiff is sine qua non for passing an Anton pillar order. However, this case did not deal with the issue of self-incrimination, granted by Article 20(3) of the Constitution of India and the privacy concerns of the defendants are overlooked. In India the application of Anton pillar order is in initial stage and there is total lack of substantial guidelines regarding the practice procedure before the courts.

#### **IV.6.i.d. John Doe Orders**

Anton Piller injunctions are extra-ordinary equitable relief allowing the plaintiff to confiscate alleged infringing goods for the purpose of preserving the evidence from destruction. However,

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<sup>417</sup> (1986) 3 All ER 338.

<sup>418</sup> (1992) 3 All ER 257.

these orders are meant for investigating the premises of the known persons and did not focus on the wrongs committed by unknown and unidentified. ‘John Doe’ or ‘Rolling Anton Piller’ orders are developed to counter the problems which copyright owners suffer identifying specific defendants, helping them to lodge ex parte infringement suits against unidentified persons forming a part of an identifiable class. Once the defendants are identified, ‘John Doe’ is substituted with the name of the concerned defendant. John Doe is a generic names for the defendants. John Doe orders help the copyright owners in minimising the delays posed by indeterminacy and anonymity of violators and seek timely protection of their right instead of being left at the mercy of the ‘wait and watch game’.<sup>419</sup>

EMI Records Ltd. v. Kudhail<sup>420</sup> was the first case in United Kingdom where John Doe copyright injunction was granted. The plaintiff brought allegation of copyright infringement of certain cassette types against the street traders. Very few of the names of those street traders could be traced. Therefore John Doe order was sought against all the members of an identifiable class to stop them from continuing the counterfeiting activities. The court held that the plaintiffs were able to determine the existence of a group sharing common interest, though the individual members could not be identified because of secrecy of the group and hence ex parte relief was granted.

In USA, the first case where John Doe order was granted was Billy Joel et al. v. Various John Does, Jane Does and ABC Company<sup>421</sup>. In this case injunctive relief was granted by the District Court against various John Does or unidentified and unauthorised defendants to avert the illegal sales of stock bearing Billy Joel’s name outside the sites where he arranged his concerts. The illegal sales negatively resulted in revenue generation from sales by lawful merchants inside the concert locations. Even though the District Court found such orders to be “troubling”, but it was observed that “Were the injunction to be denied, plaintiffs would be without any legal means to prevent blatant infringement of their valid property rights.” In order to ascertain the identities of the unauthorised vendors, the court directed that copies of the restraining order were to be served on

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<sup>419</sup> Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 Journal of Intellectual Property Rights, 351, 353-54 (2013).

<sup>420</sup> [1985] FSR 36.

<sup>421</sup> 499 F. Supp. 791 (1980).

all those whose merchandise was seized, such persons reveal their names in order to be added as parties to the suit and appear in court to contest the action.

John Doe orders arrived in India through the decision given in *Taj Television v. Rajan Mandal*<sup>422</sup> and it was named as 'Ashok Kumar Orders'. In India in the beginning John Doe orders were utilised by broadcasters against known and unknown cable operators during sporting events. The orders used to be issued by way of granting blanket search and seizure directives and / or appointment of policemen to assist 'broadcasters'. In *Taj Television* case, the plaintiff, owner of Ten Sports television channel, obtained the broadcasting rights of 2002 World Cup football matches. The plaintiff alleged that many local cable operators were airing the sporting events without taking licenses from the plaintiff's authorised agency. The plaintiff exhibited evidence of unauthorised airing and apprehended that this would result in destruction of infringing evidence, revenue loss and also causing loss to those cable operators, who had taken due license. It was also contended that illegal distribution may result in poor programme quality, impacting on the plaintiff's reputation. Therefore, the plaintiff sought, for the first time in India, a John Doe order against unidentified defendants. Basically the prayer was for an ex parte order against six named cable operators and against a further fourteen unnamed persons who were claimed to be wrongfully transmitting the Ten Sports channel. The claimed order was justified on two broad grounds: (a) Section 151 of Code of Civil Procedure, conferring inherent powers on the civil courts to evolve a fair and reasonable procedure for meeting urgent situations; and (b) international practice of issuing John Doe orders issued by courts in various foreign jurisdictions. The plaintiff relied on the decision of the Supreme Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*<sup>423</sup> to validate the use of the court's inherent powers in the interest of justice as powers which are complementary to those provided for in the Code.

If the Indian legal framework justifying John Doe orders is looked into then the provision of sec. 55 (1) of the Copyright Act, 1957, which provides for injunction as a civil remedy for copyright infringement, cannot apply to John Doe injunctions since the provision warrants for the infringement to have occurred. However, Order 39, Rule 1 of CPC empowers a civil court to grant a temporary injunction when any suit property is in danger of being wasted, damaged or alienated

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<sup>422</sup> [2003] FSR 22.

<sup>423</sup> AIR 1962 SC 527.

by any party to the suit, or wrongfully sold in execution of a decree or when the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit. Moreover, Order 39, Rule 3 provides for an ex parte injunction depending on the satisfaction of the court that any delay would defeat the object of granting the injunction. Moreover, the plaintiff depended on John Doe orders, granted in trademark matters in Canada, where courts have enforced orders against unidentified persons. As long as the ‘litigating finger’ is focused to the unknown defendant, the inability to identify him by name is considered a misnomer. Deriving authority from the foreign jurisdiction, the court in Taj Television case was satisfied that the situation’s importance justified a John Doe order. The court awarded the relief to the plaintiff by appointing a Court Commissioner who was authorised to visit the premises of various cable operators and search and take into custody all equipment used for broadcast of plaintiff’s channel.

Subsequently Taj Television order was applied in MSM Satellite Singapore Pvt. Ltd. v. Star Cable Networks and others<sup>424</sup> to stop violation of the broadcasting rights of the plaintiff over the Indian Premier League matches by 41 named defendants and an indeterminate number of unknown cable operators. In ESPN Software India Pvt Ltd v Tudu Enterprise<sup>425</sup>, a John Doe order was granted against over 175 named defendants (who the plaintiff had identified during the course of the tournament) and an indeterminate number of unnamed defendants to preserve the plaintiff’s exclusive right to broadcast the 2011 ICC Cricket World Cup. In this case the court agreed with the plaintiff that unauthorised cable transmission culminates in irreparable loss and damage including subscription and advertisement losses. It could also encourage other operators to engage in such a practice. This would harm the plaintiff’s reputation as well as the public interest due to programming quality.

Although John Doe orders were issued against the broadcasters in the beginning, later on the producers and copyright owners in the Indian film industry are relying on such orders for protecting their copyright. In Viacom 18 Motion pictures v. Jyoti Cable Network and others<sup>426</sup>, the plaintiff, producer of movie, ‘Players’, obtained John Doe order under Order 39 Rule 1 and Rule 3 of CPC

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<sup>424</sup> FAO (OS) No. 211 of 2010.

<sup>425</sup> CS (OS) No. 384 of 2011.

<sup>426</sup> CS (OS) No. 2352 of 2011.

1908 against Jyoti Cable Network and other unknown cable operators restraining them from infringing their copyrights.

The producers of the movie, ‘Speedy Singh’ moved the Delhi High Court against unknown defendants for a temporary and permanent injunction for any copyright infringement, hence the John Doe order.<sup>427</sup> The producers of the movie were represented before the Delhi HC by Naik & Naik convinced the Court to pass a ‘John Doe’ order passed against all the prospective defendants which includes unknown persons, *“restraining them from in any way displaying, releasing, showing, uploading, downloading, exhibiting, playing, defraying the movie Speedy Singhs, without a proper licence from its producers. The order also restrains those who may wish to release or distribute the film without permission through CD, DVD, Blu-ray, VCD, Cable TV, DTH, internet, MMS, tapes, conditional access system or other media. The order is valid till December 19, 2011.”*<sup>428</sup>

The verdict given in Reliance Big Entertainment Pvt Ltd. v. Jyoti Cable Network & Others<sup>429</sup> (Singham order) is a landmark verdict for bringing the ‘Internet’ into the sphere of John Doe orders. The Delhi High Court passed an injunction against five named defendants and twenty five unnamed defendants. It would be pertinent to cite the order passed by the court as this has been copied verbatim in the subsequent John Doe orders granted by courts to producers: ‘For the forgoing reasons, defendants and other unnamed and undisclosed persons, are restrained from communicating or making available or disturbing, or duplicating or displaying or releasing or showing or uploading or downloading or exhibiting or playing and / or defraying the movie ‘Singham’ in any manner without proper license from the plaintiff or in any other manner which would violate/infringe the plaintiff’s copyright in the said cinematograph film ‘Singham’ through different mediums like CD, DVD, Blue-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner.

In Reliance Big Entertainment v. Multivision Network and others<sup>430</sup>, the plaintiff, producer of movie ‘Bodyguard’ obtained a John Doe order under Order 29 Rule 1 and Rule 3 of CPC, 1908

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<sup>427</sup> Delhi HC issues yet another John Doe order protect Speedy Singhs, (Nov. 15, 2014, 9 AM) <http://spicyip.com/2011/09/guest-post-delhi-hc-issues-yet-another.html>.

<sup>428</sup> Ibid.

<sup>429</sup> CS (OS) No. 1724 of 2011.

<sup>430</sup> CS (OS) No. 2066 of 2011.

against Jyoti Cable Network and other unknown network operators restraining them from infringing their copyrights. In *UTV Software Communications Ltd. V. Home Cable Network Ltd. and others*<sup>431</sup>, an order was obtained against the cable operators who illegally telecasted pirated versions of the films ‘7 khoon Maaf’. A few cable operators who caused infringement could be identified however there were many unidentified cable operators. Such persons were collectively termed as defendant nos. 19 to 50 named as “Mr. Ashok Kumar”. In this regard, reliance was placed on the “John Doe” practice. The court held that the balance of convenience was in favour of the plaintiff and against the defendants.

Red Chillies Entertainments Private Limited, the production house of the film, ‘Happy New Year’, obtained a John Doe order from the Bombay High Court<sup>432</sup> dated 14<sup>th</sup> October, 2014 which restrains any person from “telecasting/broadcasting/distributing/putting on the cable TV network/disseminating/reproducing or otherwise making available to the public, the film ‘Happy New Year’” or *“from (i) making a copy of the said film, including a photograph of any image forming part thereof, (ii) to sell or give on hire, or offer for sale or hire, any copy of the said film, regardless of whether such copy has been sold or given on hire on earlier occasions, (iii) to communicate the film to the public in any manner whatsoever including by way of but not limited to telecasting and/or re telecasting the said film, or even otherwise dealing with the rights in the said film which vest exclusively in the Plaintiff, in any manner whatsoever.”* ; the order also restrains others *“from communicating or making available or distributing, or duplicating, or displaying, or releasing, or showing, or uploading, or downloading or exhibiting, or playing, and/or defraying the movie “HAPPY NEW YEAR” in any manner without proper license from the Plaintiff or in any other manner which would violate/infringe the Plaintiff’s copyright in the said cinematograph film “HAPPY NEW YEAR” through different mediums like CD, DVD, Blu-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner.”*<sup>433</sup>

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<sup>431</sup> CS (OS) No. 821 of 2011.

<sup>432</sup> Red Chillies Entertainments Private Limited v. Hathway Cable & Datacom Limited and others., Suit (L) No. 993 of 2014.

<sup>433</sup> Id., at p. 4.



John Doe orders were extended by various High Courts to blocking access to certain websites that upload or permit the uploading of copyrighted content such as sound recordings and cinematograph films, without authorisation from the copyright owner. The relief granted is either movie specific but against unknown persons or website specific. In *R.K. Productions Pvt Ltd. v. BSNL and others*<sup>434</sup>, an order of the above nature has been passed in respect of the Tamil Film “3”. Besides these cases Delhi and Madras High Courts have passed ‘Ashok Kumar’ orders against unidentified entities. These instances show that protective orders in the nature of John Doe orders under Order 39, Rule 1 of CPC read with Sec. 151 of CPC are going to be the trend of the present time in respect of online piracy of copyrighted content.<sup>435</sup>

Recently, Phantom Films have been granted a John Doe order by the Bombay High Court for blocking sites that ‘may’ be pirating its movie, *Masaan*.<sup>436</sup> Phantom Films had stated that it had come across dormant links which offered a ‘facility of free download’ of its movie across websites. On the basis of this argument, Phantom Films was given the John Doe order against ‘unnamed entities’, being ‘John Does’, while Sonali Cable Vision, SpectraNet, Manish Realities, Macassar Productions and Shikhya Entertainment were listed as parties.<sup>437</sup> In 2015, producers of movies like, ‘Bombay Velvet’ and ‘Piku’<sup>438</sup> have been able to secure such orders against several websites restraining from averting them from downloading or providing access to those movies.

The Indian Music Industry and a sound recording label have also approached the Calcutta High Court<sup>439</sup> and obtained a direction to the known defendants who are Internet Service Providers, to block access to various websites listed in the schedule to the plaint, which are used exclusively for providing unauthorised access to copyrighted sound and video recordings. The order is extracted below:

“This is an application by the plaintiffs in aid of a suit complaining of copyright infringement. The plaintiff no. 1 and the members of the plaintiff no. 2 are copyright

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<sup>434</sup> C.S. No. 208 of 2012.

<sup>435</sup> ANANTH PADMANABHAN, *INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS AND REMEDIES*, 420 (1st ed. 2012).

<sup>436</sup> *The Trend and Tumour that is a John Doe Order*, (Jan 16, 2015, 6 PM) <http://spicyip.com/2015/07/the-trend-and-tumour-that-is-a-john-doe-order.html>.

<sup>437</sup> *Ibid*.

<sup>438</sup> *‘Bombay Velvet’ and ‘Piku’ secure Anti-Piracy Orders*, (Jan 26, 2015, 8 PM) <http://spicyip.com/2015/05/bombay-velvet-and-piku-secure-anti-piracy-orders.html>.

<sup>439</sup> *Sagarika Music Pvt. Ltd. v. Dishnet Wireless Ltd. and others*, CS No. 23 of 2012.

owners of Hindi film songs. It is argued that the website mentioned in the prayers are posting and playing the songs, without any copyright or licence. This application is made ex parte on the apprehension that if notice of this application was served on the website they would shift their service to a different website.

In these circumstances, I pass an order of injunction in terms of prayer (a) of the Notice of Motion till further orders. I direct the respondent ISPs to indicate to the plaintiff the address of the owner/operator referred to in the prayers. I also make it clear that the above order of blocking should be confirmed to the above website only and should not otherwise interfere with internet service.”

The last part of the last sentence extracted above has been emphasised as this is precisely what is happening as a consequence of this dual kind of orders. Though the first kind of order is, on its own terms, confined to only the film that is the subject matter of the suit, internet service providers have used it to block access to entire websites in contravention of all recognised principles of network neutrality. Even in the case of the second kind of orders, there is absolutely no transparency as to how ISPs have been interpreting the order and what websites are being targeted to them under the grab of such an order. The prayers sought in some of these civil suits are in complete contravention of the salutary principle in Order VII, Rule 7 of the CPC, 1908 that “every plaint shall state specifically the relief which the plaintiff claims. It is a well-established principle that courts and judicial orders cannot be used as a vehicle for oppression, harassment or to perpetrate abuse of power. Legislative intervention is absolutely necessary for the field without any further delay to lay down the parameters for exercise of judicial power under section 151 of the CPC, which power can otherwise be construed in any manner by any court with little checks and balances on the possibility of exercise of such power.<sup>440</sup> Although promoting rights of the copyright owners is of paramount importance, it is necessary that at the time of granting such orders courts should adopt a vigilant attitude by way of including adequate safeguards so that consumers can have access to websites for legitimate activities.

#### **IV.6.i.e. Delivery-up Orders**

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<sup>440</sup> ANANTH PADMANABHAN, INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS AND REMEDIES, 421 (1st ed. 2012).

Besides the order directing the Commissioner to search the defendant's premises for counterfeited copies and preparation of report, courts are also empowered to direct that seized infringing copies and plates to be delivered to the plaintiff. Section 58 of the Copyright Act provides for a supplementary protection for copyright owners by creating a deeming fiction in their favour. As per this provision, all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for production of such infringing copies, shall be deemed to be the property of the owner of the copyright. This provision statutorily recognises prohibition against the tort of conversion.

Delivery up orders are significant remedy against in cases of big scale piracy and can be sought for in the same suit seeking an injunction in a copyright infringement suit. In *J.K. Rowling v. City Publication*,<sup>441</sup> pirated books bearing resemblance to the Harry Potter books were being distributed. The Delhi High Court granted a permanent injunction order restraining the defendants from printing, distributing, selling or offering for sale their infringing books and at the same time delivery up order of all the duplicating equipment and other plates and all infringing material which were in the possession of the defendants and/or their agents, servants, representatives etc. to the plaintiffs. In copyright infringement cases where counterfeited software or confidential information of a copyrightable nature are found loaded on to a hard discs of the infringer on inspection, Court normally appoints a Commissioner to de-seal the computer/CPU and prepare back-up copies of the hard discs/storage media on new hard disc/storage media provided by the defendant. The unlicensed/pirated software as identified by the plaintiff's representative will then be deleted from the new hard discs. The defendants will be permitted to use the new hard discs along with the seized computer/CPU and the original hard discs are then sealed and handed over to the defendants.<sup>442</sup>

#### **IV.6.i.f. Damages as a Relief for Copyright Violation**

The remedies of damages and accounts of profits provided under Indian copyright law provide monetary relief to the right holders in cases of infringement aimed at compensating the copyright owner for the harm caused by the defendant.

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<sup>441</sup> 171 (2010) DLT 791.

<sup>442</sup> *Dassault Systems S. A. v. Sphinx Worldbiz Lim.*, 2009 (41) PTC 759.

In *Pillalamarri Lakshikantham v. Ramakrishna Pictures*<sup>443</sup> both the issues of claims for damages and account of profit were considered and it exhibits Indian judiciary's approach of awarding civil remedies. Here, the author of a book entitled *Tarasasankam* had assigned his copyright to a publishing house and the first defendant made a movie based on the book and it was released in 1969. The plaintiffs approached the trial court and sought for an injunction restraining the defendant from the screening of the film. The plaintiff also asked for damages and account of profits.

The trial court allowed the injunction prayed by the plaintiff. In respect of the request for damages and account of profits, the trial court observed that "it is impossible to determine what precise part of the defendant's profits are attributable to the above borrowed material. I do not therefore consider it necessary to order the taking of an account in this respect. I consider that damages of Rs. 3,000 would be just under this head."<sup>444</sup> Subsequently, appeal was preferred against the trial court decision and a Single Bench of the High Court affirmed the verdict of the trial court. The Single bench held that the amount of Rs. 3,000 fixed by the trial court as compensation for infringement of plaintiffs copyright was neither unreasonable nor arbitrary, and the Single Bench also did not concede to the demand of the plaintiff for account of profits. The plaintiff appealed against the verdict of the Single Bench before the Division Bench of the High Court.

As the plaintiff was of the view that he was entitled to all the three major civil remedies<sup>445</sup>, mentioned under the Copyright Act, the main issue to be addressed by the Division Bench was whether the plaintiff was entitled to all the three remedies simultaneously. On the basis of a close perusal of the legislative history of copyright law, the court held that the cases of copyright infringements, injunction was the normal remedy. As copyright infringement was established under the facts of the present case, the court granted injunction against the defendants. But with the regard to the issue of granting damages and account of profits the court held that the remedies of damages and account of profits were mutually exclusive remedies. As the petitioners in the case had already been given damages, the court was of the view that the petitioners were not entitled to claim account of profits.

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<sup>443</sup> AIR 1981 AP 224.

<sup>444</sup> Ibid.

<sup>445</sup> Injunction, damages and account of profits.

#### **IV.6.i.g. Exemplary Damages**

In serious cases of piracy, it may not be possible to get exact evaluation of the profit made by the infringers, since the transactions are illegal. Therefore in India copyright holders increasingly asking for damages in place of account of profits. Generally, the courts award three types of damages: (a) actual damages, (b) damages to goodwill and reputation and (c) exemplary damages. The actual damages are provided to bring the plaintiff back to a position equal to one where the defendants might have caused no loss to the plaintiff.

However the courts in India are awarding exemplary damages and sending a deterrent message to the community as a whole. *Time Inc. v. Lokesh Srivastava*<sup>446</sup> is a leading case in this regard. Time Inc. was the publisher of the famous international news magazines Time and Time Asia. The defendants released a news magazine, 'Time Asia Sankaran' and it was very similar to the plaintiff's magazine. The plaintiff initially wanted to come to a settlement with the defendants. After the failure to come to a mutual settlement, the plaintiff sought permanent injunction against the defendants from using trademarks and designs similar to that of the plaintiff's magazine. It also sought delivery of the infringing goods and three types of damages – a sum of Rs. 1,250,000 as actual damages arising from loss of sales and advertisement revenues due to the activities of the defendants, Rs. 500,000 on account of damage to reputation and goodwill of the plaintiff and Rs. 500,000 as punitive and exemplary damages.

On the basis of the data provided by the plaintiff, the court did not grant the actual damages, claimed by the plaintiff, as he could not prove on record how and on what basis the damages were calculated. But the court granted Rs. 500, 00 for loss of reputation as it was of the view that readers who might have read the magazine of the defendants must have formed a very poor opinion about the plaintiff's magazines. The court also granted punitive damages of Rs. 5,00,000. The court observed that compensatory damages were aimed at preventing an offender from indulging in such unlawful activities. According to the court, whenever an action had criminal propensity, the punitive damages were also clearly called for, as they can curb the tendency for violation of law and infringement of the rights of others with a view to make money.

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<sup>446</sup> 2005 (30) PTC 3.

Explaining the shift in judicial approach towards IP infringement issues, the court observed that “this court has no hesitation in saying that the time has come when the courts dealing actions for infringement of trademarks, copyrights, patents, etc. should not only grant compensatory damages but award punitive damages also with a view to discourage disheartened law breakers who indulge in violations with impunity out of lust for money so that they realise that in case they are caught , they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.” The court further observed: ‘This court feels that this approach is necessitated further for the reason that it is very difficult for plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case the claim of punitive damage is of Rs. 5 lacs only which can be safely awarded. Had it been higher even, this court would not have hesitated in awarding the same. The court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend on the flagrancy of infringement.’

Further, the decision in *Microsoft Corporation v. Deepika Raval*<sup>447</sup> illustrates the inclination of the judiciary in awarding punitive damages in copyright piracy case. In this case the defendants installed various software of the plaintiff like Windows 98 and Microsoft Office in the computers they assembled and sold without any authorisation from the plaintiff. When the matter was investigated by the plaintiff and attempts for settlement failed, the plaintiff approached the court seeking remedies including permanent injunction to restrain the defendants and their associates from further infringements. The plaintiff also requested the court for delivery of infringing goods, damages, account of profits and costs.

Regarding the issue of account of profits, the court noted that it may not be of any use to pass a decree for rendition of accounts in the absence of defendants, however, the damages could be awarded on the basis of estimation. In this case since the defendant was a private limited company which shows that the business was in organised manner and also the defendant failed to answer. This proved a wilful, intentional and blatant abuse of copyrights by the defendant. The court awarded damages of Rs 5, 00,000 and held that the plaintiff shall be permitted to recover costs.

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<sup>447</sup> MIPR 2007 (1) 72.

In United States, in the case of *Blanch v. Koons*<sup>448</sup>, the Southern District allowed the plaintiff to add a prayer for punitive damages. The court elucidated that, “ultimately, the determination whether punitive damages are available for copyright infringement cases must be made in a case where the issue is squarely presented: where the jury could find malice or willful infringement, and the plaintiff is not seeking (or is barred from obtaining) statutory damages.”<sup>449</sup>

#### **IV.6.i.h. Distinction between Damages and Account of Profits**

The differences between damages and account of profits have highlighted by Madras High Court in couple of cases. In *Shantilal Paramashankar Joshi v. Themis Distributors (P) Ltd.*<sup>450</sup>, the Madras High Court illustrated the doctrine of election in respect of damages vis-à-vis account of profits. The observation given by the court here can be applied across to all cases of intellectual property rights infringement. The court held that, the plaintiff need not make the election in respect of remedies when the lis is brought to the court. The court observed,

“The plaintiff could both elect and seek the assistance of the court for the grant of damages, on the ground that the plaintiff has suffered loss by reason of wrongful infringement of the rights, and therefore privileged to get all such reasonable compensation from the infringers, or in the alternative ask for an account of profits gained by the wrongful user of the rights by the infringers.”<sup>451</sup>

In *Sakku Bai Ammal v. Babu Reddiar*<sup>452</sup>, Madras High Court observed:

“as the choice of the reliefs is always with the plaintiff, who is the dominus litis in a litigation, he could seek for more than one independent relief or also for alternative reliefs. If he asks for the last of such reliefs, then he is placing the reliefs so sought for by him on a par with each other, and if the court trying the subject matter grants him one relief, then it follows that he has the benefit of the relief and he cannot throw overboard such a benefit

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<sup>448</sup> 329 F. Supp. 2d 568 (S.D.N.Y. 2003).

<sup>449</sup> Marc J. Rachman, Sara L. Edelman and David Greenberg, *Are Punitive Damages available under Copyright Act?* 13 *The Metropolitan Corporate Counsel*, 3 (2005).

<sup>450</sup> (1979) 1 MLJ 213.

<sup>451</sup> *Ibid.*

<sup>452</sup> AIR 1977 Mad 223.

with a design or motive or to further his own cause by seeking umbrage in an appellate court....”

The nature injunctive relief is equitable and any deferral may result defeating the grant of interim injunction, even the Court concludes it to be a case of copying. In such cases, for furthering plaintiff’s interest, the court can direct the defendant to keep accounts or even pre-deposit a certain sum of money in court. This direction can be granted where the plaintiff has waited for a film to release or has approached the court after third party interests have been created in respect of the film.<sup>453</sup>

#### **IV.6.i.i. Copyright enforcement through law of torts**

Law of torts is considered as an alternative avenue of dispute resolution since it lays open the parties to a cost risk in case of any dispute. It has twofold purpose. It helps the potential victims to recover damages and inspires economic agents to internalise the costs of externalities which their actions could bring. In this context, economics and law together looks for an efficient behaviour that lessens the social cost of a potential tort by internalising the externality. This model presupposes an accident and therefore a victim and an aggressor, a cause and a fault, i.e., liability. Tort law encompasses all those involved to measure their behaviour, by the care exercised or the repetition of their actions. On the other hand, copyright is an avenue of transferring ownership right and of internalising all investments related to the asset.<sup>454</sup> Therefore, a connection is made between law of torts and copyright and therefore user possessing an unauthorised copy or downloading an unauthorised file leads to a tort that can be measured to a certain degree and can be penalised by law. Landes and Posner consider copyright enforcement as a trade-off between the benefit obtained by its beneficiary and the cost engendered by such an action, especially for its implementation and surveillance.<sup>455</sup>

Digitisation and increasing use of internet has led to a massive increase in copyright infringement and violation of copyright law in digital environment leads to two types of externalities. The first

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<sup>453</sup>Shree Venkatesh Films Pvt. Ltd. v. Vipul Amritlal Shah, A.P.O.T. No. 309 of 2009; Saregama India Ltd. v. Balaji Telefilms Ltd. T.A. No. 52 of 2012 as cited in ANANTH PADMANABHAN, INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS AND REMEDIES, 438 (1st ed. 2012).

<sup>454</sup> Harold Demsetz, *Towards a Theory of Property Rights*, 57 *The American Economic Review*, 347 (1967).

<sup>455</sup> Landes and Posner



one is a negative externality for the content owners in the form of loss of income. The second one refers to a positive effect for the user. Access to pirated content raises the utility for the internet. This increased usefulness acts as a support to initiate the network effects of digital innovations.<sup>456</sup> Digital technology and internet services have made copyright piracy difficult to crack down. Intermediaries, i.e., the internet service providers, who play the role of an external agent, which enables communications between the parties. Their intention is to host, transfer and list data or services. Technical innovations in piracy techniques is exhilarated by errors in copyright enforcement. “The rules for enforcing copyright in the digital environment have been defined in parallel a lack of liability.”

P2P file sharing network enables the sharing of files between users exploiting the ambiguity of “fair use” and the limited liability of the intermediaries under safe harbour provisions. All intermediaries benefit from the external effects of the piracy. It is observed that immunity given to intermediaries vis-à-vis piracy influences a moral hazard in the network chain. “The legal copyright enforcement flaws are exploited to develop their services.”<sup>457</sup> As a result of the immunity, the content owners choose to prosecute the end users. The mechanism operates through direct negotiation between right holders and users or through governmental agency on behalf of the right holders or content owners. Consequently the tort law exemption to intermediaries has increased the cost of copyright enforcement.<sup>458</sup>

#### **IV.6.ii. Theories of copyright infringement as crime**

Copyright infringement is considered as not only lost profits or “free riding” by consumers, but also as criminal acts, imposing serious threat to employment, creative invention and financial constancy. Latest technological development in the form of music and video compression and high-speed internet connections have changed facet of the legal storage and distribution of such works, making it more profitable. At the same time these unending developments in technologies have helped the copyright pirates to rip-off intellectual property in an enhanced manner making piracy more profitable. Moreover in the internet, piracy is growing fast. Consequently, lawmakers and

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<sup>456</sup> Oliver Bomsel and Heritiana Ranaivoson, *Decreasing Copyright enforcement Costs: The Scope of a Graduated Response*, 6 Review of Economic Research on Copyright Issue, 13, 15-16 (2009).

<sup>457</sup> Oliver Bomsel and Marine Lefort, *Can tort law be helpful to enforce copyright? Internalising intellectual property law enforcement through liability*, (Jan. 8, 2015, 8 PM) <http://www.serici.org/2012/lefort.pdf>.

<sup>458</sup> Id., at p. 14.

enforcers are trying to be at par with the modifications in technology by way of enacting new legislations to tackle the latest threats to copyright owners.

In this situation, government, copyright owners, infringers and consumers are the main actors. In respect of internet piracy, the players are vendors, consumers, sharers or downloaders. The players here may look for commercial gain, fame for dissemination of infringing copy or just free music. However, irrespective of the act or motive, legislators are required to find ways to check and penalise violators of copyright, more because technology renders piracy more viable for a greater share of the population with the help of internet access and software advancements. Music, software and motion pictures are generally considered as the most problematic type of copyrighted works, subjected to piracy. Once such work is downloaded, any consequent replication or diffusion in physical form is well within the scope of traditional, 'bricks-and-mortar- piracy'. Subsequently, most dealings incorporating 'Internet piracy' do not involve a goods-for-money transfer, but in its place it may involve an exchange of one copyrighted good for another.

Copyright infringement and most other types of crime are having certain important differences. Although intellectual property piracy is similar to traditional property crimes in many ways, it is different from other forms of crimes because anti-piracy enforcement and criminal regulation is the outcome of co-ordination between the government and property owners. Legal solutions usually contains legislations which criminalise activities that legislators consider to violate the copyright holders' rights. On the other hand, market solutions consist of technological features that provide copyright holders to exercise control over their works, like, copy-protection and also policies to create legal means of acquisition of copyrighted goods, like online digital music sales. Technological developments have provided the copyright holders with improved control over copyrighted content by way of software or hardware established anti-piracy measures and they have also assisted copyright owners in searching and prosecuting infringers more competently.

Gary Becker was the first scholar to apply economic theory to analyse criminal law. Economic analysis of criminal law emphasises on the utilitarian or "deterrence" theory. This theory advocates that criminal law should be structured to check crime ex ante, instead of only punishing ex post, with the supposition that prospective criminals will choose their course of action based on the estimated results.

Subsequently George Stigler and Richard Posner discovered the policy issues for creating an optimal criminal law enforcement system. Stigler relied on Becker's aim of structuring an optimal criminal law and Posner focused on the law's role of persuading criminal transactions into their corresponding legal markets. Posner observed that 'crimes are only potentially legitimate transfers are ineffective and not desirable, for they were committed without the consent of parties involved'

Usually, economic models of crime propose three prime concepts: (1) deterrence; (2) marginal deterrence and (3) optimal enforcement. Deterrence theory believes that the decision to commit a particular crime depends not on a prearranged 'criminal status' or 'mental state', but a rational appraisal of the cost and benefits associated with that decision. Marginal deterrence concentrates on the 'relative punishments between different, fungible crimes in an attempt to encourage criminals towards less socially costly crimes'. This notion can be applied to various crimes, such as attempted murder or more applicably to copyright infringement or to different degrees of the same crime, such as possession of varying amounts of a controlled substance. Optimal enforcement talks about overall social costs of crime as well as the costs of criminal enforcement to best allocate resources to make society better off as a whole.

Economists have observed that strictest that the stringent enforcement may not be the optimum enforcement. Behind the principal reason this contention is that enforcement actions always bring some positive costs. For instance, if the state has to enforce copyright law against the infringers involved in piracy, it has to sustain some costs like engaging more enforcement agents for dealing with the complaints from the right holders and identifying infringements, more court to adjudicate the growing number of cases, constructing more jails to provide place for the convicted people, destructing detained infringing goods. The opportunity costs spent in not using the rare properties for rendering other public goods should are also required to be given proper discussion. Simultaneously, advanced administration costs will bring some benefits to the society. This bring into picture the welfare consequences coming from the incentives for investments in creative industries, higher tax revenues for the government, decreasing related criminal actions. If the policy standpoints of the developing countries', which are having resource limitations, then the economists will observe that it will be optimal to increase the enforcement to the level where the marginal costs of enforcement get equivalent to the marginal benefits from enforcement.

In this juncture, certain practical concerns have to be taken. Firstly, developing countries will be standing by copyright violations to some extent since the measures and funds required for enforcement will be not in abundance. Moreover the enforcement measures will depend on the law of diminishing returns. This is the reason why cent percent copyright enforcement may not see the day light in any nation of this planet. Secondly, identification of a prudent approach to optimise the enforcement. Finally, there is also a need for ordering according to the priority the investments within enforcement because investment always require costs and the objective is supposed to be maximise the benefits of investment in enforcement.

#### **IV.6.iii. Criminal Remedies**

Criminal remedies available to owners of copyright are provided for in Chapter XIII of the Copyright Act, 1957 from Sections 63 to 70. It is very important to note that the issue of criminal liability requires the requirement of mens rea. Section 63<sup>459</sup> prescribes the penalty for the offence of copyright infringement. The amendments brought in 1984 augmented the punishment. Sec. 63 encompasses all types of copyright infringement, committed knowingly. As per, the proviso to sec. 63, that if a judge wants to impose an imprisonment of less than six months, the judge has to satisfy it through adequate and special reasons in the judgement This exception would apply only in cases where the infringement was not made for gain in the course of business or trade.<sup>460</sup> Fourth, the provision also shows that the minimum fine amount prescribed is Rs. 50,000 and it may go as high as Rs. 2, 00,000. As in the case of imprisonment, if a judge wants to impose a lesser than the amount specified, she or he has to set out adequate and special reasons in the judgement and she or he can provide a lower fine only in cases where the infringement was not made for gain in the course of business or trade.

In case of subsequent convictions, the minimum imprisonment is provided for one year and the minimum fine provided is one year and the upper ceiling remained the identical to what is there in case of first convictions.<sup>461</sup> Sec. 63B provides that any person who knowingly uses an infringing copy of a computer programme an offence which is punishable with a minimum of seven days

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<sup>459</sup> Copyright Act, 1957 § 63: Any person who knowingly infringes or abets the infringement of copyright is considered as an offender and is punishable with a minimum of six months imprisonment which may extend to three years and a fine between fifty thousand and two lakh rupees.

<sup>460</sup> Copyright Act, 1957 § 63, proviso.

<sup>461</sup> Copyright Act, 1957 § 63A.

imprisonment which may extend to three years and a fine between fifty thousand and two lakh rupees.

Sec. 64 empowers the police officers to seize without warrant the infringing copies of any work and the materials used for making the infringing copies, provided the police officer is convinced that a person knowingly infringes or abets the infringement of copyright or related rights in a work or if there is a likelihood of commission of such an offence. Sec. 65 of the Act prescribes that any person who knowingly makes or keeps in his possession any plate<sup>462</sup>, for the purpose of making infringing copies of a copyrighted work, shall be imprisoned for a period of up to two years and also be fined. Even in cases where an alleged offender has not been convicted, the court has the power to order other remedies including a direction to the alleged offender to hand over to the copyright owner the copies of the work and the plates in his possession, provided the court is convinced that they are infringing copies or plates used for the purpose of making infringing copies.

#### **IV.6.iii.a. 'Mens rea' in Copyright Offence**

Substantial amount of time and effort has been spent by judiciary in order to set the judicial standard of "knowledge of infringement", mentioned in Sec. 63, i.e., the 'mens rea' on the part of the violator, prerequisite for enforcing criminal remedies in copyright law. In this respect, *Sheo Ratan Upadhyaya v. Gopal Chandra Nepali*<sup>463</sup> is a leading authority. The petitioner wrote *Shri Mahabharat* in Nepali language. It was first published in 1929. The petitioner found in 1961 that copies of the book of his father had been published by the same publisher with the name of another author. Most parts of the infringing works were similar to that of the original author and the publishers had made only a few changes in the work, apart from the deletion of the name of the original author and two stanzas relating to the original author and his family history in the final part of the book.

The petitioner moved the trial court against the publishers under sec. 63 of the Indian Copyright Act, 1957. The trial court expressed doubts on the question as to whether the accused persons had

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<sup>462</sup> Copyright Act, 1957 § 2 (t). "Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, negative, duplicating equipment] or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which [sound recording] for the acoustic presentation of the work are or are intended to be made;

<sup>463</sup> AIR 1965 All 274

the necessary knowledge to constitute mens rea and it accepted the version of he accused. The petitioner appealed to the High court. The court had to examine, whether the requirements of mens rea, required to establish a case under sec. 63 were satisfied when a person knowingly publishes or prints a copyrighted work of another person.

After detailed examination, the court held that the term 'knowingly infringes' in the provision dealing with criminal remedies had to be distinguished from knowingly publishing or printing a work in which copyright exists. According to the court, the principle of *ignorantia juris neminem excusat* cannot be converted to a presumption that everyone must ascertain the facts of a case that give rise to a right under the law. The court was of the view that the question as to whether a copyright exists or not depends primarily on the facts of a case. According to the court only after facts can be correctly ascertained, law can be applied to determine whether such rights exists. The court further noted that a person may very well go wrong about the facts and he may even entertain a bona fide belief that a legal right exists in a situation where the actual situation is to be the contrary. The court further emphasised that 'it is purely a question of fact whether, upon facts proved, the accused person did entertain a bona fide belief in the existence of a copyright and the proof of such a belief is a sufficient answer to a case in which the law requires proof of knowledge of an infringement of an offence.

The court also noted that though the use of the words 'knowingly infringes' places a difficult burden on prosecution in a case under Sec. 63 of the Copyright Act, it can be discharged by direct and circumstantial evidence. On perusal of the facts of the case, particularly the records relating to the statements given by the accused before the trial court, the court was of the view that though the accused deliberately allowed alterations and modifications of the work, the accused succeeded in showing the trial court that they had sufficient grounds for believing that they had the right to do what they did. While reaching at this decision the court further noted that "if the law places upon the prosecution the duty of proving that the accused possessed the knowledge of the existence of a right, it necessarily obliges the prosecution to prove that the accused also knew the required law which gives a right. There is no room for arguing that the ignorance of law is no excuse when the law itself compels the prosecutor to prove the knowledge of some law also on the part of the accused. The court also made the interesting concluding observation that the appellant has got adequate means for obtaining reliefs from a civil court to safeguard and enforce his rights.

This judicial approach of setting high standard for proving mens rea has been restated in *A. K. Mukherjee (Dr.) v. State*<sup>464</sup>, the petitioner, under sec. 63, approached against the publisher named Ms. Chand & Co. contending that, knowingly they have infringed the petitioner's copyright in a book. During the pendency of the proceedings, the petitioner had also approached the Copyright Board and the Copyright Board had held the respondents guilty of infringement. The petitioner wanted to use the finding of the Copyright Board as a base for convicting the respondent publisher under sec. 63. The trial court rejected this application by pointing that respondents cannot be convicted without a trial, particularly on the basis of the finding of Copyright Board alone. The petitioner approached the Delhi High Court against this verdict.

It is observed that in this case also the High Court has placed a high mens rea threshold for inflicting criminal liability under copyright law. The court noted that 'a bare perusal of the provision (sec. 63) would go to show that emphasis is on the words "knowingly infringes ..... the copyright in a work". These words indicate a knowledge on the part of the accused that he was infringing the Copyright in a work. Mere possibility of his having known it would not suffice. There has to be a clear and conclusive proof of the requisite knowledge. Even the existence of reasonable means of knowing would not be enough. The word 'knowingly' in the Sec. 63 had been interpreted to require mens rea in the full sense.

However, comparatively a liberal approach was found to be adopted by the Supreme Court in *State of Andhra Pradesh v. Nagoti Venkataramana*<sup>465</sup>. The respondent in this case was the owner of a video library. Police officials had raided the establishment in December 1986 and seized copyright infringing video cassettes of various movies. The respondent was given a charge sheet for failure to keep the particulars of the video cassettes obligatory under sec. 52A and sec. 63 of the Copyright Act, 1957. The trial court convicted the respondent under sec 63 for six months imprisonment along with a fine of Rs 3000. Although the first appellate court confirmed the punishment, the respondent was acquitted by the High Court of Andhra Pradesh in further appeal. The High Court was of the view that unless a copyright owner is identified and the copyright owner provides evidence that he had copyright in the video film, the prosecution cannot establish a case of copyright violation under sec 51 or sec. 52A of the Copyright Act. The High Court had therefore

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<sup>464</sup> 1994 (2) Crimes 488.

<sup>465</sup> (1996) 6 SCC 409.

held that the conviction and sentence of the respondent were not valid. The State preferred an appeal against the verdict before the Supreme Court and the significant question to be addressed by the Court was whether identification of the owner of copyright was a pre-condition for invoking criminal remedies under the Copyright Act.

The apprehensions of the Supreme Court with regard to increasing piracy in India are visible from its analysis of the legislative background of the relevant provision and the following remarks from the court are some indications in this regard: 'The object of amending the Copyright Act by amending Act 65 of 1984 as noted above was to prevent piracy which became a global problem due to rapid advances in technology. The legislature intended to prevent piracy and punish the pirates protecting copyrights... Moreover the object of the pirate is to make quick money and avoid payment of legitimate taxes and royalties....' Based on a careful analysis of the legal provisions relating to criminal remedies, the court held that it was unnecessary for the prosecution to trace out the copyright owner in a copyright infringement case to provide evidence of infringement. According to the court, the absence of the copyright owner cannot constitute lack of an essential element of copyright infringement and the failure to meet the requirements stipulated under sec. 52A of the Indian Copyright Act, 1957 would be violation of Indian copyright law.

Another important case that needs to be discussed in the context of approach of the judiciary towards criminal remedies under Indian copyright law is *Girish Gandhi v. Union of India*. This case is significant in view of the fact that it subjected to judicial scrutiny the constitutional validity of the powers and discretion given to the police officers under Indian copyright law for search and seizures. Indian copyright law empowers a police officer to seize without warrant copies of a work and devices used for manufacturing those copies, if the police officer is satisfied that an offence of copyright infringement under sec. 63 of the Indian Copyright Act, 1957 has been committed or is likely to be committed. The petitioner in this case was running a video library and he was engaged in the business of renting out video cassettes, televisions and video cassette recorders to customers who wanted to watch movies at home. According to the petitioner, although he had certificates and permission for all the video cassettes he was renting out, he apprehended unnecessary interference in his business by police officials using the arbitrary powers conferred under sec. 64 of the Copyright Act, 1957. The petitioner approached the High Court seeking a



declaration that sec. 64 of the Indian Copyright Act, 1957 was ultra vires of the Constitution, on ground of arbitrariness, though no overt instance had taken place against him till that time.

While deciding the case the court gave special reference to the legislative intention of the Copyright (Amendment) Act 1984. This amendment addressed the increasing levels of piracy against the backdrop of new technologies. According to the court, a police officer will not act until he has got some type of information on which he is satisfied and his satisfaction shall be objective. The court was of the view that just because sec. 64 empowers a police officers to seize the material to his satisfaction, it cannot be assumed that a police officer to seize the material to his satisfaction it cannot be assumed that a police officer would act mala fide or arbitrarily. The court also took consideration the fact that other legal remedies were available to the aggrieved persons to safeguard their interests. Moreover, the court observed that the powers given were not arbitrary as the police officer is required to report the matter to the Magistrate and any aggrieved person can approach the Magistrate to return the material if it is proved that no infringing materials were involved. The Court was also of the view that sec. 64 cannot be read in isolation and Secs. 51, 52, 52A and 64(2) contained sufficient guidelines prescribing the procedure for seizing the material. The court dismissed the petition based on these grounds. The court also observed that ‘the Copyright Act has been enacted to check piracy so that fruit of the labour put by the author or the copyright owner may be enjoyed by the author or the copyright owner may be enjoyed by the author or the copyright owner may be enjoyed by the author or the owner and not by the pirates.’

Regarding the standard of proof required for invoking criminal remedies the case-laws in India suggest that the standard has remained quite high and the courts have cautiously tried the case keeping in mind the alarming increase of piracy in India. Undoubtedly, Indian judiciary has showed sincere concern towards the copyright protection of the content owners.

#### **IV.6.iii.b. Copyright Offence: Bailable or Non-bailable**

To have an effective control over copyright piracy, the foremost requirement is providing tooth to the law enforcement agency functioning under Copyright Act, 1957. Interpretations of the provisions of the Act is required to be conducive to make the implementation of the remedies meaningful. Since copyright infringement is statutorily recognised as a penal offence, the procedure for enforcement of criminal remedies under the Copyright Act is limited. The general

law governing criminal proceedings in India, i.e., the Code of Criminal Procedure governs the overall procedure for complaints, prosecution, arrest, investigation, summoning, evidence and trial, except those provided under sections 64, 66 and 70 of the Copyright Act, which is a special Act and therefore its provisions will prevail over any inconsistent provisions of Code of Criminal Procedure, 1973.

As mentioned, Sec.63 prescribes the punishment for the intentional infringement or abetment of copyright infringement. The main concern sought to be resolved before the courts is whether in copyright infringement cases, an accused can get anticipatory bail under sec. 438 of the Criminal Procedure Code, 1973. So the courts had to deal with the question of bailability of the offence of copyright infringement as anticipatory bail can be granted only for non-bailable offences. The courts refer the First Schedule to the Criminal Procedure Code, 1973 in which classification of offences has been made to understand the nature of an offence. The said schedule is divided into two parts with Part I dealing with offences under the Indian Penal Code and Part II dealing with offences under other laws. The offence of copyright infringement is covered by Part II as it is an offence under other laws, which in the present context is the Copyright Act, 1957.

Three categories of offences are created by Part II of Schedule I. The first category of offences which prescribe the punishment of death, imprisonment for life or imprisonment for more than seven years, are ‘cognisable’, ‘non-bailable’ and triable by a Court of Session. The second category of offences, which prescribe the punishment of imprisonment for three years and upwards, but not more than seven years, are ‘cognisable’, ‘non-bailable’ and ‘triable by a Magistrate of the First Class’. The third category of offences which prescribe the punishment of imprisonment for less than three years or with fine only, are ‘non-cognisable’, ‘bailable’ and ‘triable by any Magistrate’.

Offence	Cognisable or no-cognisable	Bailable or non-bailable	By what Court triable
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If punishable with death, imprisonment for life or imprisonment for more than 7 years	Cognisable	Non-bailable	Court of sessions
If punishable with imprisonment for 3 years and upwards but not more than 7 years	Cognisable	Non-bailable	Magistrate of the first class
If punishable with imprisonment for less than 3 years or with fine only	Non-cognisable	Bailable	Any Magistrate

As per this table, Sections 65, 65A, 65B, 67 and 68 of the Copyright Act are non-cognisable and bailable as they entail imprisonment of less than three years. Offences under sections 63, 63B and 68A of the Copyright Act provide for imprisonment up to three years and according to this table they should fall under item II of Part II of the 1<sup>st</sup> schedule and accordingly be cognisable and non-bailable. However, for the reason of diametrically opposite interpretations given by Andhra Pradesh High Court and the Kerala High Court, a debate has arisen as to whether the offence of copyright infringement is bailable or non-bailable.

- Jitendra Prasad Singh v. State of Assam

Prior to the conflicting decisions of Andhra Pradesh and Kerala High Court, in Jitendra Prasad Singh v. State of Assam<sup>466</sup>, Gauhati High Court observed Section 63 is a non-bailable offence and therefore Section 438 of Code of Criminal Procedure would get attracted. The rationale for such

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<sup>466</sup> 2003 (26) PTC 486 Gau.

observation was that the punishment prescribed for a term ‘which may extend to three years’ would include in itself a term of imprisonment for three years. However, the third category of offences provides for imprisonment for less than three years and does not include an imprisonment of a term of three years. Thus, in this context second category of offences would be applicable.

- Amarnath Vyas v State of Andhra Pradesh

In Amarnath Vyas v State of Andhra Pradesh<sup>467</sup>, the High Court dismissed an application for anticipatory bail since the offence alleged was bailable and no application for anticipatory bail could be maintained as it could be provided only for non-bailable offences. The Public Prosecutor requested the High Court to reconsider its decision and contended that since the punishment prescribed under sec 63 is a minimum sentence of six months and the maximum sentence, which may extend up to three years, the offence of copyright infringement is a non-bailable one. In the present case, the most significant issue for consideration was whether the second category of the classification will attract or not is. In the same paragraph it is observed, the expression ‘punishment for a term which may extend to three years is certainly not similar to the expression ‘punishment for three years and upwards’.

The decision of the Gauhati High Court was rejected by the High Court of Andhra Pradesh. It is observed that the Andhra Pradesh High Court has misunderstood the ratio of the Gauhati High Court in Jitendra Prasad. The ratio of the Gauhati high court is based on a fundamental premise. In a particular case, it is possible that the offence of copyright infringement could be punished with imprisonment for three years and then it would be inconsistent to place it in the third category in table II of schedule I. This would lead to an absurd consequence to the effect that an offence, which has been punished with a clear term of three years, would be regarded as bailable and non-cognisable. However, the legislative mandate is different in this regard.

The Andhra Pradesh High Court relied on the judgement given by Supreme Court in Rajeev Chaudhary v State (NCT) of Delhi. In this case the Supreme Court held that merely because a particular offence is not coming squarely within the domain of classification III, it cannot automatically be treated as included in the classification II. The Andhra Pradesh High Court by

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<sup>467</sup> Cri.L.J. 2007 A.P. 2025.

applying the interpretation given in Rajeev Chaudhary came to the conclusion that the term of imprisonment which may extend for three years or upwards, but not more than seven years cannot be compared with imprisonment extending to three years. Depending on this premise the Andhra Pradesh High Court did not agree to consider the offence of copyright infringement under the second category and this observed that the offence punishable under sec 63 of the Copyright Act cannot be considered as 'non-bailable' one and by doing makes the offence bailable.

Four years later, in 2011, the Kerala High Court was debating again with the issue whether copyright infringement was a cognisable offence. The decision given by Andhra Pradesh High Court in 2007 did not find any reference here. Kerala High Court maintained that the language of Sec. 63 of the Copyright Act and the language of the relevant entries in the Schedule to the Code of Criminal Procedure did not require any reference to the precedent. The learned judge observed, 'Sec. 63, according to me, is clearly punishable with imprisonment for 3 years and in these circumstances the offence has to be held to be cognisable.' The court did not refer to the precedent of Rajeev Chaudhary.

The decision of the Andhra Pradesh High Court is often criticised since the decision completely disregards the main purpose of including penal provisions in the Copyright Act. Regard should have given to the object and reasons of the Copyright Act should have been looked into before coming to any conclusion. The Copyright Act, as originally enacted, prescribed fine and maximum imprisonment of one year for the offence of copyright infringement. The Copyright Act was amended in 1984 to enhance the punishment of the offence of copyright infringement to imprisonment, extending to a maximum period of three years. The greater objective was restraining piracy in videotaping and musical record taping.<sup>468</sup>

In the presence of conflicting judicial opinions, application of the mischief rule of interpretation can be of special importance. Mischief rule of interpretation relies on factors like history of the

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<sup>468</sup> The object and reason of the Copyright (Amendment) Act 1984 are as follows: "Piracy has become a global problem due to the rapid advances in technology. It has assumed alarming proportions all over the world and all the countries are trying to meet the challenge by taking stringent legislative and enforcement measures.... The emergence of new techniques of recording, fixation and reproduction of audio programmes, combined with the advent of video technology have greatly helped the pirates. It is estimated that the losses to the film producers and the owners of copyright amount to several crores of rupees. The loss to Government in terms of tax evasion also amounts to crores of rupees..... In view of these circumstances: it is proposed to amend the Copyright Act, 1957, suitably to combat effectively the piracy that is prevalent in the country."

Act and the reasons which led to its being passed play an important role in interpretation. The statement of object and reasons of the Copyright (Amendment) Act, 1984 clearly indicate that the amendment aimed at eradicating mischief of copyright piracy. Bail could be sought as a matter of right in for every bailable offence. The legislature considers copyright infringement as a serious offence and it could not be said to have the intention to make the offence of copyright infringement bailable. For that matter, the decision of the Kerala High Court in Suresh Kumar upholds the true position of law since it is consistent with the object and reason of the Copyright (Amendment) Act 1984. The official website of Indian Copyright Office has explicitly specified that according to the Copyright (Amendment) Act, 1984 copyright infringement is a cognisable and non-bailable offence.

Supreme Court in *Nagoti Venkataraman*<sup>469</sup> sustained copyright infringement is a cognisable offence and that the law enforcement agencies should be given adequate support mechanism to strengthen enforcement of copyright law. Therefore if the offence of copyright infringement is made as a cognisable and non-bailable offence and falls under the second category of the classification in Second Part of Schedule I of the Criminal Procedure Code, 1973 then the difference will be bridged between enacting a law and ensuring that it is enforced properly. In view of the concerns expressed regarding ineffective protection given to copyright by content owners, the position regarding the nature of the offence of copyright infringement is required to be made clear at the earliest. Making the offence of copyright infringement bailable and non-cognisable is inconsistent with the intention of the legislature and the purpose for which Section 63 was amended. Following the precedent of *Amarnath Vyas* case will weaken the armoury of the Indian law enforcement agencies against copyright infringement in India since the decision overlooks the impact it is likely to have on the measures for preventing copyright infringement. It is essential that the provisions of Copyright Act are interpreted in a manner so that there is no ambiguity to defeat the object of the Act.

The need of the hour is to efficient enforcement of the Copyright Act by putting into use the powers given under it to the police to fight the threat of copyright piracy. Police has to be effectively and sincerely conduct suo moto raids to curb piracy. The 2007 IIPA Report recommended that the

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<sup>469</sup> (1996) 6 SCC 409.

number of suo moto raids must be increased in all the states to achieve the deterrence required to bring piracy rates down. The 2003 IIPA report on India observed that the procedural obstacles at the police level impede enforcement. However, in many cities the police simply refuse to act ex officio and consistently ask for a complaint from the right holder when the police can act on their own to seize infringing material under the copyright laws and have been specifically obliged to perform their functions under the Criminal Procedure Code,

#### **IV.6.iv. Preventive detention for copyright violation**

On July 28, the Karnataka Legislature passed “The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum-grabbers and Video or Audio Pirates (Amendment) Bill 2014.” The amendment adds “Acid attackers, Depredator of Environment, Digital Offenders, Money Launderers and sexual Predators” to the title. In common parlance, this law is known as the ‘Goonda Act’.

In 1923, the Goondas Act was enacted in Bengal. As per the Act, a goonda residing within, habitually frequenting or visiting Calcutta either by herself/himself or as part of a gang, committing/has committed/assisting in the commission of/is about to commit a non-bailable offence against person or property or the offence of criminal intimidation or causing breach of peace was liable for action under his action under this legislation. Similar laws were soon enacted across the country. Now used in ‘Indian English’ to mean a ‘hired thug or bully’, goonda seems to have Hindi/Urdu origins. Incidentally, thug itself has Hindi origins, with its meaning encompassing a range of criminals from robbers to murderers, or anti-social elements.

For the reason of this recent amendment digital offenders and audio and video pirates can now be booked under the Karnataka Goondas Act and can be preventively detained under the new Act seemingly in order to protect public order. As per the new amendment, Section 2(iv) of the Act first refers to a “digital offender” as “when he is engaged, or is making preparations for engaging, in any in any of his activities as a digital offender, which affect adversely or are likely to affect adversely the maintenance of public order.” An Explanation to Section 2 under Clause (f) specifies that a “digital offender” is any person who knowingly or deliberately violates for commercial purposes any copyright law in relation to any book, music, film, software, artistic or scientific work and also includes any person who illegally enters through the identity of another user and

illegally uses any computer or digital network for pecuniary gain for himself or for any other person or commits any of the offences specified under sections 67, 68, 69, 70, 71, 72, 73, 74 and 75 of the Information Technology Act, 2000.

“Video or audio pirate” is defined under amended Section 2(xiii) as anyone who is engaged or is making preparations for engaging in any of his activities as a video or audio pirate habitually for commercial gain, which affect adversely, or are likely to affect adversely the maintenance of public order. The Explanation to Section 2 under amended Clause (o) states that a “video or audio pirate” means a person who commits or attempts to commit or abets the commission of offences of infringement of copyright habitually for commercial gain, in relation to a cinematograph film or a record embodying any part of the soundtrack associated with the film, punishable under the Copyright Act, 1957.

The Explanation to amended Section 2 lays down the conditions in which public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely, viz. that if any of the activities of any of the persons referred to in this clause directly or indirectly, is causing or is calculated to cause any harm, danger or alarm, or a feeling of insecurity, among the general public or any section thereof or grave or widespread danger to life or public health.

The amendment now implies that the State Government has the power to detain audio and video pirates and digital offenders, to prevent them from acting in a manner “prejudicial” to public order. In the first instance, such an order may not be for more than three months, it may be extended to a period of twelve months (Section 13), three months at a time, passed for the commission or the suspicion of commission of various offences, including copyright infringement, which under the Copyright Act, 1957 can only be determined by a court of law and is subject to subsequent appeals.

The recent amendment to the Karnataka Goondas Act has resulted in certain irregularities. They are:

Firstly, from the provisions related to preventive detention under the Karnataka Goondas Act it can be inferred that the person arrested need not be produced before a magistrate immediately. The review process is considerably long and detention may continue for a period of one year. This is applicable for offences under the Information Technology Act, 2000, which requires the



production of the accused before a magistrate. Similarly it is for the offences under the Copyright Act, 1957, where a person may be arrested only when found guilty of an offence by the court. However, the Karnataka Goondas Act permits arrest on suspicion only and bail cannot be granted to persons arrested under the legislation.

Secondly, the provisions of the amended Karnataka Goondas Act deny the exceptions provided under the Copyright Act, 1957. The Karnataka Goondas Act provides that copyright infringement for commercial purposes comes within the purview of the legislation. Consequently non-commercial uses are excluded. Thus it transpires that even if a person were to be performing an activity permitted under the Copyright Act, 1957, the person could be preventively detained on the suspicion of engaging in commercial activity.

Moreover, the legislative competence of the Karnataka Government in amending the Karnataka Goondas Act to apply to audio and video pirates as well as to digital offenders is under scanner. There are reasons to contend that these amendments to be unconstitutional. Art. 246 of the Indian Constitution read with List I (Union List) of the Seventh Schedule of the Indian Constitution specifies those subjects on which the Centre has the authority to make laws, by virtue of the provisions related to posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication (Entry 31 of List I) and patents, inventions and designs; copyright; trademarks and merchandise marks (Entry 49 of List I).

However, the infringement on a matter provided under the Union List is not merely incidental, as the purpose sought by the Goondas Act, and the methods it adopts (preventive detention), stand in direct contradiction to the purpose of the Copyright Act, 1957.<sup>470</sup> Copyright law incentivizes creation of original works and protects the intellectual property rights of individuals. As per the Copyright Act, 1957, this offences are punishable with imprisonment up to 3 years, the police have the power to seize infringing copies, the courts have the power to order the destruction of these copies. Consideration should be the provisions related to fair-dealing provisions under Copyright law. Therefore preventive detention provisions for copyright infringement is not only inconsistent, but also incompatible. This results in bringing absurdities, which ultimately defeats

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<sup>470</sup> Nehaa Chaudhari, *Preventive Detention for Copyright Violation: Karnataka Amends the 'Goondas' Act*, (Jan. 10, 2015, 10 AM) <http://cis-india.org/a2k/blogs/spicy-ip-nehaa-chaudhari-august-13-2014-preventive-detention-for-copyright-violation>.

the basic object of the legislation. Therefore in the guise of an incidental provision, the state legislature has altered the nature of the Act, and therefore engaged in a *colourable exercise of power*.<sup>471</sup>

#### **IV.6.v. Administrative Remedies**

In addition to the civil and criminal remedies, the Copyright Act provides for administrative remedies in the form of seizure and confiscation of counterfeit or pirated goods by the customs authorities. Section 53 of the Copyright Act, 1957 and its corresponding Rule 79 of the Copyright Rules, 2013 prohibits the importation of infringing copies. A right holder or his authorised representative may give notice to the Commissioner of Customs providing the details and proof of the ownership of rights in such work and request him to treat such goods as infringing and therefore proceed to detain them.<sup>472</sup> The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 was enacted to control the import of works infringing copyright. Under these Rules, an application along with a general bond and indemnity bond need to be submitted by the copyright holder with the customs authorities. Thereafter, a Unique Permanent Registration Number is allotted to the copyright holder which is valid for 5 years. On his satisfaction as to ownership of rights in such goods, the Commissioner has the power to detain such goods. However, the Commissioner is authorised to release all such detained goods in case of a challenge against the detention by the importer, if the right-holder does not produce before him, any order from a court of competent jurisdiction as to the temporary or permanent disposal of the detained goods within fourteen days from the date on which the goods were detained.<sup>473</sup> All copies of a work in respect of which an order is made prohibiting their import are deemed to be goods, and their import is prohibited or restricted under Section 11 of the Customs Act, 1962.

Protection of intellectual property in imported goods or goods in transit and the interpretation of the relevant provisions under the Copyright Act and Customs Act were Supreme Court's concern in *Gramophone Company of India v. Birendra Bahadur Pandey*,<sup>474</sup> which is a landmark authority

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<sup>471</sup>Swaraj Paul Barooah, Karnataka's 'Goondas Act' – An examination [http://spicyip.com/2014/08/guest-post-karnatakas-goondas-act-an-examination.html?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=guest-post-karnatakas-goondas-act-an-examination](http://spicyip.com/2014/08/guest-post-karnatakas-goondas-act-an-examination.html?utm_source=rss&utm_medium=rss&utm_campaign=guest-post-karnatakas-goondas-act-an-examination)

<sup>472</sup> Copyright Act, 1957 § 53(1).

<sup>473</sup> Copyright Act, 1957 § 53(4).

<sup>474</sup> (1984) 2 SCC 534.

on the interpretation of Sec. 53. The appellant received information from the customs authorities that a consignment of pre-recorded cassettes from Singapore arrived at Calcutta port by a ship and awaiting for its dispatch to Nepal. The consignment contained pirated copies of sound recordings in which the copyright was owned by the appellant. Based on the information, the appellant sought the intervention of Registrar of Copyright under Sec. 53 of the Copyright Act. Since the Registrar did not take any action, the appellant apprehended that before any action is taken, the pirated material would successfully cross the border. They approached the High Court of Calcutta seeking a writ of Mandamus and the High court issued an order directing the Registrar to proceed with the matter immediately in accordance with section 53, after carrying necessary investigation and hearing the parties. The High Court required that the appellant should pay damages if it is found that the cassettes held back do not infringe any provision of the Act.

Against the order of the single judge, the consignee preferred an appeal before the Division Bench of the High Court. The Division Bench of the above High Court held that ‘the word ‘import’ did not merely mean bringing the goods into India but comprehended something more, that is ‘incorporating and mixing, or mixing up of the local goods imported with the mass of the property into local area’. Since these activities did not follow, the Court gave a clean chit to the respondents. The appellants appealed against this order before the Supreme Court. The court reviewed whether the administrative powers conferred on the Registrar of Copyright extended to infringing goods in transit. The Supreme Court provided a broader interpretation of ‘import’ and found respondents liable for infringement of appellant’s copyright. The court held that “the term ‘import’ in sections 51 and 53 of the Copyright Act, means bringing into India from outside’, that it is not limited to importation for commerce only, but includes importation for transit across the country.” The court observed that such interpretation is entirely in accordance with the international conventions and the treaties between India and Nepal.

The court observed that there is no necessity of referring to Custom Act when clear meaning can be derived from the wordings of the Section 53. Under Section 53 ‘copies of work made out of India of a work which if made in India would infringe copyright, shall not be imported’ indicates that ‘import’ in the provision means bringing into India from out of India. The court held that, mere bringing of goods into India amounts import of goods. It is immaterial that the goods are in

transit or that it is not brought for commercial purpose. For all these reasons, the Supreme Court allowed the appeal.

#### **IV.7. Problems faced in enforcement of criminal remedies**

Criminal remedies provided under Indian copyright law are an indicator of a robust mechanism, compared to copyright legislations in most of the jurisdictions. However, the model for criminal enforcement relies on severe punishment, but the probability of apprehension and conviction is not proportionate to that. The most prevalent misconception is that copyright infringement is a trivial offence and can be taken lightly in comparison to other heinous crimes. On the contrary, copyright infringement is required to be taken seriously as it affects the national economy. In most of the cases, the accused complains that the recovery has been fixed on him and infringing articles have not been recovered from his possession. Usually the accommodations where infringing activities are carried on are rented one and that is the reason there are no rent agreement or lease deed. Consequently, the accused defends that the rented accommodation does not belong to him. Therefore adequate attention has to be taken to recover the counterfeited goods in the presence of two public persons from the same locality in compliance of the mandatory provisions of section 100 of the Cr.P.C. and the landlord of the said rented accommodation should be kept as a witness. Related documentary evidence should be gathered during search to associate the accused with the said rented accommodation. Once it is proved that the recovery is from the accused, it becomes more convenient to convict the accused, which is why proper record has to be maintained and produced before the court regarding previous involvement of the accused in similar offences. Persons engaged in such offences are habitual offenders, because the conviction rate is low and there are high returns in these offences.<sup>475</sup>

There is one more misconception that when a music CD or DVD is purchased, the purchaser has the right to do anything with the copyrighted work. What is owned is the physical copy of the work and the original owner continues to own the copyright in the work itself. If there is distribution of copies or public performance of copyrighted works, copyright is deemed to be infringed when

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<sup>475</sup> FICCI, Copyright Enforcement Tool Kit (This Tool Kit is prepared by INTLL ADVICARE and seeks to explain the basic concepts of copyright Law in India to aid enforcement authorities in combating widespread piracy).

these acts are done without charging money. The lack of awareness on the part of the police and the public at large is a major problem in effective enforcement of copyright law.

In copyright infringement case, acquiring bail is comparatively easy and usually the courts grant bail within a week. After getting release on bail, the suspects change the location of making and selling different kinds of counterfeited goods. During trial, proper check is not imposed on the accused, regarding whether he is still engaged in the same or similar illegal undertakings. Moreover, delay in filing investigation reports in copyright infringement cases is a major obstacle. In *M/s. Apronto Tools Pvt. Ltd. v. State*,<sup>476</sup> the court took note of the fact that even a small amount of delay in filing investigation report by the police has the potentiality of causing great loss of revenue to the complainant as the accused may fill the market with counterfeited goods. The Copyright Act vide Sec. 64 provides for powers of seizure without warrants because seizure facilitates help in collecting important evidence against the accused. At the same time police should be aware of the exceptions, statutorily recognised to copyright infringement as non-awareness of section 52 is observed on the part of the police.

The most significant hurdle in copyright enforcement is that many times before the conduct of raid, the information regarding the same is leaked to the accused and the raid becomes meaningless. Proper checks should be there to stop leakage of information regarding raids, since secrecy in conducting raids is key for effective enforcement. Furthermore, at the time of trial, the witness should be well prepared. Generally, the prosecution witnesses are not well conversant with the court procedure and regarding the manner of giving statement to face the cross-examination of the defence lawyer.

Understanding the root causes of deficiency in Indian legal system for enforcement of copyright through civil remedies becomes utmost important at this juncture. At present all the copyright disputes go through the general judicial system. In India, there is lack of specialised IP courts, having exclusive original jurisdiction over copyright cases. In India, District Courts have original jurisdiction in copyright related disputes.<sup>477</sup> In view of the number of pending cases in Indian courts, the time and money required to be spent for copyright enforcement is beyond imagination.

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<sup>476</sup> 1994 Cri.L.J. 421.

<sup>477</sup> Copyright Act, 1957 § 62.

Speedier and operative judiciary is need of the time to prevent the spread of counterfeited product in this digital era. One more reason of substantial delay and miscarriage of justice is dearth of expert judicial matters on IP matters. Therefore, both long-term and short goals are required to effectively enforce copyright. The ratio between judges population in India is not satisfactory, when compared with other jurisdictions. Recruitment of judicial officers is the immediate requirement. Although it would require additional costs for the exchequer, the bonus benefits achieved through better legal environment will set off that additional costs.

#### **IV.8. Chapter conclusion**

Although the High Courts in Delhi, Mumbai, Chennai and Kolkata are performing worthy job as far as preliminary matters in cases involving copyright infringements are concerned and most of the positive civil relief measures and innovative court orders have been issued by them, but in other regions where the district courts are the courts of the first instance for piracy, the experience is not that praiseworthy. Certain factors which are attributed to be responsible for preventing effective judicial enforcement of copyright includes clogged dockets; delays due to outdated procedural laws, such as the failure to receive electronic documents and multiple opportunities for parties to delay proceedings; problems with retaining electronic evidence; onerous requests to produce evidence of ownership and/or witnesses; failing to grant seizure orders to copyright owners as a matter of right in civil cases; and difficulty enforcing civil court orders. The complications in enforcement increases when defendants deny entry to the Local Commissioner or police refuse to take action. In many cases, lack of available personnel is showed as the prime reason.<sup>478</sup>

As far as the issue of awarding compensation is concerned, it is observed that civil awards, including punitive damages, are not adequate to compensate the right holder for the injury caused. In December 2014 an amendment bill was introduced in Parliament for increasing the pecuniary jurisdiction of district courts. This will increase higher court costs (up to 300% of current costs) for cases valued at INR 20 million (US\$400,000). This was suggested as per the recommendation

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<sup>478</sup> International Intellectual Property Alliance 2015 Special 301, Report on Copyright Protection and Enforcement (2015).

given by Delhi High Court. Serious doubts have been raised by the content owners in its actual deterrence in bringing down the instances of piracy in India.<sup>479</sup>

The cases related to criminal copyright in India have failed to produce real and deterrent results. In practice bail is made available on the very day of arrest, although copyright piracy is a non-bailable offense. Though equipment utilised for manufacturing infringing goods may be subject to seizure, there exists no provisions for forfeiture of pirate product. Generally the duration of criminal prosecutions is considerably lengthier. As a result, at the relevant time, witnesses and officers become not traceable. Another significant issue is compromise of witnesses which increases acquittals. In plea bargains<sup>480</sup> or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. The experiences of the industries with criminal cases differ by region, but overall, further training of prosecutors<sup>481</sup> and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful.<sup>482</sup>

## **CHAPTER V**

# **ENFORCEMENT OF COPYRIGHT LAW IN UNITED KINGDOM, UNITED STATES OF AMERICA, AND INDIA: A COMPARATIVE STUDY**

### **THE FRAME**

The legal system in all the three jurisdictions, i.e., United Kingdom, United States and India falls under common law system. The legal system in both United Kingdom and United States of America have codified copyright law long back and have established a robust statutory mechanism for enforcing copyright. Judiciary in both the jurisdictions have contributed significantly in enforcing the same. Thus, these jurisdictions have established dedicated machinery for copyright

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<sup>479</sup> Ibid.

<sup>480</sup> The recording industry reports more than 50 plea bargains in 2014

<sup>481</sup> There are no dedicated or IP expert prosecutors

<sup>482</sup> International Intellectual Property Alliance 2015 Special 301, Report on Copyright Protection and Enforcement (2015).