

Therefore, it is argued that the law relating to ISP liability in India is vague which is facilitating an unjust shift in the liability of wrongful users on ISPs, making them the scapegoat of inadequate legal framework.<sup>810</sup> Furthermore the Indian legal system should distinguish liability of ISPs relying on concepts of direct, contributory and vicarious infringement.<sup>811</sup>

The United States is the hub for the entertainment industry that supplies content to users worldwide. Thus, its law on IP enforcement, as an 'IP exporting' country is based on concerns over increasing trade in and access to 'counterfeits' as it destroys markets for the originals and deceives consumers. Entertainment conglomerates and music companies find the lack of adequate IP enforcement in markets abroad a key obstacle to international trade in IP protected goods.<sup>812</sup> On the other hand, 'IP-importing' countries see these laws as 'protectionist'. In a nation like India, which has its own expanding entertainment industry, whose produce is very popular worldwide, a strong IP enforcement law is desirable. However, the law relating to ISP liability and online copyright infringement enforcement laws are recently amended.

## CHAPTER VI

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<sup>810</sup> Priyambada Mishra and Angsuman Dutta, *Striking a Balance between Liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour*, 14 *Journal of Intellectual Property Rights*, 321, 325-26 (2009).

<sup>811</sup> *Ibid.*

<sup>812</sup> Ruse, H G Khan, *IP Protection and enforcement – A barrier to 'legitimate trade'?*, 30<sup>th</sup> ATRIP Congress: IP Law at the Crossroads of Trade, National University Singapore, July 2011, p. 25027.

## CONCLUSIONS AND SUGGESTIONS

Unauthorised dissemination of sound recording has posed a great challenge to the copyright based industries generally and recording industry particularly. It has undermined the copyright protection afforded to them. Internet penetration has resulted in smaller growth of music CD sales. From an economic point of view, there is a harm to copyright owners and distributors if an unauthorised copy of sound recording replaces a sale that would otherwise have been made. Consumer's decisions to engage in illegal file sharing have a direct negative on the revenues from sales of legal content. Pirated music not only replaces legitimate sales, it forces the potential entrants in the industry to decline the opportunity to acquire a critical mass of customers, since both the price they could charge and the demand for their product gets limited because of piracy.

Music piracy directly affects the record labels as that illegal copying substitutes a legitimate sale that would otherwise have been made. The online service providers get affected as a result of the direct substitution effect between legal and illegal content. As consumers perceive legal and illegal content as replacements, service providers paying for licences and other operating costs are unable to penetrate the market at prices that ensure cost recovery. Since the distribution part of the value chain in the music industry gets distorted, there arises a cascading effect on the revenues accruing to labels and other rights holders. Song-writers, artists and publishers could be able to claim damages over and above the claims made by the record labels, to the extent that illegal content is broadcast in such a way that royalties would be due. Technological progress has reduced the entry barriers to the legal music distribution and could have done to a larger extent, if the legal offerings did not face competition from 'free' illegal services.

Poor enforcement and lack of awareness on copyright matters has exaggerated the problem of copyright piracy. The enforcement mechanism is inadequate in the country. Police personnel, who can play a major role in combating piracy, are not fully aware of various provisions of the law. There is also lack of adequate number of personnel who can fully devote to copyright crimes alone. The police are more concerned with usual law and order problems and copyright related crimes are attached least priority. The awareness level among end-users is also very low. While buying a copyrighted product, majority of consumers do not look at copyright notification. As long as price

is low (as generally is the case with pirated products) users do not mind buying pirated products even knowingly.

The main focus of the present study is to ascertain the important factors behind the inadequate enforcement of copyright law particularly in the recording industry. In this connection, in the first chapter, the researcher has attempted to trace the evolving mode of music business model in the film music industry in India. The provision of copyright law pertinent to the music industry has been analysed. The prevalent forms of copyright infringement in the recording industry has been identified. Moreover, the different studies, which have been undertaken in relation to the estimation of loss sales in the music industry, have been referred to understand the extent of piracy affecting the record industry at large. Consequently, the researcher has concluded that, music rights are considered to be a basic popular commodity. In the music industry, a musical work consists of a 'basket of rights'. The rights holder attempts to exploit as many of the rights as possible. It is commercialised not only when it is sold in recorded form to the public, but also when it is broadcasted through radio or television or incorporated in a film, commercial or video soundtrack and so on. The "monopoly privileges of musical copyright holders" is significant for raising the profit of the entertainment corporations. Now-a-days it is not necessary to sell the music in public. Musical work has the capability to enhance the value of other goods directly through films, video or television programmes and also indirectly in advertisements. Thus, copyright law assists music market for commercial exploitation. At the same time, it also facilitates sustainable development of music industry and draws incentives to invest in commercial music creation. A successful music industry is very much dependant on the institutional capabilities and governance structures of copyright. As indicated in this chapter, absence of copyright protection leads to the threatening of economic reward from original creative work as well as reduction of income flows.

In Indian society generally Hindi cinema and in West Bengal, Bengali cinema plays a prominent and influential role. India is one of the largest film producing country in the world. The abundant songs in the commercial feature films serve both as film songs and pop songs for India. The inclination of Indians towards film songs indicates that in India music is most successful as well as economically viable. As per the Indian Media and Entertainment Industry Report 2016, prepared by FICCI and KPMG, the value of the Indian music business increased consistently from INR 740 crore in 2008 to INR 980 crore in 2014. This marked a growth of 2.3% from 2013. The report

speculates that by 2019 the value of the music business will proliferate to INR 1, 890 crore up by 14% from 2014. In the Global Music Report of 2016, published by International Federation of Phonographic Industry, its Chief Executive, Frances Moore observed that “after two decades of almost uninterrupted decline, 2015 witnessed key milestones for recorded music: measurable revenue growth globally; consumption of music exploding everywhere; and digital revenues overtaking income from physical formats for the first time.”

Although positive trend towards growth is speculated in different reports, the entertainment report published by KPMG and FICCI in 2016 indicated a steep descent of 30-35% in physical sales of music and a similar drop is observed in respect of sales of ringtones and caller tunes. The report states explicitly that only 1-2% of music in India is consumed by way of legal avenues, when 99% of the music consumption is still illegal i.e., pirated. At the same time at global level, the report published by IFPI in 2015 indicated that Asia witnessed a revenue fall by 3.6%. Japan achieved an increase of digital revenue by 4.9%, driven by strong subscription revenues, although the market declined by 5.5% overall. The same report showed that Indian music industry underperformed and the market declined at 10.1%. The IFPI Global Music Report of 2016 reported a 4.5% fall of physical revenues and the download revenues fell down by 10.5%. 20% of fixed line internet users worldwide regularly access services offering copyright infringing music and also 4 billion music downloads have been reported via Bit Torrent alone.

The music industry is going through a transition from physical to digital format, PC to mobile and download. As far as global digital revenue is concerned, the music industry is deriving the same proportion of revenues from digital channels (46%) as physical formats (46%).<sup>813</sup> At the same time in 2015, a global decline in physical format sales at the rate of -8.1% as well as download sales (-8.0%) was found. However, now the key drivers of change in music industry are the rise of streaming and the decline of physical and download revenues. Similarly, digital music is emerging as the future of the Indian music industry. Transition is also observed from physical consumption to mobile consumption. The digital music segment is expected to enhance the revenues in the

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<sup>813</sup> International Federation of Phonographic Industry Digital Music Report 2015.

Indian music industry from 55% in 2014 to 72% in 2017.<sup>814</sup> In India monetisation of digital music is still evolving. The different categories in which revenue streams into digital music industry are: music downloads, streaming/subscription; live events and merchandising; caller ring back tones, etc. Consumption of digital music is increasing significantly with the help of better 3G and 4G services. Nonetheless, unauthorised dissemination of music files online in the form of piracy impedes the willingness to pay on the part of the consumer.

Unauthorised dissemination of sound recording has undermined the effective copyright protection afforded to recorded music, posing a great challenge to the recording industry. In appreciating the wholesome economic effects of music piracy, it becomes incumbent on the part of the researcher to look beyond just the losses of phonogram producers. Music piracy affects more than the record companies and the losses go beyond-the-scenes stakeholders as well. A significant portion of the income, lost due to economic piracy, would have gone to the music publishers as well as the songwriters and composers, since all of the counterfeited and pirated sound recordings incorporate the unauthorised mechanical reproduction of copyrighted songs and other compositions. Consequently there are secondary losses, triggered from the primary infringement. They include loss of employment opportunities in recording studios and retail stores as well as losses from the ancillary industries, such as graphic artists, musical editors, video and film support as well as marketing, promotional and advertising experts. The recording companies are dependent on the sales of their products to pay their employees, promote artists and produce new albums. The consequences of this are, firstly new works are not released, new artists are not signed and the existing artists are dropped from the labels.

After having an understanding regarding the extent of the copyright infringement in the film music industry, the researcher intended to analysis the relationship between the different copyright-based industries and national economy in the second chapter. One of the major aims of the study is to understand the implications of inadequate copyright law enforcement leading to economic losses caused to the recording industry particularly. Therefore, in this chapter the researcher wanted to establish the significance of the copyright based industries in developing the revenue and national

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<sup>814</sup> *Digital Media: Rise of On-Demand Content*, (Feb. 12, 2014, 8 PM) Deloitte [https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media telecommunications/in-tmt-rise-of-on-demand-content.pdf](https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media_telecommunications/in-tmt-rise-of-on-demand-content.pdf)

economy. The creative industries contribute not only in terms of economic development, but also they help in generating employment as well. It had an overall effect on developing the culture of a nation. Copyright law plays a pivotal role in giving ‘incentive’ to this industry, rewarding the creator of original and creative works. In this chapter the researcher has made the following conclusion.

The law of copyright is a trade-off between different costs and benefits to stakeholders. Strong copyright protection is very much instrumental in respect of the growth of the economies of the countries world over. Nations which have strengthened protection of copyright and enforcement have witnessed an increase in contribution to GDP from the copyright based industries. Copyright helps in generating wealth and bringing prosperity to the society. In India film music including Bollywood and regional film music contributes approximately 67% of the music sales.<sup>815</sup> A musical album for a film is created by the film producers and the exploitation rights are licensed to a music company. As far as the success of the albums are concerned the entire risk is born by the respective music companies. Moreover, music companies have diversified into film production, content for children and non-film music also.<sup>816</sup> The performance of creative industries is stimulated by government through economic freedom; a robust legal framework via well-established property rights as well as an innovative business environment. Institutions and enterprises producing and distributing educational, scientific as well as cultural material and entertainment fields form part of the cultural industry of the country. The cultural and information industry relies on updated, effective and properly enforced copyright legislation for its development.<sup>817</sup>

From 2002 onwards World Intellectual Property Organisation has commissioned research on estimating the economic contribution of copyright based industries. Different reports and documents, published by WIPO have presented an overview of the copyright industries’ performance in selected countries in respect of various macroeconomic indicators. Different

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<sup>815</sup> Ernst and Young, Spotlight on India’s Entertainment Economy (2010), (Jun. 12, 2014, 7 PM) [http://www.ey.com/Publication/vwLUAssets/Entertainment\\_economy\\_of\\_India/\\$FILE/Indias-Entertainment-Economy\\_Oct\\_%202011\\_.pdf](http://www.ey.com/Publication/vwLUAssets/Entertainment_economy_of_India/$FILE/Indias-Entertainment-Economy_Oct_%202011_.pdf).

<sup>816</sup> Ibid.

<sup>817</sup> Shahid Alikhan, *The Role of Copyright in the Cultural and Economic Development of Developing Countries*, 7 Journal of Intellectual Property Rights, 489, 492-93 (2002).

surveys have been conducted in developing and developed countries with the intention to inform the policy makers. These reports have compared those performance with other economic indicators and also analysed the structure of the economic contribution in this regard. Results from these studies indicated that the contribution from copyright based industries in respect of their Gross Domestic Product is significant. Copyright industry is held to have an important place in the national economy, creating jobs and stimulating growth. However, WIPO studies have not analysed how the copyright based industries could have performed with a more stringent copyright protection. Moreover, there is a confusion between copyright's economic impact and the economic impact of industries dependant on copyright law. Thus, there is an uncertainty regarding the reliability of reports, published by WIPO.

In India no systematic and substantial effort has been undertaken till date to arrive at fair indicators of the respective sector's contribution to Indian economy. Similarly, no reliable estimates are available to give a clear picture regarding the losses arising out of copyright infringement in the recording industry of India. Back in 1996, in India the cultural industry accounted for 5.06% of the gross national product and it was second only to United States of America. The contribution of this industry to the gross national product is bound to increase in the days to come certainly. There are no authentic figures regarding the estimation of total contribution of the copyright based economies in the Indian economy other than the media and entertainment reports published by FICCI and KPMG. Although the pace of global growth of GDP fell down to 2.4% in 2015 from 2.6% in 2014, the Indian economy remained strong and increased at 7.3% over 2014. The Media and Entertainment Industry sector grew by 12.8% from INR 1026 billion in 2014 to INR 1157 billion in 2015. The industry is expected to grow at a CAGR of 14.3% to INR 2260 billion by 2020. The overall industry size of the music industry in 2015 was 10.8% and a growth of 10.2% was observed in 2015 over 2014. The music industry in India is projected to grow at a CAGR of 13.8% to 20.6 billion by 2020.

In Indian music industry the interaction between technological progress and cultural products has enable new form of commercialisation of musical products. Downloading and music streaming shares equal contribution to the overall revenue, generated by digital music. 27 million online music users in India in March 2015. Streaming is suitable to the consumer demand and preference for convenience. It is illustrated by Apple's iTunes (downloads) revenues that declined by 13% to

14% world-wide in 2014. Smartphones and connected device grown at an exponential rate. In India, there are 166 million smartphones and tablets in 2015. It is further expected to increase 655 million by 2020. However, present subscription music services is less than 1% among all online music listeners. Contribution from digital music segment to overall Indian music industry revenues is predicted to grow from 55% in 2014 to 72% in 2017. 81% of the total digital music consumption is Bollywood music. In 2014, a clear shift is observed towards subscription for offline and high-quality downloads.<sup>818</sup>

However, no government sponsored estimates are existing to determine the copyright based industries' contribution to the economy of this country. However, different studies made by the industry operators indicate that copyright industries contribute immensely to the national economy. FICCI and KPMG published media and entertainment reports support this assertion to a great extent. Consequent to the development of national economy, huge employment is generated. This contribution benefits the national exchequer by way of sales tax, income tax as well as excise duty from the sale and production of copyright protected material. While there is no iota of doubt regarding the economic significance of copyright, it is not possible to measure it with much ease. The process of measuring gets complicated for several factors. Since copyright based industries comprise of vast range of activities, coming under the domain of copyright, the job of demarking the copyright industry. They are not identified as an industry in the usual sense. Till date WIPO has not conducted any study to give an overview of the economic contribution of the Indian copyright based industries. Moreover, the other empirical studies have given ambiguous pictures. There is lack of conclusive empirical evidence regarding the consequences of unauthorised dissemination of copyright protected sound recording. The picture appears to be gloomy.

The law relating to copyright protection has been significantly influenced by the technological developments in terms of the reproduction and communication of the medium in respect of printing and publishing of works. Copyright law is considered to be the most effective mechanism to tackle the issues related to intellectual property law over the internet. New technology has invited

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<sup>818</sup> *Digital Media: Rise of On-Demand Content*, (Feb. 12, 2014, 8 PM) Deloitte [https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media\\_telecommunications/in-tmt-rise-of-on-demand-content.pdf](https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media_telecommunications/in-tmt-rise-of-on-demand-content.pdf)



widespread changes in respect of the manner of listening and buying music by consumers. These technological advancements have enabled the fixation of the work on different material, such as records, cassettes, tapes, CDs, DVDs, etc. Initially musical performance was localised before a limited audience. However, now the music industry experience unlimited and repeated reproduction and use of copyright protected material beyond national borders. As a result, a difference in cost is observed between the making of original recording by the author and business partner and the reproduction of such recording by others. Development in recording technology enables the pirates and counterfeiters to produce illegal versions of the original work with much ease and convenience. Therefore, in the third chapter the researcher sought to study the emerging trends in copyright infringement in sound recording brought about by technological advancements. After going through the pertinent provisions in the Copyright Act, 1957 and the related judicial precedents, the researcher has come to the following conclusion.

The emergence of printing press can be attributed for the development of copyright law. With the advent of new technologies, such as photocopiers, tape decks, video cassette recorders, compacts disks, MP3 in the twentieth century, the relationship between copyright owner and potential copier. In due course of time technology has turned to be the worst enemy of copyright industry. The internet is posing the greatest challenges to the copyright law. Digital media has facilitated easy transmission and multiple uses of the copyright protected work. Illegal downloading and sharing of music by the consumers has become rampant. The infringing copies are sold at reduced prices and consequently, the original authors as well as the investor's and distributor's prospect of obtaining an economic and moral reward for their work and investment is seriously undermined. Copyright enforcement has always been imperfect. Anti-copying technologies have never achieved perfect protection. Moreover, the enforcement efforts have become more complicated due to social norms. Use of file swapping technology as well as peer-to-peer networks have imposed the practical limits to copyright law enforcement. Consequently, the administrator of copyright is facing the mounting task of balancing the rights of different stakeholders on the internet, namely, service providers, and content providers and so on.

Printing press has developed publishing industry. Similarly, the internet has permitted every creative person to be his or her publisher. However, this has given a warning bell to the content industry, if not death knell. The present day scholars have raised a question, whether

communicating a copyright protected work over the internet amounts to “communication to the public” or ‘publication’ of the same. The Copyright (Amendment) Act of 2012 have amended the definition of ‘communication to the public’.<sup>819</sup> This definition is considered to be extensive enough to include communication over the internet within its fold. Determination of the border between private and public use of the copyrighted material over the internet is one of the basic copyright concerns in the online medium. The Copyright Act, 1957 has earmarked the differences between reproduction for public use of protected material and private use of the same. As it has been already discussed, reproduction of the copyright protected work can be done with the due permission of the right holders only, while fair dealing for the purpose of private use, research, criticism or review is allowed by the copyright law. This line of distinction is getting blurred with the potential of an individual user to disseminate any copyrightable work over the internet to different users simultaneously from the privacy of his or her home and users being able to download in their homes concurrently a perfect copy of the material transmitted.

Various laws as well as amendment in existing legislations have been brought to curb copyright infringement. Judiciary also attempted to do the same by imposing penalties, statutorily prescribed. The main issue, which arises here is, why consumers should buy original sound recordings if they can get a substitute one at a much lower price from the internet without compromising the quality of the recording. It is observed, there is a growing tendency on the part of consumers to download illegal music files from unauthorised websites. Consequently there is a direct substitution effect on sales of legitimate music files, giving alternate ways to consumers to access unlicensed music. This substitution effect is considered to be central in the debate of losses and changing music structure. When legal music is substituted by pirated music, it causes loss in sales for the distributors, record labels and other right holders and through substitution effect piracy reduces legal demand for original copy.

Multiplication of P2P file sharing networks has been attributed for the significant decline in music format sales. Downloading MP3 files from the internet is considered to be the ‘least wrong’ of

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<sup>819</sup> Copyright Act, 1957 § 2 (ff) of the. It means ‘making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made.

offenses, committed in cyberspace. Downloaders of unlicensed music has a strong belief that they will not get caught while pirating the illegal music files. Despite the illegal status, unlicensed music downloading has become a part and parcel of the social fabric of our society. Simultaneously, the music industry has failed to construct an appropriate business model. It is evident that stricter law and its rigid enforcement alone will not be able to regulate unauthorised dissemination of sound recordings. In the book “Code and other Laws of Cyberspace”, Harvard Law School Professor Lawrence Lessig, who specialises in inter-relationship between law and technology, observes that there are four broad modalities of regulation or constraint. They are: norms, law, market and architecture or code. Each restriction inflicts different cost on the regulated for engaging in the pertinent activity, which in the present case refers to unauthorised music downloading.

Among the four modalities, code or architecture refers to the physical or technical constraints on activities over cyberspace; the market indicates the economic forces; law explicit mandates that can be enforced by the government; and norm refers to the social convention that one often feels compelled to follow. Lawrence Lessig demonstrates how each modality exercises influence over the regulated person, which he frames as the public dot. The cost incurred by norms is different from market cost from the law and the cost imposed by architecture of internet. Each of the constraints are distinct but interdependent. Each can support as well as oppose others. Each modality has a complex nature.

Law regulates behaviour in cyberspace by threatening certain consequences in case of defiance. Legislatures enact, prosecutors threaten and the courts convict. In the present context penalties for file sharing can be increased. Norms, as a set of understandings, regulates behaviour in the cyberspace, through the threat of ex post sanctions imposed by a community. So, government or industry bodies can make an attempt to change the norms regarding social acceptability of downloading. As far as markets as modality is concerned, pricing structures constrain access. Popular sites are rewarded by advertisers and online services drop low population forums. These behaviours are regulators of market, imposing constraints on market. Market approaches to prevention can increase the cost of downloading or reduce the cost of legal music downloads. The legal regulation can be modified to incorporate an open version of the existing copyright protection. A plurality of approaches can offer a better balanced protection where both the producers and users can gain benefit from the legal system.

On 12<sup>th</sup> May 2016, the Ministry of Commerce and Industry of the Government of India released the National Intellectual Property Rights Policy 2016 to “create awareness about the importance of IPRs as a marketable financial asset and economic tool.” The mission statement of the policy states that it intends to “foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development.” The policy contains seven objectives. Among them the first policy is to ‘create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.’ The policy promotes the launching of a nation-wide program to improve the awareness about the benefits of IPRs and their value to the right-holders and public. The sixth objective of the policy is “to strengthen the enforcement and adjudicatory mechanism for combating IPR infringements. The policy asserts undertaking and identification of measures to check counterfeiting and piracy. It also deliberates adjudication of IPR disputes through specialised commercial courts as well as Alternative Dispute Resolution mechanisms. The policy highlights the importance of creating awareness of the ‘value of IP’ and ‘respect for IP culture’ by ‘educating the general public, especially the youths and students, on ills of counterfeit and pirated products.’ It also aims at developing public awareness and also enforcing legal and enforcement mechanisms, ‘including technology based measures’ to combat offline and online piracy. The chief objective of the present study is to make a status report of the copyright enforcement machinery in India and to understanding the challenges faced by the law enforcement agencies in respect of the prevention of negative economic impact in the film music industry. Therefore, in the fourth chapter, which is related to enforcement of copyright law, the researcher has made the following observations.

For all the content industries, especially music, book publishing or film industries, effective copyright enforcement is of prime importance. Effective protection of the intellectual property rights, owned by these industries would determine their future sustainability. The stakeholders involved in copyright enforcement are the corporate sectors, the copyright authorities and the law enforcement machinery including police, lawyers and Courts. Not only copyright owners, but also the consumers, employment, government revenue and gross domestic production are affected by the breach of copyright law. Moreover, various sections of the society, such as, authors, publishers, musicians, performers and so on, suffer due to weak copyright protection. Although it is claimed that Indian IP regime is one of the strongest regimes all over the world, the complaints about large

scale infringement of copyright protected works is increasing steadily. Copyright Act, 1957 is considered to be very elaborate, well-encompassing and well-structured. It is widely acknowledged and credited on global platforms in many instances. Still India continues to figure in the list of those countries, having high piracy rates with little sign of deterioration in the trend, even though the law is in very much in force.

The scholars in India observe that, “Indian copyright law fails today not in its content, but in its enforcement.” It is observed that in India in respect of illegal and unauthorised dissemination of sound recording, the probability of legal enforcement is very low. Therefore, the Copyright Act, 1957 hardly renders any deterrent effects on the probable offenders. Persons involved in such breaches of law are habitual offenders, as the conviction rate is low and there are high returns in these offences. There is a general mistaken belief that copyright infringement is a trivial matter and does not deserve serious attention, when compared to other severe breaches of law. There is a tendency to treat intellectual property rights, especially copyright, differently from other types of property rights. There is a general misconception that when a music CD or DVD is purchased, the consumer is entitled to do anything with the protected work. In such case, although the consumer owns that particular copy of the work, the owner continues to own the copyright in the work itself. The buyer or the consumer of the CD or DVD cannot reproduce or perform the work without the permission of the copyright owner. In many cases of production and dissemination of the infringing material, the accused takes the excuse that the recovery has not been recovered from his possession and rather it had been planted on him.

A significant problem is that the police and the public at large are aware of the copyright law in a very limited manner in respect of both offline and online piracy of music, movies, etc. Many of the copyright lawyers have complained that police do not take copyright cases seriously. Police in India have got robust legal powers to retaliate against piracy. The copyright law confers *suo moto* authority on the police, permitting them make arrests for copyright infringement. However, such arrests are hardly made other than the specific enforcement campaigns. Moreover, it is observed that police agencies have poor understanding of copyright law. This lack of understanding is observed particularly in respect of different standards of proof of ownership, applicable in case of infringement complaints. In many cases, it is seen that in many cases the police agencies are not aware of section 52 of the Copyright Act, which provides for certain exceptions to copyright

infringement. It is known as 'fair dealing' of copyright protected material. Many a times before the raid, the information of the same is communicated to the accused and the raid makes no difference. Often it is found that there is widespread collusion between the private street vendors who sales pirated and counterfeited CDs, VCDs or DVDs and it includes payment of tip-offs to raids and related perquisites by those vendors to police. It is observed many street vendors sale pirated CDs, VCDs or DVDs in a place within stone throwing distance from the local police stations. In certain cases, even the police officers are being sighted in those pirated stalls, purchasing pirated CDs and DVDs.

Copyright enforcement does not appear to be part of the core mission of the police agencies. They do not consider media piracy as having a high priority in India, where the judicial system and the law enforcement mechanism is already immensely overburdened by more serious crimes. The police forces have several other priorities to cope with on a daily basis and copyright infringement proves to be a peripheral issue. The police officers consider cases of copyright infringement to be the cases of economic offence, where cognizance of the case cannot taken by police. Police officers often insist that the label owner should bring certificate from Copyright Registrar's office, whereas under the copyright law, registration of copyright is not mandatory and its acquisition is automatic. This is because police largely follow the general norms of tangible property offence in case of acquiring evidence of ownership. Consequently, overall conviction rates appear to be significantly low. In certain cases it is found that the producers of pirated material hire rented accommodation without any lease agreement and therefore give the defence that the particular accommodation does not belong to them. Therefore it becomes very much necessary that the mandate given under section 100 of the Code of Criminal Procedure Code should be diligently followed. The provision requires recovering the infringing articles in the presence of two public persons from the locality. It becomes more effective when the landlord of the said rented accommodation is also made a witness in this regard. Additionally, the number of police personnel trained to tackle piracy issues are inadequate, considering the existing policeman to population ratio is already low.

In addition to the above mentioned impediment in effective enforcement of copyright law, another significant contributor to this broader enforcement failure is the judicial attitude and the prevailing interpretation of copyright law. Both in respect of civil and criminal proceedings there are massive backlogs. Many cases often require investments, which is in excess of the compensation for the

injured party. This massive backlog of pending cases increases the litigation costs, both in respect of money and time to obtain the pertinent remedy provided by copyright law. It makes the prosecution and defence of the suits very much burdensome financially for all the stakeholders involved. The number of cases reported are also very less. The minimal convictions under copyright law is attributed to the complexity of due process, involving delayed resolution of the cases. Moreover, delay in filing investigation reports is a major issue in copyright infringement cases. A small delay in filing investigation report by the police results in great loss of revenue to the complainant since the market will be flooded with the infringing goods by the accused, although under section 64 of the Copyright Act, 1957 the police have been conferred with the powers of seizure without warrant. The commercial life expectancy of the entertainment goods is of limited duration and thus the delay in enforcing the copyright law results in huge losses for the concerned right holders.

Although in case of convictions, the punishments prescribed under the Copyright Act, 1957 are severe but the likelihood of apprehension and conviction is considerably low. At the same time, in cases of copyright infringement, acquiring bail is very easy and consequently after the release of the accused in bail, they start producing and selling the forged material from different locations. As far as the civil remedies under Indian copyright law is concerned, again the experts in this field maintains that the private enforcement system is almost failing weakening the protection for the right holders. Moreover, in India there is no separate trial courts to adjudicate copyright related infringement and very few judges are having expertise to tackle intellectual property related matters. In addition to that courts tend to perceive cases of copyright infringements as 'luxury' litigations in the context of socio-economic concerns which characterise a developing economy.

Before the emergence of Internet, the term 'music piracy' generally referred to sales of illegal sound recordings through physical pirated markets or other discreet street vendors. In these cases, still the profit from the illegal sales were considered to be limited as the production of voluminous physical pirated material could attract the attention of the law enforcement agencies. International Federation of Phonographic Industry has divided music piracy into physical piracy and internet piracy. As elaborated previously physical music piracy refers to unauthorised duplication and purchase of pirated music CDs. On the other hand, internet piracy refers to illegal downloading of unlicensed music files, unauthorised file sharing and also includes mobile music piracy. Although

recent studies are indicating that sale of physical pirated CDs are gradually declining, the menace of online music piracy is becoming worse due to popularisation of the Internet. Consumers of music generally try to get the highest value of the music for the lowest price and online music sharing helps them to obtain the popular music format efficiently, but without rewarding the copyright holders. Therefore, enforcement of copyright law over the Internet becomes burdensome considering the sophisticated nature of the technological nature of the online medium.

Music piracy has reached a new height because of the behavioural changes among the music consumers brought by popularisation of Internet. MP3 format can be easily transferred and shared through internet without even purchasing unauthorised pirated music CDs. Downloading of illegal music files over the internet is going on increasingly. Fast internet connections, underground P2P networks and inexpensive digital storage are considered to be the significant contributors in this regard. The consumers believe that stealing a physical good has greater probability of getting caught and punished. In contrast, when it comes to downloading of MP3 music files, the propensity of getting caught is very minimal. This translates into lower deterrence toward pirating digital media.

Globally the industry continues to sue its own customers for illegal download of music. Recently, the recording industry has resorted to new type of copyright infringement across United States of America and it is popularly known as “copyright trolls”. In this case the IP addresses, which individual modems are assigned to access the web are tracked and the subscribers of those modem, who had downloaded illegal music are traced and sued by the copyright owners. In 2013, Emily Orlando and Charlie Foster from Estacada in Oregon, United States of America were accused of illegally downloading copyrighted material through an online file sharing program. In 2012, Jammie Thomas Rasset, a 32 year old woman from Minnesota was found guilty of downloading music illegally over P2P networks and the court fined her a lofty amount of \$80, 000 per song she downloaded. RIAA has sued 3500 plus people for copyright infringement for sharing illegal music files through different file sharing networks. This strategy of RIAA got mixed success. On the one hand it was found that both substantial and non-substantial sharers have reduced the number of files shared. However, it was also found that in certain cases, there was increase in the frequency of sharing unauthorised music files over the file sharing networks. It was observed that the



reduction in sharing activities may be partially possible because of shift of sharers to some other different sharing networks.

Different studies have indicated that lawsuits can be effective in decreasing infringing activities and consequent legal demand. Growing lawsuits and adequate penalties will probably have positive results in curbing individual illegal downloading activities. However, those studies also indicate the judicial response by imposing high penalties in this regard will have short term consequences, doubtful to get an effective results in the long term. Those who upload and download pirated music files consider it to be victimless crime and show an ethical indifference to such activity. Although they have an idea about the legal framework, always they will find several justifications for downloading and copying. They do not perceive copyright infringement as an evil per se and do not feel guilty about it.

When an individual accesses unlicensed music files from internet, the architecture of internet facilitates invisibility of downloading activity by an individual user. Consequently, this helps the users from hiding their own identity and allows them to feel unnoticed and not subject to being caught. This issue of anonymous users have made the content owners repetitively directing the internet service providers to block or remove the URLs (Uniform Resource Locators), facilitating access to pirated music. The Bombay High Court has recently directed the internet service providers to block URLs of pirated websites. The court order was in response to an injunction suit filed by Eros International Media Ltd., Mumbai to prevent unauthorised access on internet to the Bollywood film, 'Dishoom'.

Till now, the entertainment industry provided names of pirated websites to the courts which then issued an order to the ISPs to block those specified pirated websites. Such a course of legal action suffered from serious limitations to implement the copyright law because the pirated websites tend to adopt a flexible response and alter their domain name systems. Moreover, holding the internet service providers liable for sharing copyright protected content by third party has invited many concerns. It is contended that the law relating to determination of ISP liability in India is not certain, making the service providers 'scapegoat' of the inadequate legal framework. Section 79 of the Information Technology Act, 2000 is considered to be the 'safe harbour provision', providing immunity to ISPs for third party content. However, the proviso to section 81 of the

Information Technology Act, 2000 states that nothing contained in the this Act shall “restrict any person from exercising any right conferred under the Copyright Act, 1957 and the Patents Act, 1970.” This provision has major implications on the liability of the service providers under the Copyright Act, 1957. Also, the ‘notice and take-down’ mechanism under the Copyright Act, 1957 is not elaborate. Thus, the immunity provided to the ISPs for the sharing of the unauthorised content by the pirates seems to be of no significant advantage.

As indicated by different reports and studies, both in United States of America and United Kingdom music piracy has resulted negatively in their respective entertainment industry even though it is claimed that both the jurisdictions have a long tradition of protecting their cultural industry through copyright protection and also having a robust enforcement machinery. As far as the civil remedies in copyright infringement cases are concerned, it is observed that in all the three jurisdictions, i.e. United States of America, United Kingdom and India, injunctions, damages and account of profits are incorporated in the concerned copyright statutes. The Indian statutory framework regarding copyright enforcement is bearing significant similarities with that of the same in United Kingdom and United States of America. When the criminal remedies are compared, in all the jurisdictions, there are striking similarities in all the three jurisdictions. For this reason, it became pertinent to make a comparative study of the legal regime related to copyright enforcement in these three jurisdictions in the fifth chapter. The following findings have been culled out from the comparative study.

As far as copyright enforcement against infringing online file sharing services are concerned in United Kingdom as well as in United States of America, separate set of legislative measures are in force. In UK, European Directive and in USA, Digital Millennium Copyright Act, 1988 contains detailed provision to determine the liability of internet service providers in respect of sharing infringing copyrighted content. In USA, in addition to the DMCA, “No Electronic Theft Act (NET Act) as well as Prioritising Resources and Organisation for Intellectual Property Act of 2008 (PRO-IP Act) have been enacted by the Congress with the aim of better copyright protection over the internet. In USA and UK, the entertainment industry has repetitively resorted to lawsuits against those who have indulged in unauthorised dissemination of copyright protected music file over online file sharing networks as well as other individual users who have downloaded pirated content from unauthorised websites. The internet service providers have also been held to be

accountable for facilitating such illegal activities. Technological protection measures are also enabled to deter copyright infringement over the internet. Both in USA and UK, recently a shift has been observed from public to private enforcement of copyright law in internet through 'graduated system', which in USA, particularly is known as Copyright Alert System. The copyright holders in the entertainment industry, especially the record labels along with the Internet Service Providers are restraining individual users from downloading pirated music files through private and contractual system. In UK, this system has got legislative backing.

Very few judicial authorities are existing with respect to online copyright enforcement against infringing file sharing networks in India. The existing Copyright Act, 1957 along with certain provisions of Information Technology Act, 2000 are deployed to tackle the copyright infringement issues over the internet. Very recently ISPs are been directed to block the pirated websites enabling downloading of pirated contents. Apart from MySpace decision, there is no other judicial interpretation in India determining ISP liability for dissemination of unlicensed music files. The procedure relating to notice and take-down of pirated content is not properly laid down in Information Technology Act, 2000. After the amendment of 2008, certain areas of conflict seem to exist between the Copyright Act, 1957 and Information Technology Act, 2000 regarding the safe harbour immunity given to the ISPs for third party content. In this respect, the law is very nascent in India. Online enforcement of copyright law in India is very minimal, although technological protection measures against copyright infringement has been incorporated in the Copyright Act, 1957 in 2012. However, the copyright law enforcement in India has not witnessed the 'graduated response system' or the 'copyright alert system' yet. Thus it can be asserted that while the laws in USA and UK have progressed enough to combat new threats to copyright protection, particularly over the internet, the provisions in Indian law has remained comparatively less effective.

Total elimination of music piracy is a daunting task, however there are different approaches to bring down the existing level of piracy. Piracy can be checked by increasing inconvenience during finding and downloading pirated content and also by increasing the risk of getting caught and punishment for doing so. Legalising acquisition by a consumer by stipulating a payment for the content that they download. The major approaches are raising awareness, adjusting enforcement techniques, improving business strategies and embracing policy amendments. Even though the

representatives from the entertainment industry are advocating for anti-piracy educational campaigns into the public sphere in general, the efforts are not streamlined properly and consequently they are not bearing any effective results. The legal and ethical issues related to music piracy need to be included into public school curriculums across the country. In this context it becomes highly important for the High school government classes to stress on the consequences of copyright infringement. Parents and guardians also has a crucial role in addressing the dangers of piracy before they teach their children how to use computers. With a strong piracy awareness educational program in force, next generations of internet users will be ready to make rational and informed decisions about illegal dissemination of unlicensed music files.

The main incentive to obtain pirated files instead of purchasing them from a legitimate seller is because of the undesirable high prices of original and authenticated media content. Consumers who are always hunting for deals incline towards free P2P services or cheaper pirated versions of media because of the expensive original content. Therefore improvement of business strategies becomes sine qua non to prevent the increasing use of pirated content. In order to adapt to the stubborn mind sets of digital natives, it is necessary for the entertainment industry to accommodate itself to the new digital environment by way of embracing the inevitable online music movement and developing better technologies to aid sales and also by reducing material costs of current physical albums.

A moderate level of user litigation is beneficial to the recording industry theoretically. However, the issue of who should be sued is still left to be determined. Is it right to sue grandpas, grandmas, and little kids? Is it fair for the recording industry to issue the same settlement amount to a computer amateur who shared several media files and a computer guru who finally got caught? Contrary to popular belief, litigation of "innocent" little kids is in fact the right thing to do. Logically, this might not make sense, but if observed from a grander economic perspective, prosecuting downloaders who are sympathetic to the recording industries is the right way to go. The industry needs to work closely with law enforcement agencies to identify and trace online pirate services.

Music piracy occurs largely due to the conflict between providers of illegal content and providers of file sharing technologies. The industry can tackle this conflict by developing new watermarking

methods that can trace the source of illegal distribution and by working with online stores to remove infringing apps and reaching their access to illegal websites. At the same time it is necessary that the industry should actively pursue the cleansing operations to eliminate accidental piracy where music is distributed by individuals without an intention to indulge in music piracy.

As discussed previously, the existing National IP strategy does not adequately address counterfeiting and piracy and pays little attention to enforcement of existing IP laws and regulations. There is lack of central coordination of India's strategies and actions to stop the growth of counterfeiting and piracy. In this context, such an approach will be required which provides more improvements in critical intellectual property infrastructure including the police and the courts and which enhances legal mechanism for enforcement.

One of the recent initiatives taken by Indian Music Industry is Music Mobile Exchange (MMX). MMX is a brand of label mobile media private limited. It is a group of music companies which provide legitimate music to mobile phone users across the country. This has been launched to cash on the growing demand for music content on mobile chips. MMX license will help in legitimising the music sale by mobile stores without violating the provisions of Copyright Act, 1957. Each shopkeeper can create his own database of music through his own legally acquired sources. Data can be categorised as per the local requirements. The license could be taken for a period of one to three years at a cost ranging from 1500 to 5000 per month or per computer depending on the kind of the shop or the location of the shop. The MMX license offers legitimate partnership opportunity with shopkeepers.

## **Suggestions**

In the light of the foregoing discussion, the following recommendations are submitted here.

- Sensitising the state police forces to allocate resources for IP crimes is a real priority. With a dedicated IP cell at the Centre, the Centre can coordinate action on large scale piracy cases across states. Measures to check counterfeiting and piracy also needs to be identified and taken.
- In short terms, additional funds should be provided to existing IP cells at the state level. The number of individual dedicated IP cells in police jurisdictions should be increased

around the country. Regular consultations should be held between copyright stakeholders and ISP and mobile networks to foster greater cooperation and expeditious and effective remedies against online and mobile infringements.

- In all state police stations cybercrime law enforcement officers should be deployed. Centralised IP crime units should be introduced under Central Bureau of Investigation (CBI). Cyber Crime Detective unit should be established to ensure proper investigation of internet piracy in a systematic, coordinated and efficient manner.
- A standard operating procedures for enforcement agencies should be properly established. Special IP panels with expert judges and IP devoted prosecutors will be able to accelerate an effective and deterrent adjudication processes in civil as well as criminal cases.
- As far as legislation is concerned, the Information Technology Act, 2000 should be amended to make copyright infringement a predicate offence, thereby empowering the authorities with power to order expeditious remedies against non-hosted online and mobile services built on copyright infringement.
- The Copyright Act, 1957 should be amended to clarify prohibitions against circumvention of access control technological protection measures and of trafficking in circumvention technologies, devices, components or services. It is necessary to remove or restrict the scope of statutory license provisions for broadcasters, which is negatively affecting the operation of market economics for audio-visual and musical works, and sound recordings.
- Providing tax benefits for copyright associations can help them in using the tax savings for anti-piracy and capacity building activities in the country. Providing this support will help create a win-win situation, since right holder groups will be able to provide greater levels of support and capacity building. Such cooperative efforts will both raise awareness of the issues surrounding copyright protection in India as well as promote greater cooperation and more effective enforcement, to the benefit of local Indian as well as foreign creators and right holders.

## **ANNEXURE I**

### **QUESTIONNAIRE FOR THE SURVEY ON MUSIC CONSUMPTION**