

**COPYRIGHT INFRINGEMENT IN HINDI AND BENGALI FILM
MUSIC INDUSTRY IN INDIA: A CRITICAL STUDY OF THE
ROLE OF INDIAN LAW ENFORCEMENT MECHANISM**

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DECLARATION

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CERTIFICATE

This is to certify that Sri Avishek Chakraborty has pursued research on the topic entitled *"COPYRIGHT INFRINGEMENT IN HINDI AND BENGALI FILM MUSIC INDUSTRY IN INDIA: A CRITICAL STUDY OF THE ROLE OF INDIAN LAW ENFORCEMENT MECHANISM"* under my supervision for more than two years and fulfilled the requirement of the Ordinances relating to the Doctor of Philosophy of the University of North Bengal 2009. He has carried out his work in the Department of Law, University of North Bengal. He has completed his work and the thesis is ready for submission. To the best of my Knowledge and belief, the thesis contains the original work done by the candidate and it has not been submitted by him or any other candidate to this or any other University for any degree previously. To the best of my knowledge he has cleared a Turnitin anti plagiarism test by showing less than 10% similarity. In habit and character the candidate is a fit and proper person for award of Ph. D. degree.

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ABSTRACT

The object of copyright law is to encourage authors, composers, artists and designers to create original works by rewarding them with exclusive rights for a limited period through commercial use of their own work for monetary gains. Besides protecting creative potential of the society, copyright contributes the economy of the nation significantly. The Indian music industry is one of the largest entertainment industries in the world and film music constitutes a lion's share of all music sales. Although the advent of technological advancement has benefited the copyright owners by providing a wider market for their works; however the flipside of the same coin makes their property vulnerable to illegal access and distribution which poses a threat to owner's control over such property. Unauthorised sharing of unlicensed music files over the internet has been regarded as the root cause for the recent decline in the size of the music industry.

In the present scenario the race is between technological inventions and copyright protection. Technological advancement has made unauthorised dissemination of copyright protected material very easy leading to economic losses to the Hindi and Bengali film music industry in India. The existing Indian copyright law as well as the enforcement mechanism is inadequate to protect the interests of the concerned copyright holders in the music industry. Therefore the present study endeavours to understand the specific areas where the Indian Copyright Act, 1957 falls short in addressing the issues related to unauthorised dissemination of copyright protected sound recordings. Subsequently, the study also focused upon understanding the factors behind inadequate enforcement of the existing legal mechanism for containing infringement of copyrighted material. Thus, the present study specifically explored the mechanism in the Indian copyright regime for weak enforcement in the recording industry particularly.

Copyright infringement in sound recording 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. 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. 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. 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. However, it is generally observed that, Indian copyright law fails today not in its content, but in its enforcement. It is found that in India in respect of illegal and unauthorised dissemination of sound recording, the probability of getting caught is very low. Therefore, the Copyright Act, 1957 hardly renders any deterrent effects on the probable offenders. 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.

When 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. 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.

A significant problem in the enforcement of copyright law 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. They lacked the orientation towards copyright

laws, such as knowledge of distinguishing infringed copies (i.e. duplicate copies) from the originals, machines used for making duplicate copies etc. and more particularly penalties for violations etc. There is no denying the fact that catching the pirates is not among the priorities of the police force. Crimes like copyright piracy do not receive the highest attention from the police. Often it is found that there is widespread collusion between the private street vendors who sell pirated and counterfeited CDs. Lack of empowered officers for enforcement of anti-piracy laws remains the key issue that is augmenting the threat of piracy. 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. This massive backlog of pending cases increases the litigations costs, both in respect of money and time to obtain the pertinent remedy provided by copyright law. 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 copyright holders. The current Copyright Act, 1957 is not up-to-date in terms of technological innovations and inventions and it also does not address the needs of the electronic media which has blown up the echelon of piracy today.

PREFACE

The Indian music industry is one of the largest entertainment industries in the world and contributes immensely in strengthening the economy of the nation. The law of copyright provides the necessary incentives towards creation of original creative works. It helps the concerned stakeholders in recovering the investment they had made in the production process. Thus, copyright law has an important influence not only on those who deal with literary, dramatic or musical works, but also the artists, performers, sound recorders, persons associated with cinematograph films and recording and broadcasting authorities as well as the entertainment industry as a whole. The protection afforded to creative original works becomes a source of livelihood for those associated with the copyright based industries. Technological progress has always shaped the development of copyright law. Technological innovation was responsible for bringing copyright law into existence. This progress in technology has also brought paradigm shift in the music business model. On the one hand, this change has enabled the content owner to disseminate the media content among the consumers in an effective and better manner. However, on the other hand, this immense technological progress is responsible for augmenting the violation of copyright law. Particularly, the advent of online media has changed the menace of copyright infringement making it very difficult to curb the danger to the copyright based industries. Online piracy has reduced the sales of legitimate contents and pirated contents have become a substitute for the legitimate contents. Unfortunately, copyright infringement has never been accorded the status of a serious crime even though it has far reaching consequences, both from social and economic angle.

In this thesis the role of Indian law enforcement mechanism in preventing copyright infringement in the Hindi and Bengali film music industry has been critically analysed.

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LIST OF ABBREVIATIONS

ASCAP	American Society of Composers, Authors and Publishers
CAGR	Compound Annual Growth Rate
CD	Compact Disc
CDPA	Copyright, Designs and Patents Act, 1988
COICA	Combating Online Infringement and Counterfeits Act
CSS	Content Scrambling System
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
DVD	Digital Video Disc
EU	European Union
FBI	Federal Bureau of Investigation
FICCI	Federation of Indian Chambers of Commerce and Industry
FTP	File Transfer Protocol
GDP	Gross Domestic Product
GNP	Gross National Product
GVA	Gross Value Added
HMV	His Master's Voice
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
INR	Indian Rupee
IPR	Intellectual Property Rights
ISPs	Internet Service Providers
KB	King's Bench
MDPA	Motion Picture Distributors' Association

MP3	Moving Picture Experts Group (MPEG) Audio Layer III
NIAPC	National Initiative against Piracy and Counterfeiting
P2P	Peer-to-peer
PPL	Phonographic Performance Limited
PTC	Patent and Trade Mark Cases
QB	Queen's Bench
RIAA	Recording Industry Association of America
RMI	Rights Management Information
SCC	Supreme Court Cases
Sec.	Section
SOPA	Stop Online Piracy Act
TPB	The Pirate Bay
TPMs	Technological Protection Measures
TRAI	Telecom Regulatory Authority of India
TRIPs	Agreement on Trade Related Aspects of Intellectual Rights
UK	United Kingdom
USA	United States of America
USC	United States Code
USTR	United States Trade Representative
VCD	Video Compact Disc
VCR	Video Cassette Recorder
WCT	World Intellectual Property Organisation Copyright Treaty
WPPT	World Intellectual Property Organisation Performance and Phonogram Treaty

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INTRODUCTION

Evolution of Problem

The law relating to protection of copyright in original works began to develop in a full-fledged manner only after the invention of the printing press which made it possible to produce copies of a work in large numbers at a low cost. Technological development extended vastly to the kind of works protected by copyright law and the nature and scope of such protection. The object of copyright law is to encourage authors, composers, artists and designers to create original works by rewarding them with exclusive rights for a limited period to exploit their own work for monetary gains. Technological progress has made reproduction of copyright material easy and cheap, but at the same time it has made piracy of copyrighted work simple and difficult to control. Technology has become the best friend as well as worst enemy of copyright. In respect of musical works, the seriousness of copyright infringement was realised only after development of gadgets like tape-recorder, magnetic tape in the earlier times and optical disc, iPod or MP3 players in the recent times. The compact disk has emerged as a both blessing and curse in the music industry.

Besides protecting creative potential of the society, copyright contributes to a nation on economic-front as well. The copyright industry is responsible for strengthening the economic potentiality of a nation. The Indian music industry is one of the largest industries in the world and film music constitutes a significant share of all music sales. Musical production independent of the film industry does of course exist, but it is still the case that popular songs are identified by the films they were first used in and the songwriters, composers and performers depend substantially upon the same. Music industry in India is one of the oldest and has had the reputation of being one of the strongest parts of the entertainment sector. The popularity of Indian music has gone beyond the national boundaries. This copyright based industry generates huge employment in the country. The national exchequer benefits from the contribution made by these industries in the form of excise duty, sales tax, income tax etc. from the production and sale of copyrighted products. The commercial exploitation of copyrights also yields income to the creative persons in the form of royalties. Therefore, copyright

infringement takes away certain portion of revenue from the legal owner of copyrights. The state gets income in the form of excise duty, sales tax, income tax etc, which pirates do not pay.

Today the law of copyright affects not only those who deal with literary, dramatic or musical works but also the artists, performers, sound recorders, person concerned with cinematograph films and recording and broadcasting authorities as well as entertainment industry as a whole. On this background it becomes evident that piracy brings in losses for all involved in the legitimate production and distribution of copyright items. The important among these are the trade loss and loss to the state exchequer. However, because of its white collar nature, many a time copyright infringement is not perceived as a crime at all, or at least not as serious as thefts are ordinarily considered. This is perhaps one of the greatest problems associated with the effective control of the piracy phenomenon, more so in a developing country like India. Our society condemns a bank robbery or even a small household theft. But when a musical composition, on the creation of which large investments were made, or a sound recording embodying the same is copied illegally by millions, no serious note is being taken. This is because copyright piracy unlike most other thefts may not involve physical products and, therefore, in many occasions it remains 'intangible'. What is stolen may not be the physical product itself but the 'intellectual property', which go unnoticed or ignored in many instances. That is why from a social and economic angle the copyright infringement is not always treated as a serious crime, even though it has far reaching consequences, both social and economic.

The music industry in general all over the world has experienced significant changes in recent years. In particular, the advent of web media through broadband networks made it possible to freely download unauthorized copies of pre-recorded music files via peer-to-peer (P2P) technologies; consumers can transmit the music in digital format among themselves using the online 'file-sharing' technology. File sharing has been the root cause for the recent decline in the size of the music industry. Online piracy may substantially undermine intellectual property rights of digital goods. The advent of online media has changed the outlook of the menace of copyright infringement making it very difficult to curb the danger to the copyright based industries. Online piracy has reduced sales of legitimate CDs and illegal MP3 downloads have become a substitute for legal CD purchases.

Another significant factor responsible for ineffective control of copyright infringement is that enforcement of copyright law in general is not satisfactory in India. They lacked the orientation

towards copyright laws, such as knowledge of distinguishing infringed copies (i.e. duplicate copies) from the originals, machines used for making duplicate copies etc and more particularly penalties for violations etc. The negligence in enforcement is the result of disregard on the part of the enforcement machinery, viz. the police on one hand and the passive attitudes on the part of right holders on the other. There is no denying the fact that catching the pirates is not among the priorities of the police force. Crimes like copyright piracy do not receive the highest attention from the police.

Thus, it transpires that although the advent of technological advancement has benefited the copyright owners by providing a wider market for their works; however the flipside of the same coin makes the property vulnerable to illegal access and distribution and posing a threat to owner's control over such property. Presently, the music industry is in transition with widespread copying and Internet downloading continued to affect music sales. Online piracy in particular is affecting the world's major markets. Germany, France, Japan, India, the US and many other nations are suffering significant declines in the music sales. The copyright legislations in the present form are not adequate to address the threats posed on the intellectual property owners. Evaluation of the law enforcement mechanism is sine qua non for effective implementation of the rights of the copyright holders.

Statement of Problem

Twentieth century inventions of scientific devices, such as audio-video tape recorders, compact discs, computers and internet have made invasion into the rights of copyright owners very easy. Offence of copyright infringement has been taken to a new height through the medium of Internet, affecting the entire music industry. The digital era has severely affected the physical music industry in India.

Lack of empowered officers for enforcement of anti-piracy laws remains the key issue that is augmenting the threat of piracy. To make the situation worse the lengthy legal and arbitration process is an impediment to the battle against pirates. The current Copyright Act too is not up-to-dated in terms of technological innovations and inventions and it also does not address the needs of the electronic media which has blown up the echelon of piracy today.

Hypothesis

Copyright regime was devised to protect the interests of the owners of intellectual property holder on one hand and to provide an incentive for creation of more intellectual property on the other. In the

present scenario the race is between technological inventions and copyright protection. Technological advancement has made unauthorised dissemination of copyright protected material very easy leading to economic losses to the Hindi and Bengali film music industry in India. The situation would be better if the laws that presently in force were effectively enforced. The existing Indian copyright law as well as the enforcement mechanism is inadequate to protect the interests of the concerned copyright holders in the music industry.

Research Questions

The above stated hypothesis gives rise to the following research questions:

- Where the Copyright Act, 1957 does fall short in addressing the issues related to unauthorised dissemination of copyright protected sound recordings?
- How far has the Copyright Act, 1957 being effective in containing infringement of copyrighted works due to technological development?
- What is the state of enforcement of the existing mechanism against copyright infringement in music industry?
- What are the reasons behind inadequate enforcement of the existing legal mechanism for containing infringement of copyrighted material?

Objective of the study

The chief object of the present study is ascertaining the extent of copyright piracy prevailing in Hindi and Bengal Film Music industry of India. It would also involve ascertaining the impact of piracy on copyright holders and the national economy. Furthermore, this research work would evaluate the role of Indian enforcement mechanism in minimising the effect of piracy on the Indian creative and entertainment industry with special reference to Hindi and Bengali Music Industry.

Contribution of the study

In India so far no significant study has been conducted to find out the contribution of the copyright industry in general and the music industry in particular on the national economy. The present study after ascertaining the existing legal framework which offers protection to musical copyright in India would concentrate on the intricacies of copyright infringement and its consequence on our creative copyright based industries, especially the film music industry. The study would contribute to the existing knowledge regarding the assessment of the functioning of existing Indian enforcement mechanism in developing a piracy free environment in Hindi and Bengali Music Industry of India.

Significance of the study

The study not only looks at the threatening phenomenon of music piracy but also makes an attempt to study economic impact of copyright infringement on Hindi and Bengali Film Music Industry of India and also on government revenue. Another important implication of the study lies in the fact that role of the Indian enforcement mechanism is examined in this regard.

Scope and Limitation of the study

Scope

There are two ongoing debates in the sphere of the copyright law. One relates to the issue of whether copyright law is restrictive of the principles of democracy and socialism and the second is the adequacy and competence of the copyright law to keep up with the fast changing technology, which provides newer ways of infringing copyright law. The scope of the present research work is limited to the second issue. The researcher in the present research has engaged himself with the fact that there is an existing copyright law regime and if implemented effectively the present law will successfully contain infringement to a large extent, if not completely. The scope of the study, therefore, is to explore the weaknesses in Indian law enforcement mechanism in respect of copyright law enforcement only. The study does not engage with the first debate regarding the need for copyright law.

Limitation

The limitation of the study is that the area of infringement through technological means and over the internet is anonymous and diverse that no study has been undertaken both at the governmental and private level to ascertain the extent of such breach and misuse. That infringement takes place is an obvious moot point and that there is economic loss is also an accepted fact. The research is structured around these two given points. Non-availability of authentic data, both at national and international level, is the limitation of this work.

Chapterisation

Introduction

Chapter I

Overview of Copyright Infringement in Hindi and Bengali Film Music Industry

Chapter II

Copyright Based Industries and National Economy: An Analysis

Chapter III

Infringement of Copyright in Sound Recording by Technology: A Study of the Emerging Challenges

Chapter IV

Challenges in Enforcement of Copyright Law in India: A Status Report

Chapter V

Enforcement of Copyright Law in United Kingdom, United States of America and India: A Comparative Study

Chapter VI

Conclusion and Suggestions

Methodology:

The present study employs a doctrinal method as well as empirical method. It explores the fundamental nature of the subject matter of the right. It analyse the rationale behind the law. The study evaluates the inadequate enforcement of the law. The study incorporates both primary and secondary sources of data. The primary sources includes statutory laws, International instruments as well as judicial precedents. The secondary sources includes text-books, articles appearing in different journals and materials available on the internet. For the purpose of empirical study, data is collected through directed interview method and through structured questionnaires. 21st Bluebook edition has been followed for edition.

Literature Review:

The subject matter of protection of musical copyright specifically has not received serious attention thus far by the Indian authors. However, the books on Intellectual Property Rights contain few general chapters on the topic of copyright protection. Similarly, up till now the available literature does not bear any significant reflection on the features of copyright infringement, piracy, counterfeiter, etc. in details.

As far as the present research on the area of Copyright Infringement in Hindi and Bengali Film Music Industry in India is concerned, the text books available on the Laws of Intellectual Property Rights as well as books exclusively covering copyright laws have been thoroughly reviewed. Besides these, articles as appearing in different journals; statutory laws relevant to the research topic and also the case-laws formulated by the judiciary have also been reviewed for the purpose of getting acquainted with the studies already done in respect of the research problem.

For the purpose of the present study, the following *text-books* which deal with more or less similar contents have been looked into and they are:

1. *Dr. S.R. Myneni Law of Intellectual Property, 3rd Edition, 2006, Asia Law House.*
2. *Dr. G.B. Reddy Intellectual Property Rights and the Law, 8th Edition, 2010, Gogia Law Agency.*

3. *Dr. Jayanata Lahiri, Lectures on Intellectual Property Laws, 1st Edition, 2009, R. Cambay & Co. Pvt. Ltd.*
4. *P Narayan, Intellectual Property Law, 3rd Edition, 2001, Eastern Law House Pvt. Ltd.*
5. *Dr. B.L. Wadhera, Law relating to Intellectual Property, 4th Edition, 2007, Universal Law Publishing Co.*
6. *Justice P.S. Narayan, Intellectual Property Law in India, 3rd Edition, 2005, Gogia Law Agency.*

All these above mentioned books deal with the key forms of intellectual property in general, such as Patent, Trademark, Designs, Geographical Indications. These books highlight the provisions on national statutory laws covering the protection of different forms of Intellectual Property, predominantly in respect of Indian laws and prevailing practices. The books define the basic concepts; describe the fundamental tenets, notions and rationale of the protection of copyright, patent, trademark, designs, etc. They endeavour on giving a detailed general idea of shielding various intellectual properties. As far as specifically copyright protection is concerned, the books have defined copyright, types of work in which copyright subsists and has deliberated on ownership of copyright, rights of copyright owner, duration of protection, infringement of copyright and the available remedies. However, these books do not contain any special reflection on any particular type of work. The present research is concentrating on the arena of musical copyright infringement within the domain of copyright law in general, which again comes under the broad regime of intellectual property law and obviously these specific and narrowed areas are not addressed in the text books since they deal with protection of all forms of intellectual property in its entirety without giving any special reference to a particular form.

P. Narayan, Law of Copyright and Industrial Designs, written by, 4th Edition, 2007, Eastern Law house. For the purpose of the present study this particular book has been reviewed. It exclusively deals with the matter of copyright protection and elaborately describes the various types of works in which copyright subsists and the various modes of their protection. The author has specifically highlighted the protection of musical works at length as well as how the rights of the concerned persons in those musical works are infringed. It contains a detailed chapter on a variety of remedies

and actions available against the copyright infringement. However, the problem of copyright infringement in the form of piracy is not specifically attended to and the enforcement mechanism to curb the menace of copyright infringement is not dealt with which is the main concern of the present study.

G.B. Reddy, Copyright Law in India, 1st edition, 2004, Gogia Law Agency. The book is a commentary especially on copyright law. The book deals with the various provisions of Copyright Act, 1957 elaborately. The author has tried to shed light on the problem of copyright infringement in details, including the various factors involved in determination of copyright infringement. The phenomenon of piracy has been dealt, although in very nominal level. As stated previously the focal concern of the research work, namely an account of the loss caused by piracy to the national economy has not find proper attention in the book. At the same time, the role of implementation and enforcement mechanisms have not been stressed upon which is sought to be evaluated in the present study.

Dr. V.K. Ahuja, Law of Copyright and Neighbouring Rights: National and International Perspectives, 1st Edition, 2007, LexisNexis Butterworths has. This particular text-book has given emphasis on the fact that copyright law has a significant role to play in the modern world full of technological innovations. It deals with not only Indian Copyright law, but also with the international treaties on copyright. The book also makes references to the laws of other countries, particularly in English law. A number of judgments delivered by English courts as well as by Indian courts also find a place in the book.

Roodney D Ryder, Intellectual Property and the Internet, 1st Edition, 2002, LexisNexis Butterworths. The text-book is primarily an analysis and reference on Intellectual Property laws and practice in relation to the Internet and new media in India. This text is intended primarily as an overview of the many issues that the internet raises for the intellectual property owner – the threats, the challenges and mostly importantly the opportunities. The book contains a detailed chapter on digital distribution of film, music and the challenges imposed by it. It also stresses on the liability of Internet Service Providers in dissemination of copyright protected material.

Apart from the above text books, dealing with the Intellectual Property Laws in India, many other text-books particularly dealing with the protection of intellectual property rights under the laws of

Great Britain have been looked into for the purpose of literature survey and also for understanding a comparative position of the relevant laws in countries other than India and they are as follows:

- i. *Jenifer Davis Intellectual Property Law, 2nd Edition, 2005, Oxford University Press;*
- ii. *William Cornish and David Llewelyn, Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights, 5th Edition, 2003, Thomas Sweet and Maxwell;*
- iii. *Paul Torremans, Holyoak and Torremans Intellectual Property Law, 5th edition, 2008, published by Oxford University Press;*
- iv. *Lionel Bently and Brad Sherman, Intellectual Property Law, 2nd Edition, 2001, Oxford University Press.*
- v. *Jeremy Philips and Alison Firth, Introduction to Intellectual Property Law, 1st Edition, 2006, Oxford University Press.*

These above mentioned books contain elaborated chapters dealing with the general protection of main forms of intellectual property. However, they do not particularly elaborate on the particular protection of musical works, although discusses at length the basic conception of protection of musical copyright. The common denominator of all these texts is that the threatening consequence of piracy to the nation's economy and the function of enforcement mechanism to curb this menace has not been received serious attention. However, some of the books to some extent have focused on the impact of present technological revolution on the copyright industry.

David Brainbridge, Intellectual Property, 5th edition, 2002, Pearson Education. This is a book which among other forms of intellectual property, deals elaborately with the various aspects of copyright law, its infringement, defences to copyright infringement and various remedies. Significantly, this book contains a detailed chapter on new technology and its impact on copyright. Similarly, the problem of piracy has not been discussed and the present study is particularly focused on that area.

Kevin Garnett, Gillian Davies and Gwilym Harbottle, Copinger and Skone James on Copyright, South Asian Edition, 2008, Thomson, Sweet and Maxwell. This text clearly and specifically draws attention to the dilemma of music piracy as a challenge to the music industry and has deliberated on the impact of the digital age and peer-to-peer networks in this regard. The book gives a detailed

account of the situation of the music industry as a principal source of revenue to the concerned government. Moreover, the author has very beautifully described the potentiality of legitimate new forms of exploitation which are giving rise to new opportunities including the online boom, mobile music and its consequential impact on the music industry and all those who depend upon it. At the same time, the enforcement machinery and its efficacy to prevent this crisis has not been given proper consideration which the present research seeks to deliberate upon.

Besides the above mentioned books, few other books are reviewed generally and they are as follows:

Sameer Hinduja, Music Piracy and Crime Theory, 1st Edition, 2006, LFB Scholarly Publishing LLC. The book attempts to examine the applicability of the general theories of crime on one specific form of Internet crime: online intellectual property theft, as measured by participation in illegally uploading and downloading unauthorized digital music (MP3) files. It also determines the most salient predictors of music piracy and serves as a foundational inquiry into novel forms of deviance engendered by computers and the Internet. The author attempts to develop fruitful policy initiatives to restrict the propagation of this criminal activity, which may simultaneously work to reduce copyright infringement of other forms of intellectual property in the future.

Kathey Bowrey, Law and Internet Cultures, 1st Edition, 2005, Cambridge University Press. Law and Internet Cultures brings to life the role played by personalities, corporate interactions, industry compromises and the regulatory incompetencies affecting the technological world we live in. The book contains detailed chapter on definition of internet law, internet cultures; role of the Internet Engineering task Force, etc. Moreover, it deals specifically with the concept of digital piracy, P2P network, Napster, Technology marketing, etc. Since the text is pre-dominantly concerned with internet cultures, obviously online piracy has been given the prime importance. However, the present study involves a wider facet and also includes the evaluation of law-enforcement mechanism, which has not found place in the book.

Chris Reed and John Angel (Eds.), Computer Law, 1st Indian Edition, 2004, Oxford University Press. This book asserts that the area of law covered by the book has developed considerably over the last few years there is a sense now that computer law has become an established area of law with a more stable content. Among many other features, a special feature of this text is that, it contains a detailed chapter specifically on copyright which includes ownership and duration of copyright, its

infringement, remedies and procedural matters. It is also shed light on copyright infringement via internet.

Ronald S. Rosen, *Music and Copyright, 1st Edition, 2008, Oxford University Press.* This book draws upon the vast literature found in the opinions of appellate courts and commentaries of eminent scholars and the rich history of music found in the scores of composers over the centuries. It also serves as a strong impetus to reconsider areas of the copyright law, in particular the ways in which music and language are analyzed by experts to aid judges and juries in determining whether a defendant has allegedly copied protectable expression or used ideas and concepts available to all creators. The book contains elaborate chapters on the Copyright law; The Basic Elements of Musical Language and Ideas from the Copyright Perspective; Music and Summary Judgment; Music, Copyright and the Impact of New Technology, etc.

Anna Morcom, *Hindi Film Songs and the Cinema, 1st Edition 2007, Ashgate Publishing Limited.* The book contains detailed chapter on the Hindi Film Songs' Cinematic Study; its production process; musical style; its commercial life. The book will be helpful in giving some insight to the intricacies of Hindi Film Music Industry of India.

Apart from text-books, various articles, published by different journals have been reviewed for the purpose of finding out the works, research and studies already done and also for understanding the present position regarding the research work proposed to be done. The articles and papers surveyed are as follows:

- Anju Jain, ***Optical Disc Legislation: A New Tool to Combat Digital Piracy***, (2002) 5 SCC (Journal):

The author of this article has considered optical media piracy as an increasing threat to key copyright industries. This paper discusses how the new optical disk law seeks to combat piracy at the manufacturing stage. This article begins with an overview of the optical disk manufacturing process and the magnitude of the piracy problem; the paper also discusses basic elements of an effective optical disk law, the WTO obligations of member countries in enforcing an optical disk regulation and lastly, the status of actual implementation and enforcement of this law in the high piracy countries. The author has also highlighted the

enforcement mechanism and criminal remedies and their utility in enforcing optical disc regulatory law to combat piracy.

- Justice Jayanta Patel, *Copyright Enforcement in India and Global World*, AIR 2002 Journal 209

This paper gives a brief overview regarding the background of enactment of copyright law as well as has explained the importance of copyright in strengthening the economic potentiality of a nation. The article contains a bird's view of the law providing criminal penalties for copyright infringement of developed countries, like USA, France, Poland, Hungary, Portugal, Singapore, etc. The author has considered piracy to be a worldwide phenomenon as it leads to loss of the owners of the property and it also adversely affects the creative potential of a society and it denies creative people their legitimate dues. The author has also asserted that the enforcing machinery is not very active on account of lack of awareness amongst public at large. He gave emphasis on enforcement measures and the role of law courts to combat piracy.

- Shivendra Singh and Aparajita, *Insight into the Nature of Offence of Copyright Infringement*, Journal of Intellectual Property Rights, November 2008, Vol. 13, pp. 583-589.

The paper discusses judicial decisions rendered on interpretation of offence of copyright infringement under Section 63 of the Copyright Act 1957 in the backdrop of two conflicting decisions of the Andhra Pradesh High Court and the Kerala High Court on the same matter. The authors have also focused on the exact wording of the Section 63 of the Copyright Act to get at the root of controversy. The paper also analyses judicial decisions in order to combat offence of copyright infringement in the most effective manner. In addition to this, the authors suggest a way out of the imbroglio. This paper is more concentrating on the cognisability and bailability of the offence of copyright infringement. Although the present study would involve determination of these issues, however, the study is more inclined towards evaluating the role of enforcement mechanisms and promotion of awareness schemes in combating copyright infringement.

- Alka Chawla, *Right of Reproduction of Composers of Music and Producers of Sound Recordings: Infringement by Home Tapes*, Delhi Law Review, (2003), Vol. XXV [Silver Jubilee Issue], pp. 135 – 148.

The paper attempts to highlight the origin and the growth of Sound Recording Technology. She explained how home tapping amounts to copyright infringement and also how the same leads to economic losses. The author shed light on various efforts taken by International Conventions and Organisations like, Berne Convention, WIPO, and WPPT in tackling home tapping. It makes an attempt to make a comparative study of the position and provision for tackling home taping in different national legislations of a number of countries, like USA, UK, European Union as well as India also. It also focuses on the relevant provisions of Indian Copyright Act in combating copyright infringement by way of unauthorised copying, especially by home tapping.

- Raman Mittal, *Online Copyright Infringement Liability of Internet Service Providers*, Journal of Indian Law Institute, Year 2004, Vol. 46:2, p. 288

This paper tries to understand who Internet Service Providers are and what role they play in communication of the internet; analysed as to what could be the potential liability of ISPs for copyright infringement; thoroughly examined the provisions of the Copyright Act, 1957 and the Information Technology Act, 2000 vis-à-vis the liability of ISPs. The author highlighted how the growth of internet, the online or web medium has contributed to the problem of online infringement of intellectual property rights. He also focused on the inherent difficulties in the course of enforcing copyright against individual internet users worldwide.

- Rajiv Vijayakar, *Film Music: the Paradigm Shift*, Yojana, August 2011, Vol. 55 (Special Issue), p. 19

This paper focuses on the various threats to the physical music industry in India and traced the various factors responsible for it. Downloading of songs in digital format in illegal manner is regarded as a significant reason for copyright infringement. The author considered adaptation to newer technologies to be the keynote or secret that has within it the potential to the music industry boom.

- Abhipsa Nayak and Satabdi Chatterjee, *Onset of Mobile Chip Piracy in the Domain of Copyright Infringement*, Journal of Intellectual Property Rights, March 2010, Vol. 15, pp. 117 – 121.

The focal point of the paper is how people are using their mobile phones for their own benefit but are unknowingly infringing the copyright by downloading songs, movies and other copyrighted materials. Technological development has paved the way for newer forms of copyright infringement. For this reason, music and other related industries are suffering a lot of losses. The paper laid emphasis on the necessity of growing awareness amongst the Indian population to curb piracy.

- Vijay Thakur, *Mobile Entertainment in India*, Yojana, August 2011, Vol. 55 (Special Issue), p. 52

The article explains how Indian mobile operators are generating additional revenues from mobile entertainment services, including mobile music, ring tones, etc. and how telecommunication network has emerged as a new handy device for music and video entertainment.

- A Abdulraheem, *Growth Potential and Barriers of Indian Entertainment Industry*, Yojana, August 2011, Vol. 55 (Special Issue), p. 38

The author of the paper considers that the Indian entertainment and media industry has all the potentiality to be a star performer of the Indian economy and also emphasised the necessity of the industry to fight all roadblocks – such as piracy – in a concerted manner. This article once again reiterated the need of Optical Disk Law for regulating piracy.

- Dr. Roger Wallis, *Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries*, WIPO-UNCTAD Report

The paper illustrates the current relevant trends prevalent in the music industry as well as the standard music practices and financing of cultural industries. It also attempted to depict the status of piracy in poorer countries. The author portrays how global distribution channels such as satellites or the Internet admittedly show no technological respect for national, territorial or

cultural (linguistic) boundaries. It also emphasises that Napster has demonstrated the enormous power of the human being, given the right technology, to discover new forms of music.

- Raman Mittal, *P2P Networks: Online Piracy of Music, Films and Computer Software*, Journal of Intellectual Property Rights, September 2004, Vol. 9, pp. 440 - 461.

The author of this article stresses how P2P technology has contributed in authorised sharing of digitalised copyright works, such as music, films without bothering to pay for them. The paper emphasises that P2P technology has become a global phenomenon and it is posing a threat to the audio-visual, sound recording industry and overall music industry giving encouragement to music piracy.

- Sudhir Kr. Chaturvedi *Protection of Musical Works and Music Industries under the Copyright Regime in India*, in B.N. Pandey (ed.), Intellectual Property Rights, Faculty of Law, Banaras Hindu University, Varanasi, pp. 269 – 274.

This article begins with outlining the various International Conventions which protect copyright and related rights. The author tries to give a brief overview of the Indian Music Industry and also highlights the important anti-piracy operations carried out by the Indian Music Industry as well as civil and criminal actions taken on behalf of the government. However, this paper depicts the scenario of Indian Music Industry briefly whereas the research work deals with a wider area covering the revenue generated by this industry, its economic significance as well as detailed analysis of the role of enforcement mechanism and this article does not contain these areas which are looked into this research.

- Vishnu Prasad Agarwal and Dr. M.N. Haque, *Infringement of Works under Copyright Act, 1957*, in B.N. Pandey (ed.), Intellectual Property Rights, Faculty of Law, Banaras Hindu University, Varanasi, pp. 269 – 274.

This article gives a detailed description as to what constitutes infringement of copyrighted works. In this paper the author dealt with copyright infringement generally and did not focus on any particular type of work. On the contrary, the present research focus is on a much more focused area, which is copyright infringement in Hindi and Bengali Film Music Industry. This

paper focuses only with what constitutes infringement but does not let know the necessary enforcement mechanisms to enforce the rights which would be looked into this research work.

- Abul Kalam Azad, ***Rock 'N' Roll in Bangladesh: Protecting Intellectual Property Rights Across Borders***: Abridged Version of a case study, WIPO Magazine, February 2008 (Special Edition for the 4th Global Congress on Counterfeiting and Piracy), p. 14.

This paper portrays beautifully the case, where Miles, a popular Bangladeshi music band had accused music director Anu Malik, a music mogul of the Mumbai movie world, of pirating one of its original compositions. A Calcutta law firm filed a writ petition on behalf of Miles in the Calcutta High Court against the producer Mahesh Bhat and the music director, Anu Malik of the film *Murder*, the singer of the song, Amir Jamal, the recording firm, Saregama India Ltd. and the audio company, RPG Global Music. It was claimed that the defendants had collaborated on copying core elements from *Phiriye Dao Amar Prem* in the soundtrack *Jana Jane Jana* of the movie murder. It was further claimed that the themes of two songs were similar and their melodies were identical. In this case the justice ordered the respondents to remove the song from the soundtrack of the movie Murder. The court further barred the respondents from manufacturing, selling, distributing or marketing any music cassette or disc containing the song. The author considered this case as a successful example of how intellectual property agreements enabled a rock band in Bangladesh to challenge successfully the unauthorised use of one of their songs by a filmmaker in India.

- Jagdish Sagar, ***Entertainment Media and Intellectual Property Rights: An Indian Perspective***, in S K Verma, and Raman Mittal, (eds.), *Intellectual Property Rights – A Global Vision*, 1st Edition, 2004, Indian Law Institute, p. 210.

The article makes special mention regarding the Indian Film industry and also stresses that the popular songs are identified by the film in which they were first used. The problem of copyright infringement and infringement through internet has received serious note by the author and special emphasis has been given on enforcement issues for the protection of copyrighted works.

- Justice R C Lahoti, *Role of Judiciary in IPR Development and Adjudication* (2004) 8 SCC (J) 1.

The author in this article highlighted the economic significance of IPR and spoke few words regarding the duty of the courts in protection of IPR giving due regard to international law. He avowed that piracy is developing in the business society as an evil and so is counterfeiting. He emphasised on a need for a proactive and tactful judiciary to handle such issues related to piracy and the judiciary also needs to have a wider wisdom which can comprehend the impact of global economy vis-à-vis national economy.

- T C James, *Indian Copyright Law and Digital Technologies*, Journal of Intellectual Property Rights, September 2002, Vol. 7, pp. 423-435

This paper traces the history of Indian copyright Act and describes various amendments carried out in it from time to time. The prominent copyright issues in the digital era are identified. It was found that in the Indian Copyright Act many issues are still left unaddressed. Amendments in the Act to make it compatible with the WIPO Copyright Treaty are suggested.

- Priyambada Mishra and Angsuman Dutta, *Striking a Balance Between Internet Service Providers and Protection of Copyright over the Internet*, Journal of Intellectual Property Rights, Vol. 14, July 2009, p. 322

This paper limits its scope to the legal issues integrated to the much debated problem of the scope of liability of ISPs for copyright infringement by third parties or subscribers. The object of the paper is to provide a comprehensive analysis of the prevailing legislative approaches towards this issue in India and bring out loopholes in the present legal framework. It also suggests that the lacuna in the Indian laws must be cured so as to develop a legal system in consonance with the international order which can combat the unforeseen anomaly of the internet era.

- Martin Peitz and Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross Section Evidence*, Review of Economic Research on Copyright Issues, 2004, vol. 1(2), pp. 71-79

This paper uses a 1998-2002 cross-section dataset to analyze the claim of losses due to internet piracy made by the record industry. The results suggest that internet piracy played a significant role in the decline in music sales during the early days of file-sharing networks.

- Robert G. Picard, *A Note on Economic Losses Due to Theft, Infringement, and Piracy of Protected Works*, Journal of Media and Economics, 2004, Vol. 17 (3), pp. 207-217.

This article explores the nature of losses when protected works are stolen, infringed or pirated and how the losses differ significantly for materials in physical and virtual form. The author shows unauthorised usages create both supply and demand issues and reveals that different forms of illegitimate use produce varying types and levels of economic loss. The author also depicts how unauthorised uses potentially affect the producers' marginal and average costs, consumer demand and revenues.

- Brett Keintz, *The Recording Industry's Digital Dilemma: Challenges and Opportunities in High Piracy Markets*, Review of Economic Research on Copyright Issues, 2005, Vol. 2(2), pp. 83-94

This paper depicts how globally, the recording industry has experienced significant revenue decline and piracy growth within the last five years. In some countries like the United States, piracy is comprised mainly of the illegal sharing of digital recorded music files such as MP3s. It also asserts that other countries like Spain, recorded music piracy is dominated by the physical production and sale of CD-Rs by organized crime networks. It points out that while there have been a number of legislative and law-enforcement changes made in many countries across the globe, these defensive efforts have at best served to slow piracy's growth. The author suggests that the next step for the recording industry is to develop a recorded digital music strategy for each country in an effort to restore revenue growth and reduce piracy by offering consumers a compelling digital music value proposition.

- David Bach, *The Double Punch of Law and Technology: Fighting Music Piracy or Remarketing Copyright in a Digital Age*, Business and Politics; 2004, Volume 6, Issue 2, Article 3.

This article critically examines the double punch of law and technology - the simultaneous and interwoven deployment of legal and electronic measures to protect digital content - and asks whether it is merely a defence strategy against piracy, as the industry asserts, or rather an attempt to fundamentally redefine the producer-consumer relationship. The article analyzes reasons for concern, outlines the current politics of copyright policymaking that have given producers the upper hand, and sketches elements of a strategy to fight music piracy that does not infringe on basic consumer rights.

- David Stopps, *How to Make a Living from Music*, WIPO Publication, Creative Industries, Volume No. 4

The publication presents useful definitions of grassroots concepts and identifies the basic income streams for authors and performers. Special attention is given to copyright and related rights and their particular application in the music context. The booklet underscores the importance of artist development and management and provides guidelines on establishing fair arrangements for benefit sharing resulting from song-writing and performances.

- M Sakthivel, *4G Peer-to-Peer Technology: Is It Covered by Copyright*, Journal of Intellectual Property Rights, July 2011, Volume 16, pp. 309-312.

This article highlights the legal issues that have developed since the advent of the fourth generation peer-to-peer Internet file transmission technology especially in the copyright regime. While examining the technology one can very well understand that the method of file transmission has some characteristics similar to that of traditional broadcasting. Therefore, broadcasting organisations and some of the streaming companies seek protection for transmission just like broadcasters' protection. In this paper it is argued that without studying the technology as well as defining rights of the author over the 4G P2P extension of rights to the broadcasters as well as streamers (webcasters in a limited context) is impossible.

- Dr. Tabrez Ahmad, *Legal Implications of Digital Copyright*, KIIT Journal of Law and Society, 2011, Volume – 1, Number – 1, p. 77

The paper examines how more and more digital products in network environment are emerging efficient management and controlled distribution of such products have become one of the

important considerations in an unprecedented way. It illustrates how the copyright owners are under a constant threat of losing control over their products on the information superhighway and are experimenting various technological adjuncts to retain control. The converging technologies raise several core issues such as, rights management, implied license, liability of Internet Service Providers and jurisdiction etc. This paper in particular questions the regulatory framework for the digital copyright convergence environment taking into account the relevance and need to safeguard the public interest.

- Ayan Roy Chowdhury, *The Future of Copyright in India*, Journal of Intellectual Law and Practice, 2008, Vol. 3, No. 2.

The article addressed the key issue that the war between copyright's big battalions and those who would profit from unauthorized use of protected works is now being fought on the battlefield of the new digital technologies, where legal rights are supplemented by weaponry such as digital rights management (DRM) techniques and the employment of technical solutions for the prevention of access to works. It also highlights that in the heat of this battle, little attention is paid to the cultural dimension to copyright exploitation or to the impact of devices such as DRM and restrictions upon access upon developing societies, particularly with regard to the relationship between indigenous copyright-based industries and those of the developed world. This article reviews proposals for copyright reform in India in terms of their potential impact on the viability of that country's copyright-based industries and the prospects for the preservation of its multilingual and multicultural make-up.

Any form of legal research remains incomplete until and unless the relevant statutes on the concerned research topic are examined. Therefore to perceive the nature of statutory protection of musical copyright and the remedies available against its infringement, the following statutes have been analysed:

- *Copyright Act, 1957*: During the last few decades, modern and advanced means of communication like broadcasting, television, etc have made inroads in the Indian economy with the result that it became essential to fulfil international obligations in the field of

copyright. This necessitated the enactment of a comprehensive legislation to revise the copyright law. In this background, the Copyright Act, 1957 was enacted to amend and consolidate the law relating to copyright in India.

- ***Indian Penal Code, 1860***: It is a detailed code defining the offences of counterfeiting, forgery, cheating, dishonestly receiving stolen property, etc. and also prescribes the punishment for the same. The offence of counterfeiting, illegal duplication, piracy can be punished under this Code.
- ***Information Technology Act, 2000***: Digital Technology and new communication systems have made dramatic changes in our lives. This Act was enacted to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as 'electronic commerce'. Copyright infringement caused through online media is sought to be protected by this piece of legislation. This Act, inter alia, provides punishment for causing damage to computer, computer system and also for other computer related offences, cyber terrorism, etc.

After reviewing the text-books and articles and the relevant statutory laws, the pertinent case-laws formulated by the judiciary have been reviewed for getting acquainted with the attitude of the judiciary in promotion and protection of copyrighted material. The cases are discussed as follows:

In *State of Andhra Pradesh v. Nagoti Venkataramana*¹, the respondent was held to have committed offence of copyright infringement since he exhibited various cassettes of cinematograph film for hire or sale to customers without complying with the provisions of the Copyright Act. In this outset, the judges showed their concern regarding the problem of piracy and the necessity for taking sufficient anti-piracy measures.

The judges emphasised how the emergence of new techniques of recording greatly helped the pirates and estimated that the loss to government in terms of tax evasion as well as losses to owners of copyright amounts to crore of rupees. In this case, proposals were made to amend the Copyright Act, 1957 to combat effectively the piracy that is prevalent in the country. However, the judgment does

¹ (1996) 6 SCC 409

not deliberate with the proper evaluation of implementation machinery which is looked into the research work.

In *Sulamangalam R. Jayalakshmi and another v. Meta Musicals Chennai and others*,² the musical works with fine music and tunes made by plaintiffs, composer and singers, Sulamangalam Sisters have been fully copied by the respondents through some other singers. The graphical notation, rhythm, music, tune and musical notes in the infringed cassettes were held to be similar to the copyrighted cassettes. The court held that the plaintiffs could be said to have made out a prima facie case in respect of the musical work for both Kandha Sasthi Kavacham and copyright over the literary work of Kandha Guru Kavacham and those rights have been held to be infringed by the respondents and consequently the plaintiffs would be entitled to interim injunction sought for in application against the defendants.

This case is particularly concerned with the grievance of an individual copyright owner caused by copyright infringement by another individual. However, the present study is deliberating on a wider facet covering the grievance of Hindi and Bengali Film Music Industry of India caused by the music pirates.

*A & M Records, Inc. v. Napster Inc.*³ is a landmark Intellectual Property case in which the US Courts of Appeals for Ninth Circuit held that the defendant, P2P file sharing service Napster was liable for contributory infringement and vicarious infringement of the plaintiff's copyrights. This was the first major case to address the application of copyright laws to P2P file sharing. The Court observed that the Napster users infringed at least two of the copyright holder's exclusive rights; the rights of reproduction and distribution. Napster users who upload file names to the search index for others to copy violated plaintiff's distribution rights. Napster users who download files containing copyrighted music violate plaintiff's reproductive rights.

In *Gramophone Co. of India Ltd. v. Mars Recording (P) Ltd. and another*⁴, infringement of copyright in music was the issue in this case. It was pleaded that sound recordings in respect of musical cassettes in question have been previously made with the consent of copyright owner and that in case of musical record, it is only such record which embodies sound recordings, amounts to copyright

² AIR 2000 Mad 454

³ 239 F. 3d 1004 (2001)

⁴ (2002) 3 SCC 103

infringement, but, if another signal is created such as, in the case of version recording, it is not an infringement. The order made by the High Court confirming temporary injunctions granted by the trial court, restraining the copyright owner from seizing the audio cassettes of the party making the said subsequent sound recording was set aside. This case is on a much narrow issue of copyright, whereas this research work is on a much broader areas of copyright infringement in musical works.

In *Amarnath Vyas v. State of Andhra Pradesh*⁵, Amarnath Vyas filed an application under Section 438 of the Criminal Procedure Code for anticipatory bail regarding the accusation that he perpetrated the offence of copyright infringement punishable under section 63 of the Copyright Act. The High Court dismissed the anticipatory bail on the ground that the offence alleged was bailable and no application for anticipatory bail could be maintained as it could be provided only for non-bailable offences.

In *Sureshkumar S/o Kumaram v. The Sub Inspector of Police*,⁶ the Kerala High Court was confronted with the question as to whether the offence of infringement of copyright was a cognisable offence. The court categorically held that the offence under sec. 63 of the Copyright Act is punishable with imprisonment for a period of three years. In this circumstance, the offence has been held to be cognisable and non-bailable. This decision contradicts the previous decision of Andhra Pradesh High Court.

In *Abdul Sattar v. Nodal Officer, Anti Piracy Cell, Kerala Crime Branch*⁷, the issue involved in the case was whether the offence under Section 63 of the Copyright Act is cognisable one or not. Section 63 deals with the punishment for the offence of infringement of copyright in a work. The court held that sec. 63 is cognisable. The judgment of this case removed the ambiguity regarding cognisability of the offence of copyright infringement. It can be helpful for the investigating agency while inquiring about the offence. However, the judgment did not focus on the evaluation of the enforcement machinery which is proposed to be studied in the present research.

In *Entertainment Network v. Super Cassettes Industries*⁸ the right of copyright owners in cinematographic films and sound recordings were infringed by free-to-air private FM radio. In this

⁵ 2007 CriLJ 2025 (AP)

⁶ 2007 (3) KLT 363

⁷ 2007 (35) PTC 780 (Ker.)

⁸ 2008 (37) PTC 353

case, the apex court has not curtailed the powers of the civil court in granting relief against copyright infringement of copyrighted works in cases where application before copyright board is pending. The court found that there is no implied ouster or implicit bar on relief against the infringement by mere filing of application for copyright licensing before the copyright board.

In *Super Cassettes Industries Ltd. v. Punit Goenka and Another*⁹, the plaintiff sought permanent injunction restraining infringement of copyright in sound recordings (audio/visual), musical works and cinematograph works owned by the plaintiff company. The main grievance of the plaintiff begins with the defendant's failure to pay monthly instalment of royalty. The defendants continue to use the plaintiff's copyrighted works but did not enter into any further agreement with the plaintiff. The court found that the use of works which are earlier licensed, but unlicensed for 2009-2010 are prima facie infringing acts within the meaning of copyright Act. The court ruled that the plaintiffs have made out a case of infringement in its favour and it is the appropriate case where interim measures are required.

In *Commissioner of Income Tax v. Oracle Software India Limited*¹⁰, the issue was home duplication vis-à-vis commercial duplication of recorded compact disc. It was observed that home duplication may result in pirated copy of a CD. Moreover, it was held that there is no difference between a sale of software programme on a CD/floppy and a sale of music on a CD/cassette. Furthermore, it was held that even though the intellectual process is embodied in a media, the logic or the intelligence of programme remains an intangible property.

The case underlined the infringement of copyright works by way of mainly home-duplication. It highlighted conversion of blank CDs into music loaded disc which was held to constitute manufacture. On the other hand, the research work covers a wider area and the judgment is concerned with comparatively a narrower issue and did not focus on the enforcement mechanism to prevent such home-duplication which is one of the key concerns of the present study.

The above stated case laws reveal the fact that the menace of piracy has got started to receive attention of the Indian judiciary as well as judiciary of foreign countries. The courts have shown their concern in measuring the impact of technological development upon the effective protection of copyrighted

⁹ 2009 (41) PTC 1 (Del)

¹⁰ (2010) 2 SCC 677

material. This fact also indicates the growing importance of developing a mechanism to curb the danger of copyright infringement.

Definition of Key Concepts

Optical Disk

Optical disk is an electronic data storage medium from which data is read and written to by using a low-powered laser beam. It is flat, circular, plastic or glass disk on which data is stored in the form of light and dark pits. The laser beam reads the pits and the data can be accessed.¹¹

Compact Disk (CD)

The Compact Disc (also known as a CD) is an optical disc used to store digital data. It was originally developed to store and playback sound recordings exclusively, but later expanded to encompass data storage (CD-ROM), write-once audio and data storage (CD-R), rewritable media (CD-RW), Video Compact Discs (VCD), Super Video Compact Discs (SVCD), PhotoCD, PictureCD.¹²

Napster

Napster is a software program which allows its users to locate and share MP3 files. It is now being regarded as the company that precipitated the digital technology revolution. It was created in 1999 by Sean Fanning. Napster technology incorporates a centralised or server based Peer-to-Peer Network. Server stores data and applications that personal computers can access. There is a central list of information that is accessed by all the users of the system. The locations of all the music files of the users, which are currently online, are kept on the central network, but the files themselves stay on the users' computers until another computer asks for it. Under the Napster program there is no process for checking to see if the materials distributed are protected by copyright and the system also does not recognise the true identity of the users involved in the transaction.

MP3 (Motion Picture Expert Group-1 Audio layer 3)

MPEG-1 or MPEG-2 Audio Layer III, more commonly referred to as MP3, is a patented digital audio encoding format for consumer audio storage. MP3 is an audio-specific format that was designed by the

¹¹ See <http://www.selfseo.com/story-18894.php>, visited on 29.12.2011 at 5 p.m.

¹² See http://en.wikipedia.org/wiki/Compact_Disc, visited on 29.12.2011 at 6 p.m.

Moving Picture Experts Group (MPEG). MP3s refer to a common format used to encode sound recordings into digital files. MP3s are highly compressed music files that make it easier to download and transfer music from one computer to another. In comparison to other formats, they are more manageable due to their size and have an increased clarity.

Peer-to-peer (P2P) Network

Peer-to-peer (P2P) network is defined as two or more computers connected by software which enables the connected computers to transmit files or data to other connected computers. It describes applications in which users can use the internet to exchange files with each other directly or through a mediating server. It is a type of internet network that allows a group of computer users with the same networking program to connect with each other and directly access files from one another's hard drives. This connection means that it is a direct link and the file is directly transferred from one computer to the other and is not going through any mediating server. Napster and Gnutella are examples of this type of P2P software.

Piracy

Generally, the term 'Piracy' is used to describe the deliberate infringement of a copyright on a commercial scale. It refers to the activity of manufacturing unauthorised copies of protected material and dealing with such copies by way of distribution and sale. Music piracy may be defined as the illegitimate possession of music by way of illegally downloading, copying, or recording songs from the internet, or any other digital medium, so as to possess it without paying the legal owners. It may also include duplication of audio CDs; conversion of music into MP3 files or other formats not offered by the music company and circulated in the markets for personal or commercial use comes within the purview of this form of piracy.

Copyright

Copyright means the exclusive right to do or authorise others to do certain acts in relation to literary, dramatic or musical work, artistic work, cinematographic film, and sound recording. It is a property right that subsists in certain specified types of works. The owner of the copyright subsisting in a work

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

Music

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

Internet Service Provider

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

CHAPTER I

BRIEF OVERVIEW OF COPYRIGHT INFRINGEMENT IN FILM

MUSIC INDUSTRY

THE FRAME

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

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

THE FOCUS

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

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

THE OBJECTIVE

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

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

I.1. Overview of the Indian Music Industry

The Indian music industry is one of the strongest actors in the entertainment sector in India. The market size of the music industry is INR 10.8 billion in 2015 and is expected to grow to INR 20.6 billion by 2020.¹³ These estimations include the physical and digital sales of music. The development of new media and merging of media with newer revenue streams need to be considered while understanding the length and breadth of the music industry. Nearly 40% of the music consumed is Bollywood, 30% is regional, 10% is classical and devotional and 20% is the rest of the market.¹⁴ Bollywood is one of the many regional film industries which represents the Hindi language movies. In 2012, the Indian Media and Entertainment Industry Report, published by FICCI and KPMG demonstrated that Hindi movies contribute 17% of the total number of movies after and the remaining 83% is distributed among other regional film industries, Telegu (18%), Tamil (18%), Kannada (13%), Bengali (12%), Marathi (10%) and Malayalam (9%) constitute the highest in terms of the percentage of the movies certified among the other regional film industries.¹⁵

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

1.1.i. The Value Chain in the Music Industry

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

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

¹⁴ Ibid.

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

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

¹⁷ Ibid.

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

The traditional formats of music are witnessing a decline and subsequently newer forms of music listenership has created opportunities for different forms of players in the forms of content aggregators, telecom operators and organised retailers. The industry is experiencing a transition from traditional formats to the new age digital formats. Digital music now accounts for 55% of the revenue of the overall size of the Indian music industry¹⁸ and a significant decline has been observed in physical sales at the rate of 30-35% year on year.¹⁹ Approximately INR 5 – 100 million is invested in the music industry for making and distribution of music. According to the experts the revenue share of film music is 30:70, where music accounts 30% and 70% for film. The mobile music industry is developing at an exponential rate. There the revenue split is 25:75, respectively for the music industry and telecom operators. Sometimes the ratio is 40:60, however in this case the music industry's share is apportioned as 15:25. 15% among the producers and music companies. However, the return on investment is becoming a real concern for the music industry. Although there is an increasing consumption of music, the monetisation of the same is not taking place appropriately. Different reports from the music industry are indicating that there is a decline of physical sale of CDs and cassettes. It is claimed that the music industry is not able to recover the investments made in making music.

I.1.ii. Hindi film music

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

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

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

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

The term "Bollywood" is understood synonymously for film industry in India. However, 'Bollywood' specifically refers to the Hindi films produced in different studios of Mumbai. Generally, one of the distinctive characteristics of Hindi films is the inclusion of six to eight songs. Incorporations of the songs into filmic narratives is one of the important factors for the increasing dominance of Hindi film songs in the arena of Indian popular music.²⁵ The song's picturization is an important element of Hindi films with the initiation of sound film and performs different functions within an individual film.²⁶ In India the close relationship between popular film and music production has explained the characteristic of popular music as an Industry from 1931.²⁷ Film songs had shown their presence in Hindi Sound films since 1931. The first Indian sound film was Alam Ara (1931) and it contained many popular songs. Then in 1932 songs were used in

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

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

²² Id., at p. 181.

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

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

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

²⁶ Id., at p. 428

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

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

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

I.1.ii.a. Gramophone Records

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

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

²⁹ *Music Industry*, (Aug. 10, 2013, 4 PM) http://en.wikipedia.org/wiki/Music_industry.

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

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

I.1.ii.b. Cassettes

The commercial potential of film music was realised on a whole scale with the arrival of cassettes in India. The advent of cassette technology has restructured the Indian music industry. Cassettes accounted for 95% of the recorded music market by the mid-1980s.³¹ The monopoly in the recording industry formerly enjoyed by HMV, declined to less than 15% of the market. The sales of film music expanded potentially from \$1.2 million in 1980 to over \$12 million in 1986.³² Film music accounted for half of the market. The revolution brought through cassette industry ended the unchallenged hegemony of Gramophone Company. By the late 1980s, 2.5 million cassette players were being purchased by the Indian annually. From the above discussion, two explanations are certain: Firstly, the point at which audio cassettes entered the musical market of India, the market was relatively small considering the last ten years after the arrival of cassettes. Secondly, estimation has revealed that through the 1960s and 1970s the sales of Hindi film songs represented 80% to 90% of those revenues. Mumbai was the centre of Hindi film and film music production and almost maximum of the profit was made by sales of Hindi film songs.³³

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

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

³² Ibid.

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

genres.³⁴ In case a film turns to be a hit one, the songs used to drive on the success of the film and acquire commercial sales within the Hindi films market. The profitability of film songs changed significantly with cassette revolution and professional marketing. The relationship between film song rights and the success of the parent film is very crucial. Generally, the music company starts by placing 7, 00,000 to 1 million cassettes in the market.³⁵ The music sales are limited before the release of the film. However, release of the film determines whether the extent of the music sales.³⁶ Film songs are marketed in two phases – through the release of trailers and through the release of the film. Audio cassettes brought a significant musical, cultural and industrial changes by mid-1980s onwards. The economic value of music increased at significant rates. In 1983, Kajal Basu stated that, in 1982 the Indian music market was worth Rs. 50 crore”.³⁷ In 1989, according to O.P. Malik, “Indians spent 400 crore on recorded music” a 700% increase in music sales from 1982 to 1989.³⁸ Kajal Basu reported an enormous increase in the financial value of the Indian music market.

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

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

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

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

³⁷ The Sunday Observer, November 13 1983.

³⁸ The Times of India, December 5 1990.

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

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

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

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

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

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

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

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

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

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

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

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

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

I.1.ii.d. MP3 and Internet

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

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

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

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

I.1.iii. Music Industry in West Bengal

In tune with the developments across the country, in West Bengal, the media industry has observed rapid evolution across the ecosystem in the industry. There is an increasing change from analogue to digital medium. This trend is noticeable from content production to content consumption throughout the value chain. Explosion of new devices, faster and better delivery channels and digitisation of content has influenced the way in which media is consumed by people. The different stakeholders and players in the industry are evolving and trying to adapt themselves to this disruption throughout the value chain. In West Bengal, the distinctive inclination of the people has rendered a unique characteristics to the media and entertainment industry in this state. Bengal's contribution in all the periods of traditional and modern Indian society is significant. Film directors like late Satyajit Ray⁴⁵ and Mrinal Sen⁴⁶ has increased the visibility of cinema of West Bengal throughout India. Kolkata had a radio station way back in 1920s. Bengali cinemas are increasingly producing commercially successful films adapted from the literary heritage. The Bengali film music industry has been consistent on its growth. Quite a few mass commercial films continued to find success through content adapted from other vernacular languages, predominantly from the South India, to cater to the rural and semi-urban audience. In parallel, the commercial successes like, 'Bhooter Bhabhishyat' have helped to sustain an alternative genre of content more targeted towards urban and multiple audiences.

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

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

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

⁴⁶ Recipient of French distinction of Commander of the Order of Arts and Letter.

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

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

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

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

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

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

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

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

I.2. Copyright in the Music Industry

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

I.2.i. Incentive structure of Copyright law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ *Ibid.*

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

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

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

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

⁵⁴ Copyright Act, 1957 § 13.

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

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

⁵⁷ Copyright Act, 1957 § 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁴ Ibid.

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

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

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

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

⁶⁵ Copyright Act, 1957 § 14

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

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

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

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

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

⁶⁶ Copyright Act, 1957 § 30.

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

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

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

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

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

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

⁶⁸ DAVID BRAINBRIDGE, *INTELLECTUAL PROPERTY*, 89 (5th ed, 2003).

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

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

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

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

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

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

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

⁷¹ Copyright Act, 1957 § 2 (xx).

⁷² Copyright Act, 1957 §14.

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

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

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

⁷³ AIR 2002 Cal 33.

⁷⁴ AIR 1977 SC 1443.

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

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

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

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

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

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

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

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

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

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

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

a. The publishing contract

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

b. The recording contract

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

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

⁷⁸ Id. at p. 259.

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

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

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

I.3. Copyright infringement in the Indian music industry

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

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

⁷⁹ Id. at p. 231.

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

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

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

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

⁸¹ (2000) PTC 681

⁸² 210 US 339, (1907) 52 L Ed 1086

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

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

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

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

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

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

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

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

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

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

⁸⁶ Subhro Niyogi & Rohit Khanna Smart killer of good ol' music business, TNN Jun 16, 2013, 02.25AM IST, http://articles.timesofindia.indiatimes.com/2013-06-16/kolkata/40005997_1_music-rights-music-retail-industry-music-world

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

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

⁸⁹ Longman Dictionary of Contemporary English (3rd ed. 1995).

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

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

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

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

I.3.ii. Types of copyright infringement

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

- Physical music piracy

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

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

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

⁹³ FICCI, *Copyright Enforcement Tool Kit*, p. 16.

2004.⁹⁴ In 2005, it was estimated that the global value of traffic of pirated music products was USD 4.5 billion and 1.2 billion pirated CDs were reported to have been sold worldwide.⁹⁵

- Counterfeits

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

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

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

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

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

⁹⁷ *State v. Hafiz Mohd. Ismail* AIR 1960 SC 669.

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

- Bootlegs

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

- Internet Piracy

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

⁹⁸ Ibid.

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

¹⁰⁰ International Federation of the Phonographic Industry, *What is Piracy?* (Oct. 14, 2013, 10 AM) http://www.ifpi.org/content/section_views/why_is_piracy_illegal.html, visited on 04.3.2010.

There are various formats in which piracy takes place over internet. It includes making databases of music files available on websites or File Transfer Protocol (FTP) sites, uploading and downloading music files through internet newsgroups or sharing files via peer-to-peer network. Music industry has found causal relationship between increasing P2P networks and declining CD sales.¹⁰¹ It is estimated that online file sharing reduced CD sales by almost 30%.¹⁰² According to different reports¹⁰³, global music sales started to decline from 2000, the same year when Napster was started by Shawn Finning. 70 million registered users are reported to have used P2P network. Music industry attributes the partial responsibility of decline in CD sales to P2P file sharing networks.¹⁰⁴

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

Copyright infringement not only has a direct bearing on revenues, but also impacts employment in the sector, decreases sales volume, impacts production, and side-lines true creative talents. A study by US-India Business Council (2008) estimated the total losses to the creative industry due to piracy and lack of effective legal framework to be US \$ 4 billion and over 800,000 jobs.¹⁰⁵ A study by FICCI-KPMG estimated that the media and entertainment industry in India is expected to grow at a CAGR of 15% over the next 5 years to touch INR 1.4 trillion by 2016.¹⁰⁶ Any accurate measurement of the economic activity of this sector in India poses considerable obstacles. Absolute quantum of exports sometimes bears little relation to the volume distributed. For example, Indian films are typically exported to markets with considerable Indian population, but still the country is not considered among the top exporters, based on custom statistics.¹⁰⁷ This is because a single master copy is usually exported to destination markets for producing multiple copies of the movie. The case of the publishing industry is even more complicated as we do not

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

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

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

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

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

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

¹⁰⁷ UNESCO, *Understanding Creative Industries Cultural statistics for public-policy making*, (Sep. 17, 2013, 5 PM) http://portal.unesco.org/culture/en/files/30297/11942616973cultural_stat_EN.pdf/cultural_stat_EN.pdf

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

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

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

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

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

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

David Blackburn investigated the effects of file sharing on the sales of recorded music in the United States. He found that file sharing had strong effects on the sales of music. The study estimated that if files available online were reduced across the board by 30%, industry sales would have been approximately 10% higher in 2003.¹¹¹ *Martin Peitz and Patrick Waelbrock* analyzed the role of music downloading on the current downturn in CD sales. They provided 2000-01 cross-country evidence in support of the claim of losses due to internet piracy made by the industry. For the United States they assessed the potential loss from internet piracy. They concluded the empirical analysis by forecasting CD sales for 2002. The results suggested that internet piracy played a significant role in the decline in the CD sales.¹¹² *Siwat Auampradit* attempted to measure the effect of music piracy on CDs purchases in Thailand. The econometric result showed that expected quantity of the original CDs individual purchased decreases by 0.001 albums when the quantity of pirated albums individual consumers increased by one album. *Duchene and Waelbrock* claimed that internet piracy has reduced sales of original CDs and that illegal MP3 files have become a substitute to legal CDs purchases.¹¹³ *N. J. Michel* specifically observed that the relationship between computer ownership and music purchases weakened due to piracy, reducing CD sales by 13%.¹¹⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2001 for the first time since its introduction in 1983.¹²⁰ This downturn coincides with the proliferation of online music file sharing.

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

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

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

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

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

¹²² International Federation of Phonographic Industry, *Recording Industry Piracy Report*, 2006.

¹²³ International Federation of Phonographic Industry, *Record Industry in Numbers*, 2013.

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

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

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

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

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

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

¹²⁴ India Entertainment and Media Outlook 2012, PWC Report.

¹²⁵ India Entertainment and Media Outlook 2011, PWC Report.

¹²⁶ India Entertainment and Media Outlook 2011, PWC Report.

India is replicating world music industry trends. Music delivery and consumption are fast evolving on digital platforms as revenues from physical sales are fading.¹²⁷ The online delivery of purchased music in digital format – as opposed to sales of physical CDs online – became available in 2001.¹²⁸ Globally, there are over 100 companies selling digital music. Among the biggest companies are iTunes, Spotify, Napster, Rhapsody and Musicmatch. In India, online music stores, such as Flipkart, Music Today, Infibeam and legal music streaming services, such as, Gaana, Dhingana, Saavn and other download stores have begun their operation. Sales of digital singles are outselling physical singles by three to one in the second half of 2003 (IFPI, 2004).

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

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

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

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

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

¹²⁷ FICCI-KPMG, Indian Media and Entertainment Industry Report 2013.

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

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

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

Development of MP3 file format¹³⁰ dramatically changed the storage and bandwidth requirements. MP3 is an audio compression format that generates near compact disk quality sound at approximately 1/10 to 1/20 the size. To give a practical example of the compression savings achieved by MP3, consider that Brian Adam's "Please Forgive Me" on compact disk requires 24 megabytes of hard disk space, but when converted to MP3 the storage requirement falls to 2 megabytes.

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

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

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

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

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

I.4.iv.b. Illegal downloading

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

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

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

I.4.iv.d. Population age

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

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

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

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

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

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

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

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

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

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

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

I.5. Chapter conclusion

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

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

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

CHAPTER II

COPYRIGHT-BASED INDUSTRIES AND NATIONAL ECONOMY: AN ANALYSIS

THE FRAME

Copyright law has provided the necessary incentives to the creative industries to further the cultural progress of the nation. Copyright protection is viewed as the ‘reward’ given to the authors for their contribution in the society in the form of original and creative works. The exclusive property rights, granted by the provisions of the Copyright Act, 1957, to the authors allow them to exploit their creative works. It allows them to retrieve the investment, they have made in the form of time, energy, money, skill, etc. The copyright law enable the authors to transfer their ownership of the works by way of assignment and licensing for effective appropriation of the market value of their works. This assignment and licensing of copyrighted work lies at the core of the music industry and helps in deriving appropriate economic benefits. World Intellectual Property Organisation has broadly classified the copyright industries into three major categories: Core copyright industries, Copyright-dependent industries and other Copyright industries.

Copyright law sets the suitable legal framework for generation of wealth. The value of copyrighted works keeps growing with the increasing copyright protection. Apart from value creation, it also facilitates employment of significant number of persons in the industry. Not only the core copyright industries get benefitted from this, but also the industries, which are partially dependent on the core copyright industries, receive the advantage in the value chain system. Emergence of digital technology has expanded the role of the copyright based industries in respect of revenue generation. Internet has enabled a paradigm shift in the music business model with the ease of wide dissemination of music to the consumer. With the ease of copying of music and its further dissemination, it becomes very much important to effectively enforce the nation’s legal regime related to copyright protection to continue the generation of national income from the creative industries.

THE FOCUS

The present study intends to analyse the wide-scale copyright infringement of sound recording and the consequent economic loss caused to the film music industry due to the same. Keeping this intention in consideration, this chapter will primarily focus on understanding the role the copyright based industries play in strengthening the national economy. The exclusive rights conferred by the provisions of copyright law allow the right holders to commercially exploit the copyright protected

work. The transfer of these rights to the producers and other stakeholders further the commercial appropriation of the work. This industry is a source of livelihood for songwriters, composers, lyricists, producers of sound recordings and all those who are related to the entertainment industry. Therefore this chapter will give emphasis in studying the economic perspective and economic functions of music copyright as well as the importance of copyright based industries in the national economy.

THE OBJECTIVE

The present chapter aims to elucidate the major economic characteristics of music copyright. It also intends to study the economic functions and consequences of music copyright. It attempts to classify different categories of copyright based industries and their specific contributions. Moreover, the chapter seeks to elaborate the contribution of Indian media and entertainment industry and also highlight the revenue generated by this industry in the national economy. All these objectives are in consonance with the central theme of the study. This chapter intends to establish the economic significance of the copyright based industries in the development of the national economy and consequently wants to argue for the effective enforcement of copyright law. The piracy of copyright protected material results into loss of the revenue that these industries are expected to create. Enhanced copyright protection will secure increased revenue leading to overall economic growth of the nation.

II.1. The economic perspective of copyright

Copyright is the livelihood for millions of creators – individuals or companies – who are enriching the world with their talent, imagination and emotions. Nothing is more fundamental to copyright law than the concept of incentives.¹³² The primary way in which the law promotes creativity is by providing creators with the incentives to create and to distribute copies of their work to the public. In this context, it is very much pertinent to focus on economic incentive perspective. The United States Constitution employs incentive theory in vindicating protection of intellectual property rights. The Constitution expressly conditions the grant of power in the copyright clause to promote the progress of arts. The Supreme Court of United States in *Mazr v. Stein*¹³³ observed that “the

¹³² Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 *Hastings L.J.* 58 (2006).

¹³³ 347 U.S. 201 (1954)

economic philosophy behind the clause empowering Congress to grant copyrights is the conviction that it is best way to advance public welfare through the talents of the authors in useful arts. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” Moreover, according to the European Directive on Copyright in the Information Society¹³⁴, the principal aim of copyright is to promote “innovation and creativity” in the regulated sector.

It is pertinent to understand the consequence of absence of intellectual property protection to justify granting exclusive rights to the creators of original works. Creation involves the investment of different types of resources in the form of the time of an author, expenditure on facilities and supplies, etc. In a private market economy, investment will not made for production of creative works except the expected return from doing so surpasses the cost of doing so. Therefore, copyright protection is *sina qua non* to encourage investment in the process of creation. In the absence of copyright protection, others will copy or otherwise duplicate the creative work without making the necessary costs and effort of creation. This hinders the original creators form making a profit in the form of return of the investment made.

The existence of intellectual property rights encourages creators to pursue their creative efforts. If they can obtain the right to prevent others from copying their creations, then they stand a much better chance to reap a profit. Hence they will be much more inclined to make the initial investment in creation. In the end, not only will the creators be wealthier, but the public will be enriched by the new and better creations brought forward by intellectual property protection.

In order to make a positive contribution to the socio-economic development of the country, it becomes very much important to recognize and reward the creator as well as protecting the rights of those, making investment in the process of making creative works. Therefore well enforced copyright system is one of the strong requirements in for economic reform and also in liberalizing and restructuring of the economic and trade policies. Consequently this results into national growth and development in terms of economy.¹³⁵ In the economies of industrialized countries, copyright protected works and the industries are important contributors. The economic significance of

¹³⁴ DIR 2001/29/EC, Sec. 4

¹³⁵ Shahid Alikhan, *The Role of Copyright in the Cultural and Economic Development of Developing Countries*, 7 *Journal of Intellectual Property Rights*, 489, 490-91 (2002).

copyrighted works is increasing immensely because information and communications technologies provide the basis for value creation in different industries in developed societies.

Creation of knowledge as well as development, processing and use of information have put copyright in the prime focus, because the industries that produce copyrightable work provide the central communication links and content that are used in other economic sectors of the information society.¹³⁶

The utilitarian justification of copyright protection brings the supply of protected works closer to a socially desirable level. Copyright is considered to be a 'natural right' of creators in the output of their work. The economic approach to copyright is grounded on two notions: first, copyright is subject to trade-offs with other objectives and values; second, copyright is worth discussing whether this function is attained efficiently.

Traditionally copyright has been studied from its legal perspective. However, recently the focus of study has moved towards the economic characteristics of copyright. It is very apparent how copyright plays a pervasive role in the arena of production, distribution and consumption of creative works. From the commercial point of view licensing, investment, trade and transfers have generated a fair amount of attention. Copyright is a part and parcel of the legal system ensuring an effective environment for creative works in different markets.¹³⁷

This increasing interest is due to several reasons. First, in the post-industrial society copyright has achieved significant recognition, where focus is more given to non-material factors. Particularly, in respect of growth and productivity of employment, investment made in production of creative works, copyright plays a pre-dominant role. Secondly, digital technology has expanded the scope of subject matter for copyright protection. As a result, economic gains from multimedia and technology based commodities gained new heights. Thirdly, digital revolution has placed copyright protected material as an important element in commercial and digital transaction.

¹³⁶ Robert G. Picard and Timo E. Toivonen, *Issues in Assessment of the Economic Impact of Copyright*, 1 Review of Economic Research on Copyright Issues, 27, 30-31 (2004).

¹³⁷ World Intellectual Property Organisation, WIPO Guide on Surveying the Economic Contribution of Copyright Based Industries.

In studying the intersection between law and economics, the economic analysis of the doctrines in copyright law is an emerging field. The economic theory of copyright law provided a strong basis for copyright based industries. With the growth of such industries more researchers and practitioners became increasingly involved in connecting theory with practice to show how the copyright protection is a significant factor of the economy, expanding more quickly than the rest of the economic sector. Several countries and scholars have done studies, reflecting and providing indication for the remarkable role of copyright and related rights, by way of strengthening the cultural and information industries to the national economy. By different surveys and measurement of the benefits, value and growth of the copyright and related rights based industries have been established.

II.2. Major economic characteristics of copyright

In many respect the characteristic of copyrighted works are different from that of tangible property and economists have always considered these differences in their analysis.¹³⁸ The following economic features of copyright are required to be elaborated in the present context.

II.2.i. Copyright is a property right

Copyright is recognized as a private property right. In a literary or artistic creation or work. Property rights refer to the ability of individuals to own, buy, sell and use their property in a market economy. In case of copyright this right acquires more significance since it confers the sense of probability of excluding others from the use of property. Therefore, the copyrighted work obtains a measurable value and also assists it to put the work into commercial use effectively.

II.2.ii. Copyright is different from means of delivery

The copyright protected work and the “means of delivery” by which the work appears in the market and is made available for consumption has to be distinguished carefully. For instance, a song is protected by copyright, but a music CD is a means of delivery. In this present context, the principal difference is that the copyrighted work has the feature of a public good, whereas the means of delivery is a private good. The expression ‘copyright’ basically refers to the intellectual property

¹³⁸ Richard Watt, *The Past and the Future of the Economics of Copyright*, 1 Review of Economic Research on Copyright Issues, 151, 155-56 (2004).

aspect of the work and not the means of delivery. Generally, the copyright-based industries and the cultural activities in general are connected with the means of delivery. So, the means of delivery performs the purpose of an intermediary between the original copyright and the market.

Two more additional differences can be discussed here. Firstly, although copyright has a statutory duration, the means of delivery in which the protected work exist, extend beyond their product life a long time before the expiry of duration of copyright. Secondly, the means of delivery contain different other types of works. This situation can be explained through the instance of a Compact Disk. The lyricist(s), composer(s), the record company and the performers, all the stakeholders here pursue different rights and possess varied significance in the pertinent markets. The existence of multiple rights poses a hindrance in measuring the precise value contributed in respect of each of the rights involved herein. This connection between the copyrighted content and the means of delivery is mutually complementary and increase each other's value mutually.

II.2.iii. Copyright has some “public good” aspects

Cultural creations retain some public goods feature. Works protected by copyright can be put into use simultaneously at the same by several users. Moreover, this does not reduce the consumption of the work by individual user separately since the present user does not possess less when new users start consuming the work. In addition to this it is impossible to eliminate free riders, except at a particular cost. This public goods aspect convey cultural, social and economic benefits to the community. The benefits create a sense of identity and determine social values.

II.3. Economics of copyright & economics of copying

The distinction between economics of copyright and the economics of copying has been elaborated by William Landes and Richard Posner¹³⁹. The economics of copying is concerned with its consequence on the economy, imposed by the technical means of reproduction. The economics of copyright concentrates on the result of the legal framework. If there is a loss of welfare, it will result in some intervention in the market, such as copyright law. Today copying has become easier and cheaper over a period of time because of the advancement of copying technologies. Consequently, the relative costs of creating, reproducing and consuming copyright works are also

¹³⁹ W.M. LANDES AND R.A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (1st ed. 2003).

taking new dimensions. Increase of the cost of unauthorised copying, leads to welfare loss. This effect appears to be less critical where the cost of copying is very low.¹⁴⁰

The effect of the emergence of the newer technologies, which has enabled copying easier and cheaper is dealt with by the economics of copying.¹⁴¹ It also gives emphasis on the connection between “the fixed costs of creating the work in the first place and the marginal cost of making copies”. This situation is broadly connected with the state of existing technology. Initially the concern was limited to copying of books and printed material. However, with the advent of photocopying, it was replaced by type-setting. During late 1970s and early 1980s the focus changed to video and VCR home copying technology. Digitisation paved way for the next big step.

In the due course of time, the loss of quality caused by copying was significantly brought down. As a result the illegitimate copy became a close substitute for the original one. After the appearance of CD-burners on personal computers and home computers, the copying of digitalised content for private use became very convenient. The recent use of peer-to-peer (P2P) and MP3 technologies has enabled fast downloading of copyright works from the internet. Therefore the end of the twentieth century, brought a paradigm shift in the domain of private copying. It brought the marginal costs of making private digital copies to be virtually zero.

II.4. Economic functions and consequences of copyright

When the copyrighted work is put into its commercial use, it performs its economic functions, which have different ramifications on the economy. The law of copyright intends to set the right balance between different economic effects. On the one hand, there is involved investment in the creation of original works and the effective distribution of the works. On the other hand, there is protection and enforcement of the copyright. This balance sought to be maintained by way of the principal functions and consequences of copyright law.

¹⁴⁰ C. Handke, *The Economics of Copyright and Digitisation: A Report on the Literature and the Need for Further Research*, (Nov. 14, 2013, 5 PM) <http://www.ipo.gov.uk/ipresearch-economics-201005.pdf>

¹⁴¹ Ruth Towse, Christian Handke and Paul Stepan, *The economics of Copyright Law: A Stocktake of the Literature*, 5 Review of Economic Research on Copyright Issues, 1, 5-6 (2008).

Firstly copyright law protects the copyright of original works. It identifies the types of works to be put in commercial work and prescribed the legal framework for this commercial use. Therefore, copyright law enables the trade with the protected works and is a pre-requisite for the transactions in the market. Lack of copyright protection makes the trade in creative works less profitable for the right holders. Secondly, copyright balances productive efficiency with distributive efficiency. For obtaining the economic value, the cultural products are required to be disseminated in a continuous manner. This in turn leads to economic sustainability providing adequate reward to the creator.

Therefore, copyright protection ensures returning the appropriate market value of their works to the creators. The market guarantees the economic value of the work by providing the statutory protection. The efficiency of copyright law depends on the extent to which the economic functions of copyright are successfully performed. The economic nature of copyright law has the following consequences: Firstly, copyright owner can set the market price at a “monopoly” and not at a competitive level¹⁴² and secondly the copyright holder can make price discrimination according to the level of accesses, depending on the other market participants.

Law of copyright ensures creation of optimal amount of creative works and permit the efficient distribution of the intellectual property by way of market transactions. The creators of original creative works are required to be rewarded adequately for further creation of content. Creation of original works involves an initial fixed cost. When the intellectual property is attached to a delivery good and the same is produced and marketed, it involves a variable cost. Lack of protection of intellectual property leads to easy reproduction of the delivery goods and as a result the illegal goods of delivery will compete with the original one. This will result in loss of profits and will not bring adequate remuneration to the creators. Moreover, there will be an increase in the marginal cost of reproduction. If there is an effective legal system for the protection of the rights of the creators, the market price will not fall. Consequently, original copies will compete effectively with the pirated copies and creators can will be benefitted with just reward.

¹⁴² The monopoly in this case is not of a traditional type. In some literature the monopoly that copyright creates is assessed as no different from the monopoly that a worker has over his efforts. This is also a main reason for limiting copyright in time – in order not to enable the copyright holder to be a monopolist and price discriminator for an indefinite period of time.

II.5. Copyright in the milieu of the national economy

II.5.i. Multiple effects on the economy

As a result of addition of value¹⁴³ production of creative work characterises an economic activity. This economic effect is connected to the entire value chain in the market process. These results are produced on the creation, production, distribution and consumption of the creative works. Estimating the economic contribution of a copyright product includes studying the activities related to the multiple effects of copyright on the economy those of the stakeholders in the value chain in the entertainment industry. In the present context, the various stakeholders are creators, the right-holders, the distributors, users, equipment manufacturers, advertisers, etc.

II.5.ii. Economic organisation and the role of the government

Copyright law helps the right owners to control the commercial uses of their works. In this way the right holders get economic benefits from the commercial distribution of their copyrighted works. The supply and demand of the protected work in the market helps the right holders to fetch the proper commercial value of the work, not merely conferring of the rights by the statute. If the dissemination costs are too high and the demand is too low, copyright will produce no economic value. Therefore it is seen that, the economic consequences of the industries producing creative works bear an important effect on the involvement of those works in the economic transaction and ensures fair returns to the creators in the forms of royalties, wages, fees, etc.

II.6. The copyright based industries

Copyright based industries are based on certain aspects: Firstly, it is to be determined which are the industries to be studied and secondly, arrangement of them into definite categories as per the degree in which the activities of the industries are related to copyright. The existing studies follow different categories: core, partial, copyright dependent, etc. The expressions keep on changing depending on the country in which it is used. No uniformity is observed as such. The different

¹⁴³ By “value added”, is understood the difference between the values of goods produced and the cost of materials and supplies used in producing them.

categories are used to keep separate the industries, which are largely used on copyright from other industries which depend on copyright protected materials to a lesser extent

In this juncture, “industries” refers to clusters of activities which can be traced and are capable of being estimated by statistics. It also includes those activities which have a certain scale and structure. The surveying of the copyright based industries can be done by two ways – firstly by “examining the creation, manufacturing and distribution of works or copyrighted products” or secondly, “by describing those in terms of core, interdependent, partial and non-dedicated support industries.”

The WIPO Guide on Surveying the Economic Contribution of the Copyright Industries provides for four categories of copyright based industries – core, interdependent, partial and non-dedicated support industries.

II.6.i. Core copyright industries

The core copyright industries are referred to as those industries “that are wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition or distribution and sales of works and other protected subject matter.” The core copyright industries include activities, such as press and literature, music, theatre and opera, motion picture and video, radio and television, photography, software and databases, visual and graphic arts, advertising services and copyright collective management societies.

Core copyright industries function exclusively with copyrighted works and other subject matter. The principal task of these industries is creation, production and distribution of copyrighted material and related subject matter.¹⁴⁴

Table: Copyright Industries		
Category	Definition	Industries
Core Copyright Industries	Industries that produce copyrighted works and other	Literature and press, music, theatre, film and video,

¹⁴⁴ Robert G. Picard and Timo E. Toivonen, *Issues in Assessment of the Economic Impact of Copyright*, 1 Review of Economic Research on Copyright Issues, 27, 30-31 (2004).

	subject matter. Industry that would not exist without copyrighted works and other subject matter	photography, visual arts, radio and T.V., software and databases, architecture, advertising, industrial design.
Copyright Dependent Industries (required hardware)	Industries whose operations essentially depend on copyrighted works. Industries that would be considerably smaller without copyrighted works and other subject matter	Manufacture and distribution of electronics (TV sets, radios, VCR and CD players, etc.), manufacture and distribution of computers, manufacture and distribution of musical instruments, photographic and cinematographic equipment.
Other Copyright Industries	Industries whose operations are related to production, distribution or use of copyrighted works. Part of industry's output is copyright related. Industries that would be moderately smaller without copyrighted works and other subject matter	Jewellery, furniture, household china and glass, clothing and footwear, toys and games, wall coverings and carpets, engineering.

II.6.ii. Interdependent copyright industries

The products that are consumed jointly with the products of the core copyright industries are produced by. These interdependent copyright industries are traced through identifying the

backward linkages,¹⁴⁵ as well as the forward linkages.¹⁴⁶ In certain cases, the term ‘independent copyright industries’ is referred in place of ‘non-core’ to establish the relationship between ‘core’ and related industries. This category includes manufacture, wholesale and retail of TV sets, radio CD recorders, computers and equipment, musical instruments, but also photographic and cinematographic instruments, photocopiers, blank recording material, etc.

II.6.iii. Partial copyright industries

The industries that deal only with part of production output, connected with copyright protected material, belong to the category of partial copyright industries. The subject matter of such industries includes design, architecture, jewellery, furniture or other crafts, etc. The last category, i.e., non-dedicated support group includes those industries that distantly depend on copyright material. However, these industries are still pertinent, since copyright makes some part of the trade.¹⁴⁷

II.7. Necessity of measuring value of copyright

Copyright law intends to prevent the loss of economic value accruing from the piracy of copyrighted materials. This loss from unauthorised dissemination of protected material differs from one copyright industries to the other. With the increase of copyright protection from zero, the total value from copyrighted material starts rising. However, with this increasing protection, after a certain point the total wealth produced by copyright starts to come down. The costs of enforcement and consumption increase with the rise in degree of copyright protection. The failure in market occurs in the form of rising copyright infringement and consequent declining demand for copyrighted work.

The national policy makers always intend to attain the optimum point of wealth creation from the commercial use of the copyrighted work. However, it is very difficult to identify and maintain a

¹⁴⁵ The relation between a copyright product and the business services, transportation, purchase of production factors, investment goods, machinery

¹⁴⁶ wholesalers and other consumer entities

¹⁴⁷ Dimiter Gantchev, *The WIPO Guide on Surveying the Economic Contribution of the Copyright Industries*, 1 Review of Economic Research on Copyright Issues, 5, 9-10 (2004).

very stable optimal copyright policy, since such conditions are dependent on number of varied unstable social conditions.

In order to comprehend how the use of creative works brings economic advantage to the society, it becomes very pertinent to estimate the economic contribution of the copyright based industries. In market economics, the focus of the national economic policies remains on bringing economic growth. The increase brought in wealth resulting from the activities of copyright based industries is kept in focus subsequently.

The contribution made by copyright based industries in the economy of a nation have been documented by a number of studies. These studies have reflected that in some nations, the production value generated by copyright based industries is more than many of the traditional industries, while in several other countries, copyrighted works have produced substantial export income. After establishing the economic value of copyrighted work, the policy makers can develop the suitable legal framework, which protect the value of copyright protected work as well as encourage the copyright based industries.

II.7.i. Measurement of the contribution of copyright in national economies

Gross Value Added (GVA) is taken into consideration while estimating an industry's economic importance. In terms of a good or service, GVA estimates the contribution of an industry. This is known as turnover (or production value) minus the cost incurred by the inputs, coming from other industries. The total of the GVA from all industries is equivalent with the GDP. In studying economic contribution, GVA is considered to be an important indicator of the wealth, generated by an industry. Most of this studies in this respect have used such approaches by way of categorising different copyright based industries and estimating value added by respective category. However, in other studies numbers of employees, turnover, and exports have also been taken into consideration.

II.7.ii. Issues in methods of measurement

II.7.ii.a. Value creation

A majority of the existing studies on the importance of copyright industries broadly adopt the same basic method for measuring value creation. Their point of departure is gross domestic product

(GDP), which measures the total output of goods and services produced by the residents of a particular country in a given year. GDP includes profits but excludes property income from abroad.

When property income from abroad is added to GDP, the result is gross national product (GNP). GDP and GNP include the output of capital goods, but these measures overstate the value of resources unless a deduction is made for depreciation of existing assets. Depreciation is, however, to some extent arbitrary and therefore hard to measure. GNP and GDP are therefore normally used as measure of the economy's output. They are measured at factor cost, excluding taxes. GDP has been chosen in previous studies on the national impact of copyright as the figure against which the copyright industries' value creation are measured.

In assessing an industry's value creation, gross output can be used to measure the industry's value of sales in a year, adjusted for changes in stock. It is normally measured at wholesale prices. Gross output of an industry, however, overestimates an industry's contribution to national income because it includes the value of inputs produced by other industries. As a result, gross value added (GVA) is used to represent the true contribution to the national economy. It is the value of gross outputs less the value of input from other countries.

II.7.ii.b. Employment

Another widely used method to assess the economic importance of industries based on copyright is measuring the number of persons employed. These figures should include persons employed by firms in the copyright industries as well as self-employed persons who play significant roles. Economic importance is expressed as the proportion of total employment in the economy provided by the industries. Assessment of industry employment is problematic, however, because statistical data in most nations do not make distinctions between full-time and part-time labour or reported full-time person years that adjust for part-time employment.

II.7.ii.c. Trade balance

Some studies on copyright impact have included the foreign trade of copyrighted material. Some studies have included only the export of copyrighted material, others count the trade balance for copyright and copyright-dependent industries respectively.

II.8. WIPO studies on economic contribution of copyright industries

World Intellectual Property Organisation has published a report, based on the data from 30 different studies on contribution of copyright based industries in 2012. The analysis and conclusions demonstrated the overall performance of the copyright based industries and elaborated the pattern of their economic contribution. The report showed there is an existence of a significant sectors of different copyright based industries. It is perceived that copyright belongs to the legal category. Overall, the copyright industries have contributed significantly in respect of the national economies.

The contribution of the copyright based industries to the national GDP varied from nation to nation. Among the other countries, the share of United States, Australia and Korea in their respective GDP was higher than average. The countries in which the economic growth is rapid, an average share of GDP has been attributed to copyright industries. As far as the contribution of copyright based industries in respect of the national employment is concerned, it was observed that the share of national employment varies from the share of GDP. In respect of labour forces in the copyright forces, it was found that, Mexico and the Philippines had the highest share. Most of the countries are exhibited to show above average share of employment.

Among the different groups of copyright industries, the report showed that the core copyright industries account for more than half of the total contribution of the copyright industries to GDP and employment. It was reported that Press and Literature is by the biggest contributor to generating added value. 55% of the share is held by other industries – Software and Databases, Radio & TV, Music & Theatre, Advertising, Motion picture and Video. However, this observation is not applicable for all the countries. Therefore it was seen that the economic contribution of Copyright industries is not evenly distributed between different industries, according to the report approximately half of the labour force in the core copyright industries is employed in Press and Literature. The most labour intensive sectors are Software and Databases and Radio & TV and they provided higher contribution to GDP.

In many countries the copyright based industries is more substantive in size in comparison to the traditional economic sectors, like agriculture with tourism, hotels and restaurants. The analysis made by the report suggested variability to larger extent among countries in respect of the overall contribution of the non-core copyright industries to GDP and employment. Non-dedicated

industries had exhibited secondary impacts and spill over effect of the copyright industries on the economy. The contribution of these industries is weighted with a copyright factor. Moreover, general wholesale and retail assures almost half of the contribution to GDP of this group of copyright industries.

II.9. Economics of music copyright

The demand for music has changed among the users by heaps and bounds. It is evident by the demand for the use of music by music users in the terrestrial and satellite radio, local, cable and satellite broadcast television, Internet and mobile phone industries. The increasing demand is also observed in many other places, ranging from hotels, restaurants, shopping malls, music channels on different vehicles to music on hold over telephone.¹⁴⁸ Innumerable number of songs titles produced by song-writers and composers have been added to the repository of titles in the entertainment industry of a nation.

It is observed that, “the compact disk (CD) has appeared as both a blessing and a curse in the music industry by the late 1980s”. The change in the consumer’s music preference from physical to digital format has caused a significant economic as well as technological changes. Sale of music CDs have changed the business pattern in the music industry. The consumers also started to replace their older music collections with better portable and enhanced sound quality of digital music.

However, the flipside of this technological progress exhibited a different picture. With the emergence of digital format of music, especially MP3, the traditionally long established structure of the music industry is facing an existential threat. Previously, music was purchased at the speciality stores like Music World. However, after the emergence of the internet, with the ease of procuring music online, many music retailers have been driven out of business.

Undoubtedly, digital technology has eased the dissemination of music has opened a wider market for the copyright based industries. The advantages digital music has brought to the stakeholders has led to the shift of newer music business models. Different studies have identified use of compact disk as one of the main factors in the music industry which increased the music sales to a larger extent. Although in the beginning sales of CD used it bring good amount of revenue as

¹⁴⁸ IVAN L. PITT, ECONOMIC ANALYSIS OF MUSIC COPYRIGHT – INCOME, MEDIA AND PERFORMANCES, (1st ed. 2010).

music consumers started buying music CDs, with the widespread use of internet, sales of CD started to drop since internet offered easy transfer and share of music files.

II.9.i. The economics of the music recording industry

Generally, the music industry is comprised of different sectors, which are interconnected. Primarily it includes music recording in the sound recording studios, then the publishing of the same; after that comes artist management, merchandising and retailing of the music recording. The role of performers, song writers, composers as well as promoters are also important in this regard. The expression ‘music industry’ refers to all the sectors, mentioned above, combined to just one sector, that is recording industry.¹⁴⁹ In this context, ‘market’ is referred to as” a group of firms selling goods or services that are close substitutes to a group of consumers.”

II.9.i.a. The creation and production process

In the music industry, a song, i.e., the musical work is considered to be the basic material. In order to produce a sound recording, musical work is the basic ingredient. The final product of the music industry is the sound recording. Apart from the sound recording, the remaining outputs of the music industry are live performances, radio broadcasts, music videos and sheet music. A musical work includes two main elements – the lyrics and the musical composition. A successful sound recording is a valuable asset capable of generating tens (or even hundreds) of millions of rupees in revenue. The song writer typically enters a contract with a music publisher that is responsible for the commercial application of the songwriter’s musical work. In order to record the musical work, the publisher enters a contract with a recording company. The record companies pay recording advance to the artist performing the musical work. Collaborating with the record company, the artist involves a record producer to record the musical work and produce a master recording. Either in CD pressing plants or in audiocassette duplication plants, multiple copies of the sound recording are produced, from the master recording.

II.9.i.b. Economic characteristic of music production

¹⁴⁹ Theo Papadopoulos, *The Economics of Copyright, Parallel Imports and Piracy in the Music Recording Industry*, Victoria University (2002).

In entertainment industries, demand for licensed songs is estimated by the consumption habits of the music users. Generally, the music publishing business follows the business cycle fluctuations in consumer spending, which is again driven by personal income.

The music sales keep on rising with the increase of disposable income and consequently this brings profits to the record companies. In case, there are downturns and recessions, it is observed that there is a decline in music sales since consumers spend less. Moreover, there is a shift to other forms of entertainment and consequently company profits decrease. The record labels and music publishers are required regularly develop, sign and promote new performing and non-performing songwriters with potential of selling millions of records to keep on the demand and supply of labour in music.

In the following three aspects artistic labour is different from other types of labour:

- a. The financial rewards given to a professional artistic practice are usually lesser, compared to other occupations having similar features;
- b. The degree in which artistic earnings vary is generally more, compared to other similar occupations;
- c. In case of allocating an artist's time between alternate labour markets, non-pecuniary motives are significant. In certain cases, the financial incentives may get dominated by the 'inner drive' to create art may dominate.

Today with technological change, the costs of production and dissemination of digital music are far lower today comparing the costs of physical products such as the CD. After the creation of master copy, the marginal cost of producing an additional unit of a song or album is comparably not so significant. The marginal cost of producing an additional unit, in the case of digital recordings, may be only the cost of physical compact disk itself when it is distributed in the physical format.

The lyrics and melody can be stored, copied and disseminated by different transmission modes, including mobile phone, iPod, etc. After the initial investment is made for creation of new song title, music publishers seek to recover investment. Music has a limited substitutability effect and

generally it is not the case with other products in which capital can be substituted for other key inputs. The reason behind this is that the copyright laws seeks to protect each song title by prohibiting the unauthorised dissemination or sale of copies. This monopoly of each composer or songwriter and their unique work is also referred to as so-called 'no-substitutes' rule.

Sometimes, it is difficult for independent labels to make an entry into the market for music distribution. The overhead costs, like retaining, cross promotions, advertising, etc. are mainly responsible for this. However, internet, computers, CD burners, camcorders, iPods have significantly changed the underlying economics of music distribution. This change in the economic structure has made it much for convenient and easier for independent artists and labels to disseminate music to thousands of listeners.

II.9.ii. Economic analysis of music copyright: from music publishers' perspectives

In the music industry, generally music content companies are the music publishers. The recorded music libraries are the sources of their content. This libraries include their catalogues of best-selling records and albums and also a roster of established and emerging song-writer and composers spanning all musical genres and time periods. The songwriters and composers focus on the content creation; the musical compositions and the publisher as well as the record label concentrate on distribution and marketing.

The content of the music catalogues have a unique set of characteristics. The publishers or the record labels bear the majority of the cost of creating the content. After that the costs of producing the work and disseminating it are comparably minor Majorly, small number of titles fetch most of the revenue from record sales and the royalty payments from public performances. This small number of revenue generating titles will then offset the losses of the vast majority of titles released by the publisher.

The business model of a particular music publishing company can be categorised into two sectors: Recorded Music and Music Publishing. By way of selling music in different channels and also by licensing of recorded music in various formats the recorded music segment generates revenue. The second category obtains the rights to musical compositions from songwriters and composers. In this way the music publishers produces income in the form of royalty payments or fees for their

use by music users. The music publisher also make commercial use of the work by way of licensing the artist's name, image and likeness for things like perfumes, clothing and beverage advertising.

The record labels, as a subsidiary of a major publisher and house, arrange financing and manufacturing of the CDs, DVDs, cassette tapes and also the distribution of a songwriter's song in as many domestic distribution channels as possible such as music stores, radio broadcast television, cable television, motion pictures, the Internet, ringtones, etc. In some cases, other services such as record production, marketing promotions and artist management and development are combined in a single roof.

Generally the music publisher deals with certain facets of the performance rights and print rights of their copyrighted songs and the record labels manages the sound and audio recording rights. Primarily the record producer selects the material suitable for the performing artist, direct the studio musicians on what to play to support the artist and interface with the record label. In certain cases, the producer helps in developing an artist with commercial opportunity for record.

II.9.iii. Economic analysis of music copyright - from songwriters' and composers' perspectives

The creative process for a songwriter initiates with spending of several months of rigorous planning and writing lyrics for the song. Subsequently, the songwriter, composer or lyricist collaborate with other participants in the music industry, such as, the record labels, music managers, agents, producers, attorneys, sound studio owners and publishers for production and marketing of the song. Once a song has been recorded and released, the song-writer/composers then expects a flow of income from the commercial use of the composition.

Two categories of songwriters are generally found in the music industry. They are the non-performing song-writer and the performing song-writer.

II.9.iv. Division of labour among composers, song-writers and lyricists

Based on the talents of the individuals involved, the division of labour on writing a song varies. The division of labour among song-writers, composers and authors is depicted in the table below. As discussed previously, it is the lyrics and melody that are given copyright protection.

Participant	Activities
Author / Lyricist	Song title and lyrics
Composer A	Solos, riffs and hooks
Composer B	Melody, harmonisation, voicing, rhythmic movements, tempo and dynamics
Producer	Directs studio musicians on what to play or co-writes a song.

In respect of a particular song, a recognised writer is the main wordsmith, who provides life to the song title and lyrics used in the song's verses and choruses. The solos, riffs, hooks or the signature instrumental part heard at the beginning of a song, supporting the melody, makes the listener interested in hearing the rest of the song. Generally, another writer is responsible for scoring or composing the melody, harmonisation, rhythmic movements, voicing and dynamics.

The issues of the intent to create a joint work, the joint ownership of a work, the independent contributors of a work and who has the right to license a song often become copyright infringement disputes in the music industry. Under copyright law, irrespective of the amount of contribution to the song, a joint author can license the rights to another party without the consent of the other joint author.

II.10. Contribution of music copyright industries in Indian economy

Both in respect of foreign and domestic field, India is one of the world's leading legitimate markets for the creative industries. As discussed in the first chapter, India produces a significant number of films in the world¹⁵⁰. It comprises of a creative and diverse music market. Other key economic studies¹⁵¹ also showed the continuation of growth in the music market.¹⁵²

¹⁵⁰ Estimated at nearly 1000 full-length feature films per year

¹⁵¹ Studies made by international organisations like UNCTAD and the Motion Picture Distributors Association

¹⁵² International Intellectual Property Alliance, Special Report on Copyright Protection and Enforcement, 2013.

The overall size of Indian Media and Entertainment Industry grew from INR 728 billion in 2011 to INR 821 billion in 2012. The overall growth was 12.6%.¹⁵³ The real GDP growth is expected to be in the range of 6.1 to 6.7% in 2013-14.¹⁵⁴ Several factors, such as the drive brought by digitisation, consistent growth of regional media, strength in the film sector and fast increasing new media businesses, it was assessed that the growth rate of 11.8% in 2013 to reach INR 917 billion. It was also projected that this sector will have a growth of a steady CAGR of 15.2% to reach INR 1661 billion by 2017.

In 2013, the Indian Media and Entertainment (M&E) industry recorded a growth of 11.8% over 2012 and touched INR 918 billion. Gaming and digital advertising recorded a strong growth in 2013 in comparison to the last year. According to the report, the industry was expected to register a CAGR of 14.2% to touch INR 1785.8 billion by 2018. In the music industry streaming and downloading services experienced growth, with the growth in mobiles, especially smartphones. This growth contributed significantly towards increased consumption of music 'on-the-go'. In 2013As a result of continued decline in physical music sales, aggravated by the significant decline in revenues from ringbacktone, this segment of the music industry suffered an overall decrease in size by 10%. It was projected that digital revenues are will drive the growth in the sector.

Steady growth has been registered in the sector of animation/VFX. Significant growth was observed in the Films. 21% growth was registered in 2012 over 2011 vis-à-vis 11% per growth in 2011 over 2010. With the benefits of digitisation, music sectors experienced growth. 18% growth was seen in 2012 over 2011 in comparison to 4.7% growth in 2011 over 2010.

India is one of the fastest growing economy in the world. India is one of the biggest economy in the world in respect of the purchasing power parity. Indian is a key market in respect of the media works. With the growth of Indian economy, Indian middle class has expanded considerably. This Indian middle class with greater earning power and a higher disposable income are the chief factors that determines the development of the Indian entertainment industry. In comparison to other several nations, the Indian middle class spends a significant percentage of their monthly expenditure on entertainment. The amount of expenditure consumer directly spends on

¹⁵³ FICCI-KPMG, Indian Media and Entertainment Industry Report, 2013.

¹⁵⁴ Economic Survey 2012-13

entertainment and advertising revenue is on the rise. The share of younger generation in respect of Indian population is significant and consequently the expenditure on non-essentials the entertainment industry has grown drastically.¹⁵⁵ The average Indian is getting richer and as a result, their expenditure on discretionary items, like media and entertainment works, also rises. India is the sixth largest market for mobile handsets (16 million units per annum) and is growing at 50% a year.¹⁵⁶

Considering the existing penetration levels in comparison to the other countries, the expenditure on entertainment & media by the consumers in India is on the higher side. The average annual spend (per capita)¹⁵⁷ is estimated at a low 6.6 USD in 2011, when the same in China is 22 USD in China and 65 USD in Brazil. In respect of media and entertainment, the consumer spend as a percentage of income.¹⁵⁸ In addition to that the increasing household incomes in India is driving fast growth in consumer expenditure on entertainment and media.

- **Segment Revenue Contribution**¹⁵⁹:

Segment	Revenue – 2010 (billion INR)	Revenue – 2011 (billion INR)	Y-o-y growth (%)	Contribution to the Industry (%)
Television	294	340	15.7	42
Print	178	190	7.2	24
Internet Access	74	116	57.2	14
Film	88	96	9.4	12
OOH	14	16	10.7	1.9
Radio	13	14	10.8	1.7

¹⁵⁵ CII-KPMG, Indian Entertainment Industry Focus: Dreams to Reality Report, 2010.

¹⁵⁶ Ibid.

¹⁵⁷ Calculated as total consumer spend on entertainment and media for each country, divided by its total population. The population figures are based on World Bank estimates.

¹⁵⁸ Calculated as total consumer spend on entertainment and media for each country, as a percentage of its GDP per capita (total GDP divided by total population). The GDP per capita and population figures are based on World Bank estimates.

¹⁵⁹ Ibid.

Music	10	12	25	1.5
Gaming	8	11	32.6	1.4
Internet advertising	8	10	30.9	1.3
Total	685	805	17.5	

Over the last decade the steady economic growth has been stimulated by the constant economic reform. GDP of India has been pushed beyond 5% because of the emphasis on making an investment friendly environment for the full realisation of the inherent potential of the Indian economy.¹⁶⁰

Country	GDP (in billions)	GDP Growth	GDP per capita
India	4,735 US\$	+5.4%	3,900 US\$

Presently, the entertainment and media market in India is the 14th largest in the world and the revenue generated by this industry contributes about 1% of its GDP. Industry stakeholders understand and acknowledge that India has the potential to achieve path-breaking growth over the next few years; possibly to reach a size of 100 billion USD.¹⁶¹

II.10.i. Indian music industry

Music is a significant component of the Indian entertainment industry. The Indian Music Industry has a century old history. Film and devotional music dominated the entertainment industry till 1990. Non-film albums and remixes have become popular simultaneously after the emergence of satellite television and increasing consumer exposure to non-film music channels. Comparing other global markets, the Indian music sector is quite distinctive.

Indian Music Industry is popular for the rich musical tradition. Every genre of the music industry generates considerable amount of revenue for India. A combination of classical music, pop music

¹⁶⁰ International Federation of Phonographic Industry, Recording Industry in Numbers, 2013.

¹⁶¹ KPMG-FICCI, India Entertainment and Media Outlook, 2012.

constitutes popular contemporary Indian film music. In India, existence of different genre of music can be observed. Moreover, the music of Indian films has always been full of entertainment for their song and dance sequences. Music has been integral part of Indian movies right. The popularity of music in Indian films drives every filmmaker include at least four to five songs in the movies which are enjoyed by one and all.

Film music dominates approximately 65% of music sales in India.¹⁶² Bollywood dominates at least half of that, followed by regional film music markets. In most of the cases, success of the films depends on the success of these music albums. Moreover, they have the backing of strong promotional spends by the film fraternity. This strong symbiotic relationship with music and film is evidenced the wide pre-launch of music albums for wide publicity of the film. In the recent times, the music preferences of the Indian consumer is found to be changing. They have been widely influenced by the contemporary and western interpretations of the traditional sounds of Bollywood songs.

The bulk consumption of music video in social and media sites comprises of Bollywood movie music. One Digital Entertainment recently launched a live music channel 24x7, nonstop Punjabi music feed for Speed Records, with built in chat, reflecting the demand for video based and interactive content. Some of the popular channels with significant music content include:

The costs of acquisition of film music generally and Bollywood music particularly, is high. For A+ films with superstar casts, the costs remain in the range of INR 70-100 million and INR 40-60 million for the next tier of films. What is more challenging is to maintain profitability at these levels. For example, it is reported that T-Series have paid INR 70 million for the music of Shah Rukh Khan's Chennai Express, INR 210 million for Salman Khan's movies, Kick and Mental, INR 50 million for Hrithik Roshan's Krrish3 and another Rs 50 million for Ranbir Kapoor's Besharam.¹⁶³

II.10.ii. Indian recorded music market in 2012

¹⁶² KPMG-FICCI, Frames Report: The Stage is set, 2014.

¹⁶³ 'After Tips and Venus, T-Series abstains from purchasing music rights.' Mumbai Mirror, October 23 2013.

Music sales in India reached their highest-ever level in 2012, growing by 22% with digital accounting for 60% of revenues. The Indian music market has gone through significant transformation over the past 10 years. Revenue streams have diversified and more recently subscriptions and streaming services have taken off, accounting for a growing share of the market. Mobile operator services dominated the digital space in India. Operators such as Airtel, Vodafone, Idea and Tata Docomo offer a range of mobile music products, ranging from ringtones, ringbacktones, MP3 downloads and mobile streaming services. These products were sold on a unit basis or bundled into a subscription for a small fee. Airtel's mobile radio retails for a monthly fee of US\$0.6, including 300 minutes of listening time per month.

Another important player in the Indian market is Nokia's Music Unlimited, launched in December 2011, offering 'all you can eat' DRM-free music downloads to consumers purchasing a Nokia phone. Through a partnership with Reliance Communications, India's second largest ISP, the cost of the service is integrated into the mobile tariff, removing the need for a credit card. iTunes launched its store in India in December 2012, but downloads remained relatively smaller part of the digital sector.

II.10.iii. Snapshot of Indian music industry performance in 2013:

The music industry trends show clearly how technology has transformed the production, distribution and monetization of music. In 2013, consumption of music was increasingly 'on the go'. The increasing uses of mobile devices, especially smartphones, affordable data plans and the popularity of streaming services and mobile applications are regarded as the major factors behind this changing scenario. In case of monetization of digital consumption through subscription services, some amount of lagging back was noted. Adoption of slow 3G networks, low willingness to pay and hurdles in online payments were identified as the main reasons for the decline in generating revenue from digital music. Further, with the significant fall in CRBT (call back ring tones) revenues and continued decline in physical sales, the overall size of the industry in 2013 declined for the first time in many years, by 10% to reach INR 9.6 billion.¹⁶⁴ The shutdown of

¹⁶⁴ KPMG-FICCI, Frames Report: The Stage is set, 2014.

players like Flyte and Dhingana also indicated that the industry is still in the process of fine-tuning digital business models and collaborations.

Going forward, digital revenues are expected to be driven by the rapid growth in mobile devices, with increased connectivity as 3G/4G networks advance. Digital revenues, which already contribute 53% of the industry are expected to contribute close to 62% by 2018. The music industry is trying to tap its full potential by shifting the business to the digital platform:

- a. Increasing use of digital platforms, such as download and streaming services.
- b. Giving due consideration to the interests of the consumer as well in every aspect; from digital product design, to content curation, to exploration of hybrid payment models to enable growth of subscriptions.
- c. Collaborations within the industry to innovate new ranges of services across different devices and platforms.
- d. Expansion of the business model to develop new music related services – exploitation of music rights through artist management and sync revenues from placement in advertisements, videos, gaming etc.
- e. Expansion of the format of Business to Business in the music industry – particularly, packaging and licensing music with electronic devices.

Digital channels have facilitated greater access for the key global players in the music industry. Major licensed stores and services now operate in over a 100 countries in 2013 vis-à-vis 24 countries in 2012.¹⁶⁵ Although not in higher scale, Indian media and entertainment industry is one of the higher growth markets. This development is driven by growth of digital revenue. This progress is quite evident from the record published by International Federation of Phonographic Industry. In the global recorded music market, India's position has shifted to 23rd in 2004 rank from 14th position in 2012 (9th rank for digital segment).¹⁶⁶ The report also indicated a growing importance of Indian music for global music labels as well. In the four key revenue streams in the

¹⁶⁵ International Federation of Phonographic Industry, Digital Music Report, 2013.

¹⁶⁶ Industry Discussions, based on IFPI reports.

Indian industry; digital, physical, royalties from Radio and TV broadcast and royalties from public performances, the following growth had been observed.

- Globally, India is having one of the largest mobile base. Approximately 130 million accessed the internet via mobile devices. According to the International Data Corporation (IDC), India became the third largest smartphone market in the world in 2013, in terms of smartphone shipments of 44 million units.¹⁶⁷
- It was estimated that Android OS was having 90% of the market share of smartphones. Data plan rates have been reduced to a greater extent. The telecom operators are now focusing on increased data usage; music appeared to be a main element. In the last quarter of 2013, streaming service Gaana saw an increase of approximately 50% in mobile consumption.¹⁶⁸
- According to Comscore India Digital Future in Focus 2013, “24% of users access music on the go (mobile or tablet) vis-à-vis 76% on PC.”¹⁶⁹ In respect awareness and availability of music based applications. This has been a significant driver overall, for digital music services.
- Overall, there has been a shift in composition of digital revenues. The fall in RBT (Ringback tone) revenues due to TRAI guidelines has been compensated to some extent by growth in other revenue streams, but given its dominance over digital revenue market till now, this has resulted in all overall decline in revenues by 15% to INR 5.1 billion in 2013.¹⁷⁰

II.10.iv. Growing revenue through streaming business

At global level, streaming services has experienced a significant growth. According to estimates from IFPI, there was a 44% growth in 2012, resulting in 20 million paying subscribers globally.¹⁷¹ In Europe, comparatively streaming services are well established. In 2012 in Scandinavia, subscription revenues account for approximately 20% total digital income vis-à-vis the global average of around 10%. Streaming services, especially Gaana, Hungama, Saavn, Raaga have recorded a significant increase in traffic in India, in 2013. In respect of Gaana consumption through

¹⁶⁷ IDC Press Release, February 26 2014.

¹⁶⁸ Gaana Management

¹⁶⁹ Comscore India Digital Future in Focus 2013.

¹⁷⁰ KPMG in India analysis.

¹⁷¹ IFPI Digital Music Report 2013.

streaming grew 2.5 times.¹⁷² Initially the services had been offered without charging any price for the consumption, subscription services were offered from 2013. The beginning phase of the service did not experience significant growth. However, the industry speculated that with price discovery and experimentation with hybrid models (including elements of free and paid, download and streaming) these business structures will experience increased uptake eventually. The hybrid models include free and paid streaming and downloading. Video streaming, especially on YouTube in particular, has also evolved strongly as one of the significant revenue streams for the music industry.

This changing business model, offered mostly through the digital subscription played a crucial role is in getting legal customers. However, the music industry still struggles with widespread piracy in the market. Monetizing of the potential consumption of these web based music websites is essential for the successful operation of the subscription model. The industry saw the shutdown of the major player Dhingana in 2013. A significant portion of digital revenues comprises of downloading. Now, global major players such as Apple, Google and Amazon have extended the market for download stores. Unfortunately, In India, Flipkart's digital music service, Flyte was shut down in 2013. Apple still has just 2.3% market share in the price sensitive Indian market.¹⁷³ Hurdles continue to be online payments, as less than 2% of the Indian population has a credit card and low and slow broadband access.

II.11. Chapter conclusion

Law of copyright provides the necessary incentive to create original works. It gives the necessary impetus to the creative industries to foster creativity and to contribute to the development of national economy. It provides a source of livelihood to all those concerned people who are involved in the value chain of the music industry. This in turn help in strengthening the GDP of the nation. The copyright based industries are playing a significant role in developing the culture as well as economy of the nation. With the progress of technology, the modes of music dissemination has changed and consequently the economies related to music. Downloading and

¹⁷² Gaana management

¹⁷³ KPMG-FICCI, Frames Report: The Stage is set, 2014

music streaming online has increased digital revenue. In this way the music business is going through a paradigm shift.

The increasing digital consumption of music, through legal and illegal channels, has continued occupied the share of physical sales. Sales of physical music continued to decline approximately at the rate of 13% in 2013 to reach INR 2 billion.¹⁷⁴ In 2013 the music industry witnessed further retail shutdowns. The music sales of MusicWorld chain or several Reliance TimeOut Stores significantly reduced. The other music retail chain which suffered similar consequences include Tata's Landmark, Shopper's Stop Crossword and Videocon's Planet M.¹⁷⁵ Now record labels are focusing more on measures to expand the digital market, and as a result there are lack of titles available in the physical market.

At the same time, physical sales are still having hold in the markets, where lower internet penetration has resulted in slow development of digital services. However, continued sales of physical music has been observed in some of the regional language markets and genres such as devotional, classical and fusion. While this phenomenon of declining sales of physical music has exhibited the global trend, physical sales still comprises a significant contribution of the global market. In 2012 it was estimated to be 58%.¹⁷⁶ In some cases, innovations have brought about some renewed interest. Indian players also have been found innovating with formats, such as kiosks inside other stores, for digital content or shop in shop. For example, Giri Traders, a retailer with origins in South India, set up over 40 music download kiosks across Tamil Nadu, leveraging a model where albums are updated online and distribution is still physical across locations.¹⁷⁷ Another example is Sony DADC that has consolidated catalogues of Sony and Saregama, which has tied up with over 100 Nilgiris stores in South India to retail music and is considering non-traditional outlets as well. Vinyl records is another small but growing space with dedicated fan base that has increased their collections.¹⁷⁸ Amazon.in launched its music store in India in February 2014. It has positioned it as the largest online physical album store in India, with options to

¹⁷⁴ Ibid.

¹⁷⁵ Soundbox.co.in, 'Are the shutters rolling down', October 2013.

¹⁷⁶ IFPI Digital Music Report 2013.

¹⁷⁷ Retail Plus Chennai, Music Add-on

¹⁷⁸ Industry discussions with KPMG in India

purchase over 400000 Indian and international albums including the Warner Music repertoire from Sony DADC, digital downloads are currently not an option.

CHAPTER III

INFRINGEMENT OF COPYRIGHT IN SOUND RECORDING BY TECHNOLOGY: A STUDY OF THE EMERGING CHALLENGES

THE FRAME

Invention of movable type mechanical printing technology, credited to German printer Johannes Guttenberg in 1440, is considered to be a milestone in the development of copyright law. Before invention of printing press, there was little practical need for legal protection of authors. It is asserted that there is a symbiotic relationship between technology and copyright law. Technological advancement was the prime reason copyright law came into existence. However, with development of technology, newer modes of dissemination of copyrighted material came into existence. They facilitated easy copying and further distribution of the protected work. In turn, through this wider dissemination of works, the copyright owners started to have better reach to the consumers in the market. The way consumers can purchase and experience music is undergoing sea change. However, the flipside of the same technological advancement helped the counterfeiters and the pirates to make unauthorised copies of the protected materials and sell the same in the market at a reduced rate. This resulted in revenue loss to the concerned right holders. Emergence of internet has made the situation even worse. Now, it becomes absolutely impossible to trace the

individual violators of the copyright law. Technology, which was considered to be the ‘best friend’ of copyright has turned to be its ‘worst enemy’.

With the advance of technology, the modes of music dissemination has kept on shifting from time to time. Moreover, with the help of MP3 technology, digital music has brought a revolution in the music industry. However, the sales of music records started to drop with the rise of Napster and other peer-to-peer networks. This unauthorised dissemination of unlicensed music files worldwide has deprived the copyright holder from the licensed sales and has made infringement of copyrighted works very easy. The several lawsuits against the P2P networks and the claims for compensation for the loss rise from the substantial fall in sales from piracy. The consumers at the same time tend to pirate rather than buying a legal and licensed copy of the music. Technology is a two-edged sword. However the unauthorised duplication of protected works using the file sharing networks has resulted into largescale violation of copyright law, leading to economic losses to the film music industry.

THE FOCUS

This chapter is based on the very idea that technological advancement has augmented violation of copyright law and that has brought losses to the film music industry relating to sound recording. Considering this proposition, this chapter will study the relationship between technological growth and the consequent violation of copyright law in the sound recording. The chapter will narrow down its scope to understand the primary and secondary liability of the internet users in respect of copyright infringement. It will study the judicial precedents related to the liabilities of the online file sharing services for facilitating copyright infringement. Overall that the chapter will focus on how technological advancement has resulted in easy copying and distribution of copyrighted material and subsequently aided the counterfeiters and pirated in infringing the provisions of copyright law. This in turn has negatively impacted the concerned industries.

THE OBJECTIVE

The chapter firstly aims at studying the transformation brought to the music industry by way of emergence of digital music. The other objectives of this chapter include understanding the liability of the copyright infringement of both the internet users and service providers in the P2P and other

types of file sharing services. The statutory requirement for the imposition of the liability for copyright infringement and the concerned judicial precedents will be analysed elaborately. This chapter also intends to comprehend the behavioural attitude and various predisposition of users towards online sharing of music. Moreover, it attempts to analyse the implications of technological protection measures towards better protection of copyright both in online and offline medium. The central objective of the chapter is to identify the causal relationship between technology and copyright law, especially in respect of facilitation of copyright infringement in the film music industry.

The origin of copyright law lies in technology and copyright law always has a symbiotic relationship with technology. The emergence of printing press led to the enactment of legislation which granted copyright protection to the publishers. Whenever new means of copying or communicating copyrighted works are developed, the relationship between existing copyright laws and the use as well as dissemination of the copyrighted work by the latest technology always go through a constant flux. Technological progress has always influenced the structure of copyright law and has raised issues regarding the scope of the law. This gives rise to the question that “is a person who stores copyrighted music files on her computer in publicly accessible folders liable for infringing upon the copyright owner’s exclusive right to distribute?”¹⁷⁹ The existing technologies have determined the functioning of the recording industry.¹⁸⁰ Technology has changed the delivery of music, the device through which the consumer consumes music and also the consequent promotion of musical work. The technology related to production of music has evolved over a period of time. It began with sheet music followed by piano rolls, phonograph records, analogue tapes, compact discs and now MP3. Post 1990, the changes that have occurred to the business model of the music industry is entirely of a new dimension. This period has seen the advent of different new set of technologies: digitisation, data compression and the Internet.¹⁸¹

III.1. Technological development and copyright law

¹⁷⁹ Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 *University of Pennsylvania Law Review*, 1831, 1838-39 (2009).

¹⁸⁰ Joelle Farchy and Heritiana Ranaivoson, *DRMS: New Strategic Stake for Contents Industries: The Case of the Online Music Market*, 2 *Review of Economic Research on Copyright Issues*, 53, 53-54 (2005).

¹⁸¹ Ulrich Dolata, *The Music Industry and the Internet*, Discussion Paper, University of Stuttgart (2011).

In respect of copyright law, high rate of innovation and an inherently unpredictable outcome are the two chief characters of technological advancement. “Unpredictable and rapid innovation, fails copyright law to adopt with new technological advancements.”¹⁸² Ben Depoorter in the article, “Technology and Uncertainty: The Shaping Effect on Copyright Law” has identified certain factors which explains the response of copyright law to a new technological development.¹⁸³ First, time consuming law making process, including different procedural safeguards. Secondly, it becomes challenging for the lawmakers to foresee the form of technological advancement, because of unpredictable character of technological innovation. Thirdly, it becomes necessary to set open-ended standards in copyright law due to uncertain character of technological change. Finally, uncertain result on the future consequences of a new technology is one of the significant factors in this regard. Once the use of the latest technology becomes clear, then only the implications of the novel uses of copyrighted content becomes evident in the minds of the policy and law makers as well as the content owners.¹⁸⁴ Few decades ago, the copyright issue occupied the notice of no more than a few individuals in a world of media built around printing presses, celluloid film, record vinyl and analogue broadcasts. Copyright issues moved to centre stage in the policy arena with the advent of digital technology and the capacity of the Internet to move audio, video, text and numeric data from point to point in a short amount of time.¹⁸⁵ As digital technology developed further, cinema fans started to access movies at any hour, music fans began to download tunes from an historic catalogue, e-book purchasers replaced visits to libraries and bookstores with convenient downloads. Basically, introduction of personal computer, a machine that worked digitally rather than analogue media, changed the entire phenomenon.

If we think back to the world of 1980, then by now, in many respects it was an unimaginable world. There were no mobile phones, no text messages, and no emails. There was only the occasional music video on free-to air television, no MP3s, and no DVDs. CDs were still in the lab, soon to escape. Cable television was rare, there was no internet in every nook and corner except few elite places, the idea of a home computer was almost mystical, the average VCR weighed about ten

¹⁸² Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 *University of Pennsylvania Law Review*, 1831, 1838-39 (2009).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ MICHAEL A. EINHORN, *MEDIA, TECHNOLOGY AND COPYRIGHT*, (1st ed. 2005).

kilos and most important thing music was analogue and music sharing had not become such abundant.¹⁸⁶ An important consequence of the seismic shifts in the landscape of the music industry was the development of Compact Disk (CD). The Compact Disc, which recorded music digitally, was introduced about the same time as the personal computer. A decade later software publishers realised they could use CDs as a delivery medium for their applications. Instead of 10 or 20 floppy disks, a single CD could be used to store an entire program.

“One of the biggest inventions of the 20th century, Internet, spread its tentacles far and wide spanning the continents and helping humans reach out to teach other in a matter of seconds.” Internet has enabled access to all the latest technologies. Now information dissemination has been digitalised. While this scenario has its own drawbacks.¹⁸⁷ Rapid technological progress has posed new concerns as far as law of copyright is concerned. The digitisation of creative content poses a more serious challenge to copyright law than did earlier episodes of technological advance. A digital music file can be disseminated easily worldwide over the Internet. This consequently causes a negative impact on the content owner in the form of revenue loss, which could have otherwise be derived from licensed sales.¹⁸⁸ Internet helps the content owners by ensuring a bigger market for their works; at the same time the other side of the coin makes the intellectual property susceptible to unauthorised use and dissemination. As a result, the copyright owner loses effective control over their protected work. One of the important feature of the digital goods is that it have comparatively higher initial production costs and very low reproduction costs, which is almost zero. They have characteristics of a public good. It implies that sharing the work with others does not amount to reduction a consumer’s utility for the product. These feature of copyright protected work has resulted into illegal distribution of the protected content worldwide.¹⁸⁹

Better internet connectivity and digital compression technologies have substantially raised online sharing of digitised material. Subsequently it raised concerns of intellectual property rights

¹⁸⁶ CHARLES FAIRCHILD, *POP IDOLS AND PIRATES: MECHANISMS OF CONSUMPTION AND THE GLOBAL CIRCULATION OF POPULAR MUSIC*, 1 (1st ed. 2008).

¹⁸⁷ 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, 321-22 (2009).

¹⁸⁸ The Congress of the United States, *Copyright Issues in Digital Media*, (Dec. 2014, 6 PM) see <http://www.cbo.gov/doc.cfm?index=5738&type=1>.

¹⁸⁹ Sudip Bhattacharjee, Ram D. Gopal and G. Lawrence Sanders, *Digital Music and Online Sharing: Software Piracy 2.0?* 46 *Communications of the ACM*, 108, 108-09 (2003).

violation and lost sales.¹⁹⁰ Especially, file sharing technologies, have augmented the dissemination of digital resources.¹⁹¹ The conflict of interest between the music recording industry and the users of illegal sharing of music over the Internet has become a serious concern for the copyright holders.¹⁹² Among the different file sharing technologies, Peer-to-Peer service has infringed the copyright of digital content to a larger extent. The major studies have attributed file sharing services to be the major cause for the recent decline in the size of the music industry.¹⁹³

III.2. MP3, internet and transformation of the music industry

Approximately during the end of the 1990s, the technology oriented transformation of the music industry, to a greater extent, was modulated by two technological developments. This transformation established the ground, which led to loss of control over the content, owned by the music industry. Around in 1983, compact discs entered the market. CD recorders and writable CDs were introduced in the market in the second half of the 1990s made it possible to copy digital media from physical recording devices without any loss of quality. No restrictions existed on the use and dissemination of these copies. Afterwards, data-compression software in open format MP3s facilitated file sharing of music online. It also helped in the converting music data onto CDs. However, the content owners in the music industry did not anticipate these two technological advancements. The possible future potential of the combination between MP3 technology and the Internet were perceived lately.

III.2.i. MP3: Origin of music file sharing activity

Among many other novel technologies, MP3 compression software is one of the most significant while discussing the development of copyright law. Out of different content industries, dissemination of data in digital has affected the music industry most.¹⁹⁴ Increasing use of MP3

¹⁹⁰ Id., p. 107.

¹⁹¹ Rong-An Shang, Yu-Chen Chen, Pin-Cheng Chen, *Ethical decisions about Music Files in the P2P Environment*, 80 *Journal of Business Ethics* 349, 349-50 (2008).

¹⁹² David Buch, *The Double Punch of Law and Technology: Fighting Music Piracy or Remaking Copyright in a Digital Age?* 6 *Business and Politics*, 22 (2004).

¹⁹³ Steven Lysonski and Srinivas Durvasula, *Digital Piracy of MP3s: Consumer and Ethical Predispositions*, 25 *Journal of Consumer Marketing*, 1 (2008).

¹⁹⁴ 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, 321-22 (2001).

technology is one of the most remarkable development that the music industry has ever seen. The use of MP3 movement started not with the industry itself, but with a huge audience of music lovers on the Internet.¹⁹⁵ However, the introduction of the cassette or the CD in the music industry did not happen in this fashion. The music enthusiast's access to music has been enabled by the MP3 technology. According to the most recent annual statistics available from Google, the most popular search engine as of today, "MP3" was the 10th most popular search term queried among the billions of searches in 2004 (Google, 2004).¹⁹⁶ MP3 technology has brought revolution in digital music platform by making music. MP3 player has restructured the music business industry in the following ways: (1) restructuring music as an online product, which facilitates better collection or archiving of music; and (2) extending the musical work from private to public zones, making music pervasive in everyday life.¹⁹⁷

III.2.i.a. Music as a Digital Good

Digital products are described as "any form of information that has some meaning and does not need a specific physical exchange media to be carried from the producer to the consumer." Most of the intellectual products, such as, music, software, videos, books, maps, news etc. are potential candidates for digital products. All these contents that can be transformed into digital format and disseminated over the internet from the developer to the user. Once the products reach the user, the digital products can be transferred to other physical means of support. For instance, music can be burned in CDs or uploaded to digital audio players. Two standards have been found when the business model comprises of digital goods. Digital products have features which makes the product immune from destruction. The other trait is 'transmutability'. This trait helps the consumers to make easy changes on the products and lastly reproducibility. Digital format of music enables easy and convenient copying or reproduction. Consequently, it reduces the marginal cost to almost

¹⁹⁵ Raman Mittal, P2P Networks: Online Piracy of Music, Films and Computer Software, *Journal of Intellectual Property Rights*, Vol. 9, September 2004, pp. 440-461 at p. 440.

¹⁹⁶ SAMEER HINDUJA, *MUSIC PIRACY AND CRIME THEORY*, 3 (1st ed. 2006).

¹⁹⁷ David Beer, *The Iconic Interface and the Veneer of Simplicity: MP3 players and the reconfiguration of music collecting and reproduction practices in the digital age*, 11 *Information, Communication and Society*, 71, 73-74 (2008).

zero.¹⁹⁸ Moreover, MP3 technology has enabled music as a potential candidate for online and digital goods and has brought revolution in digital music phenomenon.

III.2.i.b. “Moving Pictures Expert Group Audio Layer-3” or “MP3”

The full form of MP3 is MPEG-1 Layer Audio 3. It is a technology and format by which a sound sequence is compressed into a very small file. After compressing, while playing the song the original level of sound quality is maintained. The process of compression includes systematic removal of sound waves outside the human audible range so that no significant change in the sound quality is observed. MP3 is an encoding technology, which compresses a digital music file by a ratio of approximately 12:1 and in this way reduces the original size of the file. In Germany, at the Fraunhofer Institute Integrierte Schaltugen, MP3 was developed in 1987. The project was named as EUREKA (EU417). In the University of Erlangen, Professor Dieter Seitzer assisted in development of the project. Subsequently, this was known as ISO-MPEG Audio Layer-3 standard. MPEG stands for Moving Pictures Expert Group. It was subcommittee which developed the MP3.¹⁹⁹ The concept of digital distribution has been enhanced by MP3 technology. Through this technology the computers are connected to the internet through cable rather than modem, increasing the speed at which files can be transferred.²⁰⁰ The compression technique is one of the convenient method of music dissemination over the Internet for two reasons. Firstly, low cost of compression, and secondly, the conversion of a music file to MP3 format is made without compromising the quality of original sound recording.²⁰¹ Therefore, it can be asserted that MP3 reduces the amount of digital information required to store music by encoding the data more efficiently and lopping off bits that your ears would not really miss. This entire process is referred to as compression.²⁰²

¹⁹⁸ Americo Nobre G. F. Amorim and Jairo S. Dornelas, *P2P Users: Important Dimensions for Changing to Legal Online Music Stores*, Project E-Society: Building Bricks 228, 229-30 (2006).

¹⁹⁹ Raman Mittal, *P2P Networks: Online Piracy of Music, Films and Computer Software*, 9 Journal of Intellectual Property Rights, 440, 441-42 (2004).

²⁰⁰ Peter J. Alexander, *Peer-to-Peer File Sharing: The Case of the Music Recording Industry*, 20 Review of Industrial Organisation, 151, 152-53 (2002).

²⁰¹ 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, 321-22 (2001).

²⁰² David Beer, *The Iconic Interface and the Veneer of Simplicity: MP3 players and the reconfiguration of music collecting and reproduction practices in the digital age*, 11 Information, Communication and Society, 71, 73-74 (2008).

The emergence of MP3 technology led to the creation of many Internet sites and they allowed the users for to download music without charging any price for the same. High-speed Internet connections, particularly on many university campuses made the MP3 technology the most convenient method of being involved the era of digital music. Consequently there was exponential demand for MP3 music files on the Internet. With this development, the music industry experienced massive circulation, distribution and downloading of digital music in the MP3 format by the consumers around the world.

III.2.ii. Music file sharing via P2P network

“The information and communication technologies (ICT) and micro-electronics, including the emergence of a digital technological paradigm, has changed the economic status of creative expressions, such as music.”²⁰³ On the one hand the internet has facilitated transfer of music files and it has benefitted the music copyright industries.²⁰⁴ However, on the other side of the coin, internet and the introduction of high speed or broadband access for domestic consumers together with the widespread availability of hardware for the making or storage of digital copies of sound recordings have made it possible for the individual consumers not only to make unauthorised copies with ease but also to distribute them in unimaginable quantities at negligible cost. The so-called ‘file-sharing’ or ‘peer-to-peer’ networks made it possible for millions of individuals to exchange copies of sound recordings.²⁰⁵

III.2.ii.a. Fundamentals of P2P Networks:

The term ‘**Peer-to-peer**’ (**P2P**) refers to a computer network, where each performs the role of a server for the other computers in the network. This network permits shared access to digital files without requiring a central server.²⁰⁶ In P2P network, the connected computers in the network through software transmit audio, video, data or anything in digital format to other connected

²⁰³ Birgitte Andersen and Marion Frenz, *Don't blame the P2P file-sharers: the impact of free music downloads on the purchase of music CDs in Canada*, 20 J. Evol. Econ. 715, 716-17 (2010).

²⁰⁴ Bob Clark, *Illegal downloads: sharing out online liability: sharing files, sharing risks*, Journal of Intellectual Property Law and Practice, 2007, Vol. 2, No.6, p. 402

²⁰⁵ KEVIN GARNETT, GILLIAN DAVIES AND GWILYM HARBOTTLE, *COPINGER AND SKONE JAMES ON COPYRIGHT*, 688 (15th ed. 2005).

²⁰⁶ *Peer-to-peer* (Dec. 14, 2014, 7 PM) <http://en.wikipedia.org/wiki/Peer-to-peer>.

computers. Napster and Gnutella are the premier examples of this type of P2P software.²⁰⁷ Sharing of unlicensed music files over the P2P network has been regarded as one of the chief reason in rising piracy over the Internet. P2P networks permits anonymous file sharers to share unauthorised music files, infringing the copyright over the same. Consequently, this has caused significant pecuniary loss in revenue to the entertainment industry.²⁰⁸

In the essay, 'A Bipolar Copyright System for the Digital Network Environment', Alexander Peukert has attempted to identify the implications of these P2P networks in the context of the media and entertainment industry: "Peer-to-peer networks provide architecture for stable, cheap and global sharing of any digitised information, be it music, movies, software, writings or other data. The end-to-end or peer-to-peer architecture makes it possible for thousands of terabytes to rush through P2P networks every month without anybody having to invest in and provide for a centralised server..... It terrifies copyright owners to definitely lose control over their works, which for the user of these networks actually seem to be 'free as the air to common use.'"²⁰⁹

III.2.ii.b. Premier file sharing programs and applications:

Downloading and sharing of files through peer to peer file sharing networks & programs has grown to tremendous level. The leading Peer-to-peer file sharing programs and applications are described hereunder:

- ***Napster:***

Shawn Fanning, a 19-year-old freshman at Boston's North-Eastern University in 1999 developed a software application that married file-sharing and Internet searches with instant messaging, and thus solved the problem of finding MP3s on the Internet. He named his program Napster (his college nickname).²¹⁰ The idea that Fanning had was to create a music community site where fans of bands or singers could go, chat and share music with each other. The file sharing aspect of

²⁰⁷ Raman Mittal, *P2P Networks: Online Piracy of Music, Films and Computer Software*, 9 *Journal of Intellectual Property Rights*, 440, 441-42 (2004).

²⁰⁸ Rajeev Prasad, *Piracy over Peer-to-Peer Based on Personal Network*, 37 *Wireless Personal Communication*, 221, 221-22 (2006).

²⁰⁹ ALAIN STORWEL, *PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW*, 25 (1st ed. 2009).

²¹⁰ JOHN GANTZ AND JACK B. ROCHESTER, *PIRATES OF THE DIGITAL MILLENNIUM: HOW THE INTELLECTUAL PROPERTY WARS DAMAGE OUR PERSONAL FREEDOMS, OUR JOBS AND THE WORLD ECONOMY*, 174 (1st ed. 2005).

Napster did not seem to hold primacy in Fanning's original design, rather than his focus was on creating a music community, but as a part of his design he included the ability for users to directly swap MP3 files with each other. In so doing, he created the first fully functional peer-to-peer protocol, the Napster protocol.

Napster is a software program which allows its users to locate and share MP3 files. It is now being regarded as the company that precipitated the digital technology revolution. Napster technology incorporates a centralised or server based Peer-to-peer network. Servers stores data and applications that personal computer can access. There is a central list of information that is accessed by all users of the system. With Napster, individual people started to store files that they wanted to share MP3 music files on their hard disks and shared them directly with other people. In Napster, MP3 files are distributed differently. Instead of storing the song files on a central computer, the songs were stored on user's machines. When a song is to be downloaded using Napster, it is downloaded from another person's machine and that person could be the next-door neighbour or someone halfway around the world.

To explain the contribution of the Napster protocol we need to examine the distinction between Peer-to-Peer file sharing and traditional server-client file systems. Fanning described the difference between client server networks and the Napster network by using an analogy of attending a party. In the client-server party each guest turns up empty handed to the party and all the food and drink is supplied by the host. To get a drink you must ask the host to supply it and you can only have what the host has supplied. Your host may be efficient but he has to serve everybody and you must have to wait in a queue. At a Napster party all the guests bring their own food and drink. There is still a host but all he does is greets you at the door and takes a note of what you have brought. Then anytime anyone wants a drink they can ask the host who has brought a particular product. The host can check his list and put them in touch with the right person and they can exchange drinks directly with each other.²¹¹

- **Gnutella:**

²¹¹ ANDREW MURRAY, INFORMATION TECHNOLOGY LAW, 237 (1st ed. 2010).

After the downfall of Napster, Gnutella emerged as a major P2P service. This network had no central server maintaining 'direct file listings' of all the music files. Gnutella contained couple of clients including: BearShare, Cnucleus, LimeWire, Morpheus, WinMX, XoloX. The P2P services that came into existence after Napster P2P services did not contain any central server, which gave access to direct file listings of all these music files and this made enforcement very tough. In Gnutella, the users did not rely on any other server for sharing of the content. This was not the case with Napster and posed a serious challenge against the legal system.

There are certain similarities between the operation of Gnutella and Napster. Firstly, in both the cases the sharers put the files on their hard disks and make them available to everyone else for downloading in P2P fashion and secondly users run the pertinent software to connect to the respective network. However, to have access the Gnutella network different client applications are required. On the other hand, Napster had one piece of client software that users used to connect their computers to the Napster network.

- **Kazaa:**

It is one of the latest versions in the P2P technology. It was originally established in the Netherlands. Kazaa network is built on a technology called the first-track technology. By using Kazaa the downloading runs much faster and is highly reliable. Kazaa allows the user to even pause downloads and resume them later on.

- **BitTorrent:**

BitTorrent is a new peer-to-peer protocol designed by programmer Bram Cohen to facilitate the exchange of files between users.²¹² Instead of facilitating links between two networked nodes as traditional P2P services, such as Napster and later, Kazaa and Morpheus have done. Different chunks of the same file can be distributed by multiple nodes. After 20 million downloads, BitTorrent now accounts for more than one-third of all internet traffic.²¹³ Besides the above mentioned popular programmes, there are certain other P2P based networking programmes which

²¹² SAMEER HINDUJA, MUSIC PIRACY AND CRIME THEORY 21 (1st ed. 2006).

²¹³ Paul Ganley, *The Internet, Creativity and Copyright Incentives*, 10 *Journal of Intellectual Property Rights*, 188, 192-93 (2005).

offer free sharing of digital music files and they are - Soulseek, Ares Galaxy, KCeasy, eMule, iMesh, Shareaza, Piolet, Overnet, etc.²¹⁴

III.3. MP3 usage and copyright infringement

Initially the use of MP3 was encouraged by a website, MP3.com. Any user was able to upload a song. The songs which were available on MP3.com were mostly public domain songs. The other songs found on the website were those, uploaded by upcoming artists in search of exposure. The remaining available songs were the ones released by record companies trying to build interest in a CD. MP3 emerged as a dominant instrument in respect of dissemination of music over the internet.

Several MP3 sites, both legal and illegal, are existing on the internet. One of the earlier search engines to locating MP3 files is Lycos. Most of these files can be downloaded free of charge. All the MP3 distributors can be divided into two categories: legal and pirated. For instance, 'GoodNoise' is a legal internet record company which do not infringe copyright. The pirated sites pose greater concern to the major record labels, as they are responsible for dissemination of unlicensed recordings of copyrighted material in MP3 file format.²¹⁵ A CD Ripper encodes a music CD and converts it into an MP3 file. This encoding or 'ripping' will not come under the purview of copyright infringement, when the use of such music procured in this manner is exempted under the provisions of the Copyright Act, 1957. When without the copyright holder's permission, the MP3 files are uploaded to the internet and the copyrighted protected work is communicated to the public, the legality of such activities are challenged under copyright law.

III.3.i. Liability of file sharing services:

File sharing is the most litigated area in respect of determination of liability for online copyright infringement. Every digital file is reduced into a tangible form, either on a hard drive, CD and hence qualify for being protected under copyright law. Moreover, the transmission of a file from one person to another amounts to reproduction or distribution for the purpose of copyright law.

²¹⁴ *Top 20 best peer-to-peer file sharing programs application software*, (Oct. 14, 2014, 10 AM) <http://www.blogsdna.com/923/top-20-best-peer-2-peer-p2p-file-sharing-programs-applications-software.htm>.

²¹⁵ Mark Carey and David Wall, *MP3: The Beat Bytes Back*, 15 *International Review of Law, Computers & Technology*, 35, 36-37 (2001).

“P2P networks are harbingers of copyright violations costing the music, industries millions of dollars in lost revenue, through illegal sharing of content.”²¹⁶

In IFPI’s Digital Music Report 2008, it was estimated that online music sales have increased from zero to an estimated US \$2.9 billion. This record also indicated “tens of billions of illegal files were swapped in 2007 and the ratio of unlicensed tracks downloaded to legal tracks sold is about 20 to 1.” In 2007 Italy’s “Luigi Einaudi Foundation” reported that 30% of peer-to-peer users bought fewer CDs and DVDs, while 6% said they bought more CDs. In the same year in Australia it was reported that 57% of P2P downloaders rarely or never purchase the music they download. All this data suggest straight substitution of legitimate sales. Around 80% of ISP traffic still comprises distribution of copyright-infringing files. Expansion of broadband, particularly in developing markets like China, Southeast Asia and Latin America, is driving an increase in unauthorised file sharing on P2P networks.²¹⁷

III.3.i.a. Copyright Infringement Liability of Internet Users in the P2P System - Direct Infringement

Increasing use of internet and other online services has posed the question regarding how traditional copyright rules will adapt to the rising online activities. Copies are now stored, transmitted and used electronically – sometimes even temporarily. Article 9 of the Berne Convention, which talks about the reproduction right, is applicable to the use of works in digital form. Law of copyright includes the very act of ‘making available’ copyrighted material for access on the Internet.²¹⁸ It is found internet user share copyrighted material on the Internet over file-sharing services without authorisation. Judiciary across the globe have issued judgements against music ‘file-sharers’.

In *Polydor Ltd. v. Brown*,²¹⁹ it was observed that “connecting a computer to the Internet which is running P2P software in which music files are placed in a shared directory falls within this infringing act.” This is regarded as a primary act of copyright infringement. Whether the person

²¹⁶ Ankur Gupta, *Conscience Based Routing in P2P Networks: Preventing Copyright Violations and Social Malaise*, (Dec. 15, 2014, 5 PM) <http://www.springerlink.com/index/H8M0V7H136N41251.pdf>.

²¹⁷ ALAIN STORWEL, *PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW*, 44 (1st ed. 2009).

²¹⁸ WIPO Copyright Treaty, 1996 § Art. 8; WIPO Performance and Phonogram Treaty, 1996 § 10.

²¹⁹ [2005] EWHC 3191 (Ch).

intended to infringe the copyright is not relevant in this regard. In a P2P network users can access or download information through their P2P shared directory. Thus, over the Internet, each P2P user is considered as the direct infringer of copyright.²²⁰ The direct liability of the users under the Indian Copyright Act, 1957 arises from a conjoint reading of Section 14 of the Act provides meaning of Sec. 51 (a) (i) of the Act.

III.3.i.b. The P2P tool maker: “contributory” and “vicarious” infringement - Indirect infringement

In P2P network, the developer of the network does not involve directly in the copying and dissemination of the files being shared. Sometimes, the liability under copyright law extends beyond the liability of direct infringer. For instance, if an owner rents his or her space to a vendor with the knowledge that the vendor sells counterfeit CDs, the owner will be held liable for copyright infringement along with the vendor. This indirect, or “secondary,” liability is divided into two categories: contributory and vicarious.

The liability for contributory infringement liability is derived from law of torts. The liability is based on the principle that the person who aids or contributes to the infringement of another person, bears a secondary liability. The rationale behind imposing contributory copyright is to assist the owners of copyrighted content to identify and sue the root cause of numerous infringements, instead of tracing the ‘multitude of individuals’ for infringements.²²¹ Under Indian Copyright Act, 1957, P2P file sharing service can be held to be liable for secondary liability under Section 51(a) (ii) of the Copyright Act, 1957. Sec. 51(a)(ii) provides that a person who permits any place to be used for communication of work to the public for profit and where such communication constitutes an infringement of copyright in the work, shall be liable for copyright infringement. To impose contributory infringement liability, two definite elements are required to be present. They are as follows:

(a) Knowledge or Intent on the Part of Infringer:

²²⁰ Jianhong Zhou, *Exploration and Analysis of Copyright Infringement Liability in P2P System*, (Nov. 6, 2013, 7 PM) <http://www.springerlink.com/index/P03U16X87T386KV0.pdf>.

²²¹ J M Moye, *How Sony survived: peer-to-peer software, Grokster and contributory copyright liability in the twenty-first century*, 84 North Carolina Law Review, 646 (2006).

In order to constitute contributory infringement, it is necessary to establish ‘specific’ knowledge or the intent of the infringer. The secondary infringer should ‘know or have reason to know’ of direct infringement to bear secondary liability. Not general knowledge, but actual and constructive knowledge is required to be proved.

(b) Material Contribution:

The third party should have materially contributed to the primary infringement. It is required to be established that whether an integral service was provided by the defendant to the infringer, which assisted the infringer to infringe the copyright. Moreover, it is also examined whether the defendant merely acted as a ‘passive conduit’ enabling the infringing activity.

*Gershwin Publishing Corp. v. Columbia Artists Management Inc.*²²² is one of the earliest authority in the context of secondary infringement. In this case it was required to be determined when musicians played copyright-protected work at the promoter’s concerts without taking the necessary public performance license, whether the concert promoter should bear liability for contributory infringement. Since Columbia Artists Management Inc. had the knowledge that copyright protected works were being communicated to the public at the Port Washington concert and the local association or the performing artists did not procure a copyright license, The Court of Appeals held that Columbia Artists Management Inc. should be liable for contributory infringement.

Another important authority in this context is the famous ‘Sony Betamax’ case. In *Sony Corporation of America v. Universal City Studio Inc.*²²³ it was argued that the Sony Betamax VCR was a device which could be used to infringe copyright in their content and that Sony by knowing what use their customer would make of the device were secondarily liable for any primary infringement carried out by their customers, This secondary infringement claim was made under the US copyright principles of vicarious and contributory infringement. It was alleged that VCR consumers had recorded and exhibited on commercially sponsored television the copyrighted works of Universal City Studio Inc. and therefore the respondents’ copyright. This case was

²²² 443 F 2d. 1159.

²²³ 464 U.S. 417 (1984).

dismissed by the District Court. However, the Ninth Circuit reversed the decision held the plaintiff to be liable for contributory infringement.

The US Supreme Court on appeal reversed the Ninth Circuit Decision and denied all charges of contributory infringement against Sony. The Supreme Court ruled that Sony were not liable for contributory infringement. It was reasoned that Betamax VCR had a protected fair use, to be used for the purpose of ‘time shifting’. Time shifting is described as the practice of the “average member of the [using] a VCR principally to record a program he cannot view as it is being televised and then to watch it once a later time”. The court held that “if a product is capable of other non-infringing and ‘substantially lawful’ uses, the producer could not be held liable.” Ultimately it was held that the Betamax VCR had substantially non-infringing use and for this reason Sony was not liable of contributory infringement under the copyright law.

In India, there are less precedents in respect of contributory infringement under the domain of copyright law.²²⁴ Under Indian Copyright Act, 1957 there is no specific provision regarding contributory infringement. However, it is contended that section 51 (a) (ii) of the Indian Copyright Act, 1957 establishes the liability of contributory copyright infringement ²²⁵ it provides that “if any person without a license permits for any place to be used for communication of the work to the public will be held liable.”

III.3.ii. The law suits in context

III.3.ii.a. The “Rio” MP3 Player case

The Recording Industry Association of America sued Diamond Multimedia systems (“Diamond”) under the American Home Recording Act in 1988. It was alleged that the portable MP3 player manufactured and distributed by Diamond (the “Rio”) was a ‘digital audio recording device’ and it violated the statutory requirements of Serial Copyright Management System (SCMS). The AHRA prohibits the “manufacture or distribution of any digital audio recording device that does not conform to the SCMS. However, the Act does not prohibit digital copying of copyrighted audio recordings. The U.S. Court of Appeals for Ninth Circuit held that considering the nature and

²²⁴ Sneha Jha and Samar Jha, *An Analysis of the Theory of Contributory Infringement*, 11 Journal of Intellectual Property Rights, 318, 323-24 (2006).

²²⁵ Ibid.

workings of the Rio, it was not a “digital audio recording device” for the purpose of the statute. Particularly, the court gave referred the case of *Sony Corp. v. Universal City Studios*, where it was held that “time shifting” of copyrighted television programmes using video cassette recorders constituted fair use of copyright works.

III.3.ii.b. The MP3.com case

Probably, the first case to examine the liability of file sharing technologies was *UMG Recordings v. MP3.com*.²²⁶ MP3.com offered an exciting new service. They were digitising all music available on CD in the US with a view to offer to offer service known as MyMp3.com. This would allow subscribers to listen to an MP3 version of music they owned from any computer anywhere in the world. It worked by storing MP3 copies of the music on a web server which could be accessed by the subscriber across a network connection.²²⁷ This website permitted users to listen to MP3 music from their own private collections and on any computer connected to the Internet.

With the increasing use of this website, the music industry started to assert that the economic and market-related interests of the industry were getting affected negatively. The plaintiffs contended that the defendant company’s services, the ‘Instant Listening Service’ and ‘Beam-it’ were liable for copyright infringement. It was argued that MP3.com, by way of ‘Instant Listening Service’ made the consumers buy thousands of commercial CDs. Then they converted them to MP3 format; copied the track of these CDs and stored them in the computer servers operating the MP3.com site. These activities were alleged to have infringed the copyright in the respective content.

Being the exclusive owners of copyright over the sound recordings, the plaintiffs argued that MP3.com were never authorised to reproduce the protected work. It was contended that conversion of the CDs into MP3 formats and the subsequent storing of the sound recordings infringed the copyright by way of unauthorised copying. The plaintiffs asked for remedy in the form of declaration that MP3.com’s actions wilfully infringes the plaintiff’s copyright and also requested for injunctive relief.

²²⁶ 92 F Supp 2d. 349 (SDNY 2000).

²²⁷ ANDREW MURRAY, INFORMATION TECHNOLOGY LAW, 234 (1st ed. 2010).

The defendants contended that by way of this innovative technology, users were able to listen to the music they already owned. Therefore, they are merely enforcing their fair use claims. The court ruled in favour of the plaintiff. The defendant's 'fair use' defence was denied. The court emphasised that: "The complex marvels of cyberspatial communication may create difficult legal issues but not in this case. Defendant's infringement of plaintiff's copyright is clear".

The court found that what MP3.com was doing was transforming the copyright protected music files which were encoded on CDs in CD-DA (Compact Disc, Digital Audio) format into MP3 format in a process known as 'ripping'. They were then retransmitting the 'ripped' MP3 file to their subscribers. As MP3.com was committing the infringement for a commercial purpose they could not be defended by the 'space shifting' exception.

III.3.ii.c. The Napster case

In *A & M Records, Inc. v. Napster Inc.*²²⁸ the plaintiffs brought a copyright infringement action against a P2P network company, Napster. The plaintiff alleged that Napster was liable for contributory infringement. By way of MusicShare software, Napster permitted the users to upload and download songs from the P2P network. The technical support, including the indexing and searching of MP3 files, was given by Napster. This 'MusicShare' assisted the users to store MP3 music files computer hard drives. Further it helped in search for MP3 music files stored on other users' computers and also share the exact copies of the contents of other users' MP3 files from one computer to another. The plaintiffs, being the copyright owners initiated the legal proceeding in the Northern district of California on the ground of contributory and vicarious infringement. The defendant, Napster resorted to Sony doctrine and claimed exemption from secondary liability as the software and network were capable of substantial non-infringing uses. Preliminary injunction was granted in favour of the plaintiff. It was shown that around 87% of the material available on Napster was copyrighted and that the plaintiffs owned the copyrights on about 70% of this material.²²⁹

²²⁸ 239 F. 3d 1004 (9th Cir. 2001).

²²⁹ R M Myrick, *Peer-to-peer and substantial non-infringing use: Giving the term 'substantial' some meaning*, 12 Journal of Intellectual Property Law, 546 (2005).

When the judgement was appealed to the Ninth Circuit Court, the court concurred with the District Court. The Court determined Napster's contributory liability on the basis of two elements of contributory infringement: (1) knowledge of a direct infringement and (2) a material contribution to that infringement. As the Napster server recorded all files available for distribution in real time and as many of these files contained material that was clearly being offered in breach of copyright Napster could have knowledge of the infringing activity to its subscribers. The court though was careful to tread a fine line. They did not want to outlaw P2P systems just because they could be used for copyright infringement. Judge Beezer commented that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be held liable for contributory infringement merely because the structure of the system allows for exchange of copyrighted material." As the Napster software and server hardware was essential to the swapping of copyright protected files the court therefore had little difficulty in finding the second arm of the test also proven. Napster was found liable for copyright infringement.

The court then turned to the question of vicarious infringement. Vicarious infringement requires the application of a three part test: (1) there has been a direct infringement (2) the vicarious infringer is in a position to control the actions of the direct infringer and (3) the vicarious infringer benefits financially from the infringement. The first element of the test had already been established so the court focused on the remaining questions. Napster argued they did not benefit financially; they did not charge subscribers for either the software or access to the service, in fact Napster argued that they made no money at all through the availability of infringing files Napster would not have grown at the phenomenal rate at which it grew. This court felt was a direct financial benefit.

Thus the court came to the conclusion that, Napster had constructive knowledge of the infringement and they had the required means to prevent infringement by denying access. As far as the requirement of material contribution is concerned, the judges were of the opinion that Napster facilitating the users in accessing the music files by providing 'indexing central servers'. The court stated, "without the support services defendant provides, Napster users could not find

and download the music they want with the ease of which defendant boasts.” Napster was held to be liable for contributory infringement and injunction was also granted.

Following protracted discussions to try and save Napster, including a reported deal to sell the company to German music publisher Bertelsmann for \$85 million, Napster eventually went into liquidation. Its trademarks and brand name were bought at a bankruptcy auction by Roxio Inc. and they rebranded their pressplay music service ‘Napster 2.0’. Today Napster operates as a leading legal download service specialising in music for mobile phones through its ‘Napster To Go’ service. Napster is now a subsidiary of US retail giant Best Buy.

III.3.ii.d. Post Napster - MGM Studios, Inc. v. Grokster Ltd.

It seemed the Court of Appeals had suggested the P2P technology Napster had used was not illegal by itself, but rather the problem was the Napster server which allowed Napster a high degree of oversight and control. If a P2P system could be designed which did not use a central index server it seemed its implementation would not infringe US copyright law.

Two such systems were quickly developed. One was to design a centralised P2P network which operates more like the Internet. This does away with the need to have a central server. Instead when one logs in to network a connection is made to the nearest active user, or node, on the network. As this node already has onward connections any requests may be forwarded throughout the network without the need for a central server. Decentralised P2P systems have some advantages but also some strong advantages. As they are completely centralised there can be no claim of a controlling mind and they are difficult to disrupt. But they can be extremely slow and they carry a large amount of network traffic as requests are sent and replies. A better system, technically, is the semi-structured system allowed by the use of ‘supernodes’. A semi-structured system combines the advantages of the centralised and decentralised systems. Instead of having a central server, semi-structured P2P systems use a number of users as temporary information hosts, or supernodes.

Several P2P providers began offering either decentralised or semi-structured P2P services. Famous brand names to use one or other of these technologies included Kazaa, eMule, EDonkey, Gnutella, Grokster and Morpheus. Users quickly migrated to these new P2P systems, many of which had

been developed outside the US. It seemed that the music industry had won the battle but lost the war. Even worse for copyright holders while Napster had only allowed the sharing of MP3 audio files these new services allowed sharing of any type of file meaning Hollywood movie studios, television networks and software developers were now all affected. The copyright holders began afresh. In spring 2003, a number of entertainment industry plaintiffs raised an action Grokster Ltd and Streamcast Ltd suppliers of leading P2P technologies Grokster and Morpheus.

Grokster and Steamcast distributed free software that allowed computer users to share electronic files through P2P network. The users of the P2P network were involved in downloading copyrighted materials, such as, cinematographic films and songs through the network. The petitioners MGM complained that Grokster and StreamCast, were used to transfer copyright protected material. The District Court found Grokster not to be liable for contributory infringement of copyright. The US Court of Appeal of the Ninth Circuit upheld the decision since the elements determining contributory vicarious infringement were not met in this case. While coming to the conclusion, the Ninth Circuit Court relied on the Sony case.

The Court made a distinction in respect of the technology that was being used for sharing between Napster and Grokster. The Betamax defence was also referred to while maintaining that distribution of a commercial product capable of substantial non-infringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge. While focusing on the centralised structure, the Court made a distinction between Grokster from Napster. The software distributed by Grokster and StreamCast did not make use of a centralised computer server for processing search requests or sharing file. On the other hand, Napster operated through a centralised indexing system Napster had the knowledge of the infringing material being downloaded. The main differences between Napster and Grokster P2P system, was in respect of distinct indexing modes. Therefore, the injunction was denied to the plaintiffs and Grokster were held not to be liable of contributory infringement by the Court of Appeals.

When the case was appealed the US Supreme Court held the P2P networks were liable for contributory infringement. The Supreme Court opined that the subordinate courts wrongly interpreted the decision of the Sony case and also said that the secondary liability theory was wrongly applied by the Court of Appeals. Through this judgment the Supreme Court tried to strike

a balance between the interests of content industries and technologists.²³⁰ However, the scholars of IP also think that the court in this case undermined that the software had substantial non-infringing uses. Moreover, the court also did not state the conditions for the application of Sony test where an infringement-enabling software is involved.²³¹

Peer-to-peer litigation has not been restricted only to the United States of America. Major cases have taken place and indeed are still taking place, in the Netherlands, Australia, Denmark, Italy and Sweden. Technology has also moved on with most people now using BitTorrent technology to fuel their demand for illicit copies of copyright protected content. One of the most interesting international actions was raised in the Netherlands.

III.3.ii.e. The ‘Kazaa’ case

Arguably the best known P2P system to arise out of the ashes of Napster was Kazaa. It was designed by the Scandinavian design team of Niklas Zennstrom, Janus Firiis and Priit Kasealu who would go on to develop Skype and Joost and was distributed by their Dutch registered company Consumer Empowerment. In September 2000 Consumer Empowerment had written had written to Buma/Stemra²³² seeking a licence for the use of music by the users of the Kaaza software. Consumer Empowerment believed such a licence would protect them from Napster style litigation. Over the course of following year though the negotiations broke down and eventually Consumer Empowerment raised an action in an attempt to compel Buma/Stemra to continue negotiations. Buma/Stemra entered a counter-claim that Kazaa be compelled to take steps to prevent the distribution of works.

In November 2001, a suit was filed by Buma/Stemra against Kazaa to restrain the dissemination of Kazaa’s file-sharing software. This software enabled the users to search and download files from other KaZaA users. District courts ruled favouring Buma/Stemra. The Court of Appeals reversed that decision. Then Buma/Stemra appealed to the Supreme Court. The Court of Appeals reasoned that “the illegal acts and not carried out by KaZaA, but by the users of KaZaA’s software

²³⁰ R G Chen, *Rewinding Sony: An inducement theory of secondary liability*, 27 *European Intellectual Property Review*, 428 (2005).

²³¹ Robert M Hirning, *Contributory and vicarious copyright infringement in computer software harming one form of intellectual property by protecting another*, 6 *Chicago-Kent Journal of Intellectual Property*, 10 (2006).

²³² The Dutch licensing and collecting society for performers and composers.

and providing the means for publication or reproduction of a work is not an act of publication or reproduction per se.”²³³ The court observed that KaZaA would not prevent the search and exchange of files – if anything it would become more difficult to trace this illegal activity, therefore it would be unfair to impute the liability on KaZaA. Moreover, KaZaa did not have centralised indexing. Therefore it was concluded that they did not have specific knowledge of the files exchanged and copied. This was not the case with Napster.

III.3.ii.f. Universal Music Australia Pvt. Ltd. v. Sharman License Holding Ltd.²³⁴

In this case the plaintiff, Australian record companies brought infringement proceedings against Kazaa. It was alleged that Kazaa promoted, facilitated and authorised unauthorised copying of music through its software in Australia. In identifying the infringing activity of the defendants, the court found that “there is no evidence regarding the identity of the particular Kazaa user or users who made available for sharing, or downloaded from another user, each of the defined recordings.” The court observed that the defendants were liable for copyright infringement and ordered them to stop authorising infringement; to pay 90% of the plaintiff’s costs and to come back to court for a damages hearing. The parties settled the litigation in July 2006. The defendants paid US\$100 million in terms of damages to the record companies.²³⁵ Witnesses for the applicants gave uncontested evidence of being able to download each of these sound recordings as blue files.

In *Cooper v. Universal Music Australia Pty Ltd*, the Federal Court of Australia found the proprietor of a website MP3s4free.net (Cooper), the website host (the ISP) and a director to be liable for authorising infringement by knowingly permitting others to place on his website hyperlinks to infringing material and encouraging website users to access infringing files via the links. In this case the website in issue provided ‘deep links’ to infringing files located at remote third parties’ IP addresses. For this reason, the court found this activity as rendering ‘ready access’ to the files.

III.3.ii.g. The Pirate Bay case

²³³ P Akester, Copyright and the P2P Challenge, *European Intellectual Property Law Review*, 27(3) (2005) 110.

²³⁴ [2005] FCA 1242.

²³⁵ IFPI Press Release: KAZAA settles with record industry and goes legitimate (27 July 2006), http://www.ifpi.org/content/section_resources/piracy-report-current.html.

Any discussion on liability of P2P file sharing technologies would remain incomplete without deliberating the most recent and popular form of file sharing technology BitTorrent. BitTorrent works in a completely different manner to both centralised and decentralised P2P technologies. BitTorrent is an internet protocol, similar in function to File Transfer Protocol. To use the BitTorrent protocol you need a BitTorrent client, a specialised program which allows the transfer of files using the BitTorrent system. These BitTorrent clients are well known and include “BitTornado”, ‘µTorrent’ and ‘BitLord’.²³⁶

Once installed a BitTorrent client allows for the uploading and downloading of BitTorrent files. To obtain a file via BitTorrent the user has to first obtain a small file called a Torrent file. This contains metadata used by the BitTorrent client to obtain the location of the file. What makes BitTorrent both efficient and attractive is its method of sharing files. Instead of the file sharing taking place between two users (a Peer-to-Peer transfer) it allows for an interaction between several users simultaneously (a Multi Peer transfer) by breaking large files down into smaller chunks and having different users transmit each chunk independently.

BitTorrent technology increases download speeds by using a random download pattern or attempting to download the hard-to-find pieces of the file first, thereby expanding their availability and increasing the net speed of the swarm.²³⁷ As a result, a download from the swarm may start slowly and speed up as more of the rare pieces of the file arrive. As the pieces arrive, the BitTorrent client will use the metadata contained in the .torrent file to reconstruct the pieces of the file into its original form. The person who has the first full copy of the video file and each subsequent person who finishes the download but continues to upload are known as seeds, while users who do not have the full file are known as leeches.

The key to a fast download is to find a Torrent which tracks many seeders and fewer leechers. For the purposes of our analysis though the key part of the analogy is the operation of the guest book which is analogous to these small Torrent files which are essential to finding all the parts of your larger music, video or software file. This tends to be made available through BitTorrent indexes, sites which specialise in tracking and listing available Torrent files. The largest and best known

²³⁶ ANDREW MURRAY, INFORMATION TECHNOLOGY LAW, 250 (1st ed. 2010).

²³⁷ Michael A Carrier, *The Pirate Bay, Grokster and Google*, 15 Journal of Intellectual Property Rights, 7, 8-9 (2010).

index is the Swedish site, The Pirate Bay, which due both to its high profile and popularity as a Torrent index has had several confrontations with law enforcement authorities and copyright holders.

Originally started in 2003 by a Swedish anti-copyright organisation called Piratbyran, it has operated as a separate organisation since 2004. TPB operates as a torrent-indexing website and tracker that allows users who visits its website to upload and download .torrent files. It does not keep any parts of the files that users are transferring and does not host any copyrighted material. Instead it provides: (i) a means to organise, search and index .torrent files and (ii) a tracker for those wishing to use more traditional version of BitTorrent protocol. On TPB's main page, users can search for .torrent files by keyword. This has the same functionality as search engines such as Google. The primary difference is that, unlike Google, TPB has historically maintained the .torrent files on its servers instead of pointing to a webpage that itself contains the .torrent file. The advantage of maintaining the .torrent file on its servers is that the TPB can ensure that the .torrent file actually exists and can employ the most up-to-date information regarding the number of seeds and leeches in the swarm.

In January 2008, Swedish prosecutors sued The Pirate Bay (TPB) for 'complicity in breach of the Copyright Act' and 'preparation for breach of the Act.'²³⁸ The first offense consisted of 'assisting copyright infringement' and 'assisting making available' copyrighted works. Later on the trial, the prosecutor dropped charges for 'assisting copyright infringement' based on the prosecution's use of tracker less torrents, which did not use TPB's tracker. On 17th April 2009, the District Court found the defendants to be liable for assisting in making copyrighted content available. The court explained that copyrighted works are made available when 'work is transferred to the general public' when it 'is made available to the public in a location other than that in which the general public can enjoy the work.'²³⁹ TPB satisfied this condition since those 'downloading works 'can gain access to the work from a place and at time of his or her own choosing.'²⁴⁰

Once the court found that the principal offense was satisfied, it examined the 'acts of complicity', first examining the activity of TPB and then turning to the individual defendants. The court found

²³⁸ VERDICT B 13301-06 (Stockholm District Court, Division 5, Unit 52 Apr 17, 2009)

²³⁹ Ibid.

²⁴⁰ Ibid.

that TPB: provided a website with ‘advanced search features; provided a website with ‘easy uploading and downloading facilities,’ and put ‘individual file sharers in touch with one another through the tracker linked to the site.’²⁴¹ Resultantly TPB ‘facilitated and consequently, aided and abetted these offenses.’²⁴² Once the court determined that ‘the operation carried on’ by TPB ‘constituted complicity in the breach of the Copyright Act,’ it turned to the defendant’s liability. The court clarified that under Swedish law, liability may attach to each person involved in the offense, when acting collectively, if the offense has been completed by several individuals acting together even if she has not herself satisfied each of the elements of the offense.²⁴³

The court concluded that the four defendants ‘worked as a team, with the common purpose of expanding further both technical and business aspects of TPB.’ The court also found that defendants had the requisite subjective intent for liability.²⁴⁴ Even if the defendants did not know that the specific works listed had been made available via TPB, it was ‘sufficient for them to have had the intent to bring about the existence of copyright protected material on the website.’ On account of the massive scale of making available copyrighted works and advertising revenue generated from the website. TPB was a ‘commercial project’ that led to significant damage given the ‘making available’ of works on ‘a popular website with many users.’ The court imposed a sentence of one year in prison for each of the defendants and it imposed monetary damages, holding the four defendants jointly and severally liable for 30 million Swedish kronor (roughly \$3.5 million).

- Analysis of the Liability in TPB case

The liability decided in the TPB case consisted of four primary elements.²⁴⁵ The first addressed the principal offense. The remaining three described ‘acts of complicity’ by exploring general complicity as well as the defendants’ objective and subjective liability.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Michael A Carrier, *The Pirate Bay, Grokster and Google*, 15 *Journal of Intellectual Property Rights*, 7, 10-11 (2010).

- a. Principal offense: The principal offense of making copyrighted works available would apply expansively. TPB did not directly infringe copyrighted works. Nor did it itself make such works available for others to infringe. It enabled users in making copyrighted works available. Making it possible for someone downloading works to ‘gain access to the work from a place and at a time of his or her own choosing’ would apply to many distributors over the Internet. Another basis for liability could be TPB’s search function which makes it easier for users to locate .torrent files.
- b. General complicity: The court pointed to TPB’s provision of a website with ‘advanced search features’ and ‘easy uploading and downloading facilities’ and it noted its role in putting ‘individual file-sharers in touch with one another the tracker linked to the site.’²⁴⁶ The court concluded that TPB ‘facilitated and consequently, aided and abetted’ infringement, the court did not clarify the necessary relationship between the activity and infringement.
- c. Objective liability: The defendants closest to the challenged activity were Neji and Svartholm, who were ‘principally responsible for technical operations and for the technical and functional development of the website.’²⁴⁷ The court’s analysis for the other two defendants reaches more broadly. It found Lundstorm liable based on his financial contributions and role in generating advertising revenue. Such punishment imposes a type of ‘tertiary liability.’²⁴⁸
- d. Subjective liability: The court found that the defendants ‘had the intent to bring about the existence of copyright protected material on the website’ by referring to ‘the examination of the defendants, the letters from rights holders published on the website and the e-mail correspondence indicating that the operation involved pirate copying.’ Despite this awareness the defendants ‘elected to take no action to prevent the infringement of copyright.’²⁴⁹

²⁴⁶ VERDICT B 13301-06 (Stockholm District Court, Division 5, Unit 52 Apr 17, 2009)

²⁴⁷ Ibid.

²⁴⁸ Michael A Carrier, *The Pirate Bay, Grokster and Google*, 15 *Journal of Intellectual Property Rights*, 7, 12-13 (2010).

²⁴⁹ Yen Alfred C, *Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 *Columbia Journal of Law and Arts*, 34 (2009).

This decision had an important effect all over the world regarding criminalisation of distribution of copyright works over P2P file sharing applications. Taiwan government passed a new law that criminalised the distribution of P2P file-sharing applications and that allowed Internet Service Providers to restrict internet access to subscribers who download copyrighted material three or more times.²⁵⁰ The French Assembly passed a ‘three strike’ system.²⁵¹ Later that law was struck down by Constitutional Council²⁵² and the French Senate passed a revised version that gave judges authority to disconnect the internet service of those who infringe three times.²⁵³ The Malaysian government ordered the BitTorrent tracker to shut down. Several BitTorrent trackers in Sweden were closed down after the TPB verdict.

III.3.ii.h. Indian Precedent: Super Cassettes Industries Ltd. v. MySpace Inc. and another

MySpace Inc. was operating a website, which enabled users in uploading and downloading different media content including audio and video clips. It was alleged that providing a search and indexing function to trace the required sound or video recordings resulted into widespread copyright infringement by disseminating the infringed copies without license over the internet. Primary as well as secondary infringement on the part of the defendant. It was contended that the defendant sanctioned the dissemination of copyright protected works of the plaintiff to the public without permission of the plaintiff. In order to establish secondary infringement the plaintiff referred. Under Section 51 (a) (ii) of the Act “permitting any space to be used for infringing communication to the public, with profit motive, amounts to secondary infringement unless the defendant was not aware, and had no reasonable ground for believing, that such communication to the public would amount to an infringement.”

The High Court rejected the argument of primary infringement, raised by the plaintiff. The High Court held that for the purpose of determining primary infringement under Section 51 (a) (i), the ‘authorisation’ required something more than merely providing the means to communicate the work to the public or providing the place for such communication, as under Section 51 (a) (ii).

²⁵⁰ Mark Hefflinger, Taiwan Passes ‘Three-Strikes’ P2P Law; Adds ISP Safe Harbor, DigitalMediaWire, 27 April 2009

²⁵¹ Leigh Phillips, France Passes ‘Three Strikes’ Piracy Law, Business week, May 14 2009.

²⁵² Court Curbs French Net Piracy Law, BBC News, June 10 2009.

²⁵³ French Senate Passes Revamped Anti-Piracy Bill, CBC News, July 9 2009.

Focusing on the required level of involvement for a primary infringer on the ground of authorisation of infringement, the High Court stated that active participation, inducement or approval was a necessary ingredients to establish authorisation. However, the facts of the case did not indicate the existence of all the requirements mentioned above.

Similarly knowledge of the fact that certain acts were infringing in character was different from active participation in, or any inducement of, such acts. To establish authorisation, clear active participation or reasonable degree was required to be shown besides the existence of such knowledge. The Court clarified that merely providing the means for infringement would not establish control and therefore, any person providing such means could not be said to have approved such act. Applying this yardstick to the conduct of defendant, the High Court came to the conclusion that defendant's conduct did not prima facie satisfy 'authorisation' test, merely because search functionality was provided on website or users were permitted to register and upload their content.

On the issue of secondary infringement, the conflict was much more closely fought and the views of the Single Judge on this plea will have a lot of bearing on content-based file sharing websites. The arguments on the presence or absence of secondary infringement on the part of the defendant revolved entirely around the scope of and exceptions to Section 51 (a) (ii). The plaintiff contended that the defendant had reasonable belief that its conduct of running its website would result in communication of an infringing character. The plaintiff focused on the revenue model of the defendant, which depended largely on the revenue from advertisements displayed on the webpages. The plaintiff contended that there was a deeper involvement and knowledge on the part of the defendant as to infringing character of the data uploaded on its servers.

The defendants argued that their website hosts files which are infringing as well as non-infringing and it was problematic to make a distinction between the same. Similar argument was raised before the U.S. Supreme Court in 'Betamax' case.²⁵⁴ The court referred the decision of Garware Plastics and Polyester Ltd. v. Telelink²⁵⁵ In this case the Bombay High Court observed that in hotels both private and public viewings went on. Not all the cases are that of infringing use. However, the

²⁵⁴ Sony Corp. v. Universal City Studios 464 U.S. 417 (1984).

²⁵⁵ AIR 1989 Bom 331.

Court granted injunction against the defendants from infringing the plaintiff's works in respect of which the plaintiff was the owners and/or assignee of copyright. Ultimately, the Delhi High Court held that the defendant's unauthorised use of the copyright protected work infringed of the Copyright Act, 1957. The court reasoned that web space is a "place" in the terms required by the section 51 (a) (ii) of the Act and also monetary gains were present in the form of ad revenue.

III.4. Behavioural attitude and predispositions of users towards online sharing of music

Today the manner in which music is consumed in everyday life makes it evident how it has become integrated into our personal and social lives. At the same time, the technologies through which music is distributed, purchased, organised, shared, chosen, and interacted with has undergone a significant change.²⁵⁶ With the development of peer-to peer network, huge quantity of music is shared and it can have a tendency to remove some of the social aspects of the music sharing seen with swapping tapes among friends.²⁵⁷ Downloading music from the internet has become an easy, fast, and efficient means to procure music files. Unlicensed downloading of music through P2P computer networks is currently the one of the prominent download method. However, consumers can procure music online legally for a small fee.

III.4.i. Previous Studies – At a Glance

Illegal music sharing is a much faster growing issue than ever before. A survey of 92 students at a medium sized, public liberal arts university²⁵⁸ inquired into how many students are engaging in this behaviour, how many students are engaging in this behaviour, how much they know about the surrounding laws and why they choose to download illegally. The results showed that 83% of students download digital files and 54% share their own files. Reasons for their behaviour include cost issues, laziness and convenience. Majority of the students knew little about the legal issues.

In another study,²⁵⁹ a sample of university students were studied because according to Recording Industry Association of America, university students represent a large section of copyright

²⁵⁶ Kenton O'Hara and Barry Brown, *Consuming Music Together: Introduction and Overview*, p. 3.

²⁵⁷ *Id.* at p. 4

²⁵⁸ Cameron Keith, *Student Attitudes and Behavior on File Sharing*, Salisury University, Maryland, USA (2008).

²⁵⁹ Steven Lyonski, Srinivas Durvasula, *Digital Piracy of MP3: Consumer and Ethical Predispositions*, 25 *Journal of Consumer Marketing*, 1 (2008).

infringers. College students at several locations throughout the campus such as the university library, student union and various academic buildings were approached to obtain the sample. The fieldworkers visited these locations at various times in the day to reach a broad cross-section of the student population.

A June 2005 study commissioned by the RIAA found of those 18 to 54 in age, only 13% paid to download music in contrast to only 6% in June 2004. Business Week (2005) reported that 52% of College students believe it is okay to download and swap copyrighted files, even in workplace. Moreover, piracy in Asia is particularly acute given that 90% of music sales are for illegal recordings. One-third of the teenagers between the ages of eight and 18 continue to download pirated MP3 music.²⁶⁰

A sample of 196 participants (93 males and 103 females) from the University of Otago, Dnuedin, New Zealand was identified.²⁶¹ Such a university sample was selected for the study because downloading was considered to be prevalent among university students and students condone downloading. The Recording Industry Association of America (RIAA) also focuses on university campuses because they believe that downloading among university students samples is most detrimental to industry.

A study²⁶² tried to find out the relationship between teenagers' intention to illegally download music and their intention to buy a specific singer's CDs. As the target of the study was teenagers, idolatry was included as an important antecedent of buying and a moderator on the downloading-buying relationship from the perspective of the social identity theory.

Similarly, another study chosen consumers aged 15-19 as respondents.²⁶³ There were three major reasons for this decision. First, these consumers are found to be most likely to conduct music piracy because of budget constraints and their strong computer knowledge. Second, this group of consumers is more likely to have an idol singer/band. Idolisation was considered to be one of the

²⁶⁰ Ibid.

²⁶¹ Kirsten Robertson, Lisa McNeill, James Green, Claire Roberts, *Illegal Downloading, Ethical Concerns, and Illegal Behavior*, 108 *Journal of Business Ethics*, 215, 217-18 (2011).

²⁶² Chia-chen Wang, Chin-ta Chen, Shu-chen Yang, Cheng-kiang Farn, *Pirate or Buy? The Moderating Effect of Idolatry*, 90 *Journal of Business Ethics* 81, 82-83 (2009).

²⁶³ Jyh-Shen Chiou, Chien-yi Huang and Hsin-hui Lee, *The Antecedents of Music Piracy Attitudes and Intentions*, 57 *Journal of Business Ethics* 161, 162-63 (2005).

major antecedents in this study. Moreover, this group of consumers is one of the major targets of music producers in the market. In one more study²⁶⁴ the sample was based on a student sample from a business college at a university in the Midwest, USA. Students were considered to be the target populations, since a high proportion of students have been shown to pirate.

As a part of studying consumer attitudes towards online music a survey was conducted during 2000-'01 over 200 respondents. Respondents were primarily enrolled as full time or part time students in colleges; ages ranged from 19 to 54 years, with 61% of males. The sample group was diverse in demographic, economic and social aspects and represents a significant component of the music industry customer segment. Respondents were asked to reveal their online music experiences and specify preferences for certain online music activities and Internet connection speeds.²⁶⁵

III.4.ii. Attitudes driving illegal download of digital Music

In 2006, the report published by International Federation of the Phonographic Industry estimated that “95% of all music is downloaded without payment to artists or producers” (2006). Downloading of unlicensed music files from the internet has a negative impact on society, the economy and the music industry. It results in closure of retail music stores, damage of artist careers and displacement of music sales.²⁶⁶ In a survey done by the Hong Kong Institute of Asia-Pacific Studies on behalf of the Motion Picture Industry Association Limited, 17.2% of 1,502 respondents admitted that they have downloaded free movies from the internet. The rate was much higher (23.6% more) among younger age group of 15-24 than older age group of 45-64.8 In another survey done by the Intellectual Property Department of Hong Kong, among the sample of 1,214 respondents, most people (95.7%) saw the need to protect IP rights but there were still 10% of the respondents admitted that they have “illegally downloaded MP3/movies/games from unauthorized websites and shared them with other people.”²⁶⁷ Among those admitted, over 40% of them were

²⁶⁴ Sulaiman Al-Rafee and Timothy Paul Cronan, *Digital Piracy: Factors that Influence Attitude Towards Behavior*, 63 *Journal of Business Ethics* 237, 239-40 (2006).

²⁶⁵ Sudip Bhattacharjee, Ram D. Gopal and G. Lawrence Sanders, *Digital Music and Online Sharing: Software Piracy 2.0?* 46 *Communications of the ACM*, 108, 108-09 (2003).

²⁶⁶ Kirsten Robertson, Lisa McNeill, James Green and Claire Roberts, *Illegal, Downloading, Ethical Concern, and Illegal Behaviour*, 108 *Journal of Business Ethics*, 215, 218-19 (2012)

²⁶⁷ Annual Survey on Public Awareness of Protection of Intellectual Property Rights, Intellectual Property Right Department of Hong Kong, (2004).

under the age of 30. Although 10% may not sound very astounding, the figures only included those who admitted to have illegally downloaded the files and shared. So, the issue here arises that, if the act of downloading unauthorized MP3/movies from the internet is against the law and thus considered to be “illegal”, why would so many people incline to take the risks?²⁶⁸

Different studies have indicated that intention of a consumer-user considerably affects the user’s attitude towards downloading of illegal music files. If attitude can be changed, then intention may be influenced and subsequently behaviour may be influenced.²⁶⁹ There are certain uncertainty regarding the major reasons which influence the ethical decisions of the users to share copyrighted files in the P2P environment. Unauthorized copying of music files is a problem of consumer ethics.²⁷⁰

The decision of a consumer to purchase or download illegal copy of music files presents certain incentives that induce certain ethical dilemmas that sway the ethical decision making processes of a consumers.²⁷¹ In this context, it becomes necessary to understand the effect of moral perceptions on the piracy behaviours. There are two categories of music piracy behaviour from the view point of a consumer.²⁷² The first one is known as unauthorised duplication/download (mostly from a website); while the second one is called pirated music product purchasing. As Internet facilitates data exchange since it enables nearly free distribution with much convenience, music copyrights holders find it difficult to fight multiple infringers, difficult to identify and locate who are personally engaging in relatively minor copyright infringement, creating a massive headache for the music industry.²⁷³ The purchase of pirated music and the unauthorised duplication/download of music are distinguished in several aspects. Consumers had no idea that they were infringing anyone’s copyright when they were infringing anyone’s when they downloaded music from the Internet.

²⁶⁸ Shelly S.K. Cheung, *Illegal Download Attitudes, Leisure Boredom, Sensation Seeking and Value of Honesty*, School of Journalism and Communication, The Chinese University of Hong Kong, (2005).

²⁶⁹ Sulaiman Al-Rafee and Timothy Paul Cronan, *Digital Piracy: Factors that Influence Attitude Towards Behavior*, 63 *Journal of Business Ethics* 237, 239-40 (2006).

²⁷⁰ Rong-An Shang, Yu-Chen and Pin-Cheng Chen, *Ethical Decisions About Sharing Music Files in the P2P Environment*, 80 *Journal of Business Ethics*, 349, 349-50 (2008).

²⁷¹ Jyh-Shen Chiou, Chien-yi Huang and Hsin-hui Lee, *The Antecedents of Music Piracy Attitudes and Intentions*, 57 *Journal of Business Ethics* 161, 162-63 (2005).

²⁷² Ibid.

²⁷³ Ibid.

Several studies have indicated that downloaders of unlicensed music files perceive that while pirating digital material there is very less probability of getting caught.²⁷⁴ This results into lower deterrence in respect of restraining pirated digital content. The downloaders did not regard the issue of digital piracy itself as important.²⁷⁵ The downloaders were found to be happy and excited when they get access to pirated digital media. Consequently if more people are informed about the threats of dealing with pirated content, that will assist in curbing that feeling of happiness and excitement. Moral judgment, distress and the sex (gender) of the individual were not found to be significant influencers of attitude toward digital piracy.²⁷⁶

No relation could be established between the user's ethical nature and his/her ethical beliefs about downloading.²⁷⁷ The same person who believe themselves to have a strong ethical ideal and would also not steal a music CD from a store appear to be uncertain about downloading music. The studies also indicate that the indifferent attitude towards the ethical consequences of downloading music show that majority of students believe that it is acceptable to download music from the internet and there is no harm in downloading infringed material.²⁷⁸ To certain extent students fear punishment, but since it is not happening around them, they are not that concerned about it. Overall, students are not aware of the legislation or the litigation in recent years, partly because the regulations that exist are not very well enforced. Students also have a tendency to believe that "it won't happen to them" so they are doing it.²⁷⁹

Increasing the price of a music CD has a strong effect of increasing its related online piracy.²⁸⁰ Inclination to pirate music increases dramatically as internet bandwidth improves, with similar trends for all music categories, implying that the consumers would pirate more music as the ease of piracy increases. It has been observed that income has negative effects regarding unknown songs, indicating that individuals with lower incomes are likely to pirate rather than purchase and

²⁷⁴ Salman Al-Rafee and Timothy Paul Cronan, *Digital Piracy: Factors that Influence Attitude Toward Behaviour*, 63 *Journal of Business Ethics* 237, 238-39 (2006).

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ Robert F. Easley, *Ethical Issues in the Music Industry: Response to Innovation and Piracy*, 62 *Journal of Business Ethics*, 163, 165-66 (2005).

²⁷⁸ *Ibid.*

²⁷⁹ Cameron Keith, *Student Attitudes and Behavior on File Sharing*, Salisury University, Maryland, USA (2008).

²⁸⁰ Sudip Bhattacharjee, Ram D. Gopal and G. Lawrence Sanders, *Digital Music and Online Sharing: Software Piracy 2.0?* 46 *Communications of the ACM*, 108, 109-10 (2003).

sample, based on current prices.²⁸¹ In respect of pricing, as more music becomes available online, users with fast connections would rather download and listen then buy. Moreover, a user's willingness to pay depends on perceived value of music.²⁸²

III.4.iii. Ethical contemplations involved in illegal music download

In order to eliminate the threat imposed by P2P file sharing, the music industry has implemented numerous initiatives. The softer approaches to deterrence includes building collaborations with internet service providers to trace and suspend downloaders, educating users and diversifying into music channels. The existing anti-piracy arguments and pecuniary penalties have not been much effective and users did not refrain themselves from downloading music illegally, knowing that it is not legal.²⁸³ Illegal downloading of music continues to be a rampant activity especially among college students. This category of infringers have not been deterred by industry legal actions effectively. The rate of unauthorised downloading still continues to be high rate and there is a strong inclination towards the belief that it is not ethically wrong. Different studies have showed that ethical orientation of a consumer is positively connected with awareness of the social cost of downloading, consequences of downloading and ethical belief in downloading.²⁸⁴ In many instances, it is observed that fear of consequences did not have much effect to reduce illegal downloads. Similarly appeals to ethics or guilt also did not have much impact on reducing illegal downloads. The use of punishment for downloaders may have a short-term effect but other (more positive) measures are required.

Generally the law is obeyed when people perceive that violating the law goes against their moral convictions. Accordingly it was found moral obligations anticipated the intention to infringe the copyright protected media content. The ethical profile of downloaders was found to be different

²⁸¹ Ibid.

²⁸² Id. at p. 110.

²⁸³ Kirsten Robertson, Lisa McNeill, James Green, Claire Roberts, *Illegal Downloading, Ethical Concerns, and Illegal Behavior*, 108 *Journal of Business Ethics*, 215, 219-20 (2011).

²⁸⁴ Steven Lysonski and Srinivas Durvasaula, *Digital Piracy of MP3s: Consumer and Ethical Predispositions*, *Journal of Consumer Marketing*, (2008), Vol. 25, No. 3, p. 2.

than those who do not download. They have less ethical concern. Those who are less concerned with law depicted a positive attitude towards piracy. It was seen that in many cases downloaders are discouraged from illegal downloading by anti-piracy messages.²⁸⁵

The ethical contemplation of those who download illegal music is explained by different theories. Ethical decision-making theory Hunt and Vitell's has been applied to examine. According to Hunt and Vitell's ethical decision model "ethical judgment influences behaviour through behavioural intention."²⁸⁶ Ethical judgment of a user influences behaviour, which is again connected to 'Theory of Reasoned Action'. According to the '*Theory of Reasoned Action*', (TRA) behaviour is connected to intention. It is assumed that individuals are rational human beings. Their intentions are influenced by their attitudes towards a behaviour (favourable or unfavourable) and their perceptions of subjective norms (what others' think they should do).

Theory of Planned Behaviour, (TPB) provides that the actual behaviour of an individual is affected by the intention to perform a certain action. This theory was developed from the theory of reasoned action. The theory of reasoned action proposes that excluding impulsive actions, an individual's actions are the result of intention. Intention comes from rational thinking. The attitude to the action of an individual and subjective norms are considered to be the main factors behind individual's intention. TPB has been engaged to illustrate dishonest behaviour in cheating in exams, lying and shoplifting. Moreover, *deterrence theory* attempts to explain the manner in which the fear of the consequences of illegal behaviour stimulates deterrence. As per this theory, if the results of an action are certain and severe then individuals are prevented from resorting to illegal behaviour. As certainty and severity of punishment increase, illegal behaviour should decrease. Through an extended model of TPB that incorporates deterrence and expected utility theory, it is found that attitudes, PCB and subjective norms were indeed significant in predicting the intention to illegally copy software. Furthermore punishment severity, certainty of punishment and software costs were directly related to attitudes towards pirating whereas punishment certainty was also related to behavioural control.

²⁸⁵ Kirsten Robertson, Lisa McNeill, James Green, Claire Roberts, *Illegal Downloading, Ethical Concerns, and Illegal Behavior*, 108 Journal of Business Ethics, 215, 217-18 (2011).

²⁸⁶ Ibid.

There are several interesting findings regarding the beliefs about downloading. When it was asked, “If you download music illegally, artists do not get royalties which is their primary way to make a living”, the majority of the those who download illegally do not have strong beliefs in respect of the fact that illegal downloading hurts the livelihood of artists. Therefore, spreading messages to students using a guilt appeal may not be effective always. When illegal downloads are done, it is found that the intentions to download are linked with perceptions that there is no social cost to downloading; there are social benefits to downloading; it is ethical to download; and there are legal consequences to downloading. However, ethical idealists believe that there is a social cost to downloading, that downloading is not ethical, and that there are negative consequences to downloading. Thus, increase in ethical idealism can lead to rising consciousness about downloading.

III.5. Technological shift in recording industry – Implications of P2P networks

The significant technological advancements have challenged many deep rooted interests.²⁸⁷ By way of developing economic opportunities and changing social relationships technological progress has always posed threat on the pertinent institutions and stakeholders. The changes brought by the online medium is no exception. Now, manufacturers of goods and providers of services are finding new ways to contact the consumers directly. As a result, the contribution of middleman is reduced to a greater extent and the consumers are trying to establish relations with one another or to become producers in their own right.²⁸⁸ The initiative taken by the recording companies and movie studios to prohibit the operations of P2P networks is an example of such reaction against technological change. The business model of the industry is defending is an example of oligopolistic market in which a handful of companies control the distribution of content. It is observed that in the market, anticompetitive practices and anti-consumer policies have resulted in overpricing of music CDs.²⁸⁹

287 Mark N. Cooper, *Time for the Recording Industry to Face the Music: The Political, Social and Economic Benefits of Peer-to-Peer Communication Networks*, 25 Stanford Law School Center for Internet and Society, 11 (2005).

²⁸⁸ Ibid.

²⁸⁹ Ibid.

File sharing technology entered the oligopolistic music market with an ‘arbitrage’ opportunity. From 2004, the rising sales of digital music challenged the music industry’s claim.²⁹⁰ Digital technologies have posed a threat on the hold of the recording companies in the market by decreasing the costs of manufacturing and distribution. In a digital delivery environment, consumers should never be forced to pay for songs they do not want in order to get the songs they do want. Without much success to restrain the sharing of unauthorised music files over P2P networks, in 2004 the record industry decided to adapt its business model. However, the music industry continued with its strategy of litigation at the same time.²⁹¹

In order to grow commercially and also to be updated technologically the recording industry has to consider that P2P technology and its uses have developed beyond Napster.²⁹² Now, file sharing technology is no longer dependant on a connection to or assistance of a central server or registry. Software is available, running generally either on the “OpenNap” or Gnutella networks that allow users to connect directly with each other to exchange music files. A significant advantage of much of the alternative software and networks is that they are often provided free and as such no one company or persons control its distribution, or is able to assert any proprietary right over technology and its exploitation.²⁹³ A collaborative effort between companies and consumers can bring several benefits and advantages to both the side.²⁹⁴

III. 6. Liability of internet service providers for third party online copyright infringement

The access providers contribute in the functioning of internet by way of making available various services. These includes dial-up account for the home user, permanent leased-line connection for commercial users and many others. These commercial access providers are referred to as Internet Service Providers (ISPs). ISPs facilitate connection to the Internet. It is enables passage of information to and from the computer.²⁹⁵ ISP provides the user with services like World Wide

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Mary W. S. Wong, *Rocking and Ripping on the World Wide web: The Collision between Digital Music and Copyright Law*, 13 Singapore Academy of Law and Journal, 323, 333-334 (2001).

²⁹³ Ibid.

²⁹⁴ Id. at p. 350

²⁹⁵ ROPER BRENT D, *USING COMPUTERS IN THE LAW OFFICE*, 289 (1st ed. 2000).

Web, e-mail, newsgroup and other additional services. ISPs are also known as Online Service Providers (OSPs).

III.6.i. Definition of internet service providers

Digital Millennium Copyright Act, 1998 (DMCA) in United States of America has provided the definition of 'service provider'. Under Section 512 (k) (1) (a) it is defined as an "entity offering transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of the material of user's choice, without modification to the content of material as sent or received" Section 512 (k) (1) (b) provides that a 'service provider' is a 'provider of online services or network access or the operator of facilities therefore'. This DMCA included the Online Copyright Infringement Liability Limitation Act. DMCA mentions the statutory requirements for holding ISPs liable for copyright infringement by their subscribers. It also lays down the limitation in respect of the liability of ISPs in specified cases.²⁹⁶ In United Kingdoms a 'service provider' is defined as "any person providing an information society service." Information society service refers to "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the request of a recipient of a service."

In India, the liability of online service providers for copyright infringement has not been determined expressly. Information Technology Act, 2000 (IT Act) has defined ISP as a 'network service provider' referring it as an intermediary.²⁹⁷ It defines 'intermediary' as 'any person who on behalf of another person receives, stores or transmits that message or provides any service with

²⁹⁶ In Section 512(a) protection is given for the conduit function and it protects ISP for 'transmitting, routing or providing connections for, material through a system or network controlled or operated by or for the service provider.' Section 512 (b) limits liability of an ISP for caching and Section 512 (c) protects storage of material on the provider's system or network at the direction of the user and finally, ISPs who provide information location tools such as links or directories which are also protected, subject to certain circumstances, [Digital Millennium Copyright Act, 1988 § 512 (d)].

²⁹⁷ CHRIS REED AND JOHN ANGEL, COMPUTER LAW – THE LAW AND REGULATION OF INFORMATION TECHNOLOGY, 240 (6th ed. 2007).

respect to that message'. This definition of 'intermediary' takes into consideration both professional as well non-professional intermediaries.

III.6.ii. Rationale for ISPs Liability

Online transmission is done by the interference of third parties, i.e., the service providers. Therefore it is contended that, a law cannot be violated over the internet without intentional or unintentional involvement of service providers, who enable the communication to take place.²⁹⁸ Consequently, the liability of ISP for copyright infringement committed by third parties and the nature and scope of such liability is debated intensely. The content owners have supported the imposition of liability on ISPs since the right to receive compensation for the use and reproduction of their material vests with the copyright owner. The ISPs have opposed this argument and have asked for limitation on their liability.²⁹⁹

III.6.ii.a. Arguments for holding ISPs liable:

It becomes difficult to find the actual wrongdoer since the internet enables to retain the anonymity of the users. On the other hand the ISP is noticeable and often located in the same jurisdiction³⁰⁰. Thus, it becomes convenient to make them liable in terms of tracking the culprits. In addition to that the ISPs are considered to be easy targets for initiating a litigation than the originator of the offending information content.³⁰¹ The offender may not have "the bigger pocket" to pay heavy damages whereas it is economically more viable to make ISP liable since ISPs are expected to have adequate resources to pay compensation with its share of profits. ISPs remain in a better position for policing the internet and supervising the activities over the internet.³⁰² ISPs can close down the offending webpage to stop further infringement. Moreover, when the wrongdoer and the

²⁹⁸ RAMAN MITTAL AND S K VERMA, LIABILITY OF INTERNET PROVIDERS FOR COPYRIGHT INFRINGEMENT - LEGAL DIMENSIONS OF CYBERSPACE, 147 (1st ed. 2004).

²⁹⁹ Thilini Kahandawaarachchi, *Liability of Internet Service Providers for third party online copyright infringement: A Study of the US and Indian Laws*, 12 Journal of Intellectual Property Rights, 553, 555-56 (2007).

³⁰⁰ V K Unni, *Internet Service Provider's Liability for Copyright Infringement – How to clear the misty Indian Perspective*, 8 Richmond Journal of Law and Technology, 13, 15-16 (2001).

³⁰¹ Electronic Commerce (EC Directive) 2002, SI 2002/2013.

³⁰² Subhasis Saha & Sourav Keshri, *Challenges to copyrightable work in cyberspace*, 13 Journal of Intellectual Property Rights, 35, 36-37(2008).

right holder operate in multiple jurisdictions, it is convenient to assert the claim against ISP in the jurisdiction of the claimant or in a jurisdiction that has given favourable decisions in similar claims.

III.6.ii.b. Arguments for limiting the liability of ISP

To counter the arguments raised by the right holders to hold the ISPs liable, they have opined that they are being made the scapegoats of the situation without having any fault of their own. They have lobbied for limiting their liability.³⁰³ ISPs have argued that they are only ‘passive carriers’ and ‘mere conduits of information. Moreover, they also contended that they are merely messenger and not a publisher.³⁰⁴ In *Fonovisa v. Cherry Auctions*,³⁰⁵ the court held that providing with the ‘site and facilities’ for direct infringement is ‘materially contributing’ to the infringing conduct of another and will give rise to liability. In *Sony Betamax case*,³⁰⁶ the court held that “merely providing the means to accomplish an infringing activity” was not adequate without constructive knowledge of the infringing activity. It is difficult to expect from ISPs that they will filter all the content passing through their systems considering the huge number of transactions that take place every day. Even after persistent monitoring, 100% precision cannot be achieved so as to prevent every single instance of copyright infringement. Furthermore, holding ISPs liable would hinder the growth of internet in such an emerging phase.³⁰⁷

III.6.iii. Legal framework regulating ISP liability in India

Presently, the law related to determination of ISP liability is uncertain in India. The issues concerning liability of ISPs regarding copyright infringement of third party content uploaded by its subscribers are not explicitly dealt with by the Indian Copyright Act of 1957. The present

³⁰³ Thilini Kahandawaarachchi, *Liability of Internet Service Providers for third party online copyright infringement: A Study of the US and Indian Laws*, Journal of Intellectual Property Rights, 2007, Vol. 12, Issue no. 6, pp. 553-561

³⁰⁴ 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, 322-23 (2009).

³⁰⁵ 847 F. Supp. 1492 (E.D. Cal. 1994).

³⁰⁶ *Sony v. Universal Studios* 464 U.S. 417 (1984).

³⁰⁷ 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, 323-24 (2009).

legislation on copyright was enacted without prior knowledge of the emergence of the internet. Even after the amendment of the Copyright Act in 1994 and 1999, there was no mention of ISP liability.

Section 51 (a) (ii) of the Copyright Act, 1957 provides that if any person allows the work to be exposed to the public with a view to making gains, without an express license given by the Registrar of Copyright, that amounts to copyright infringement. Moreover, liability is attracted only when anyone allows ‘any place’ to be used for copyright infringement. The liability of ISP arises when the computer servers and other devices storing infringed materials are located at their business place thereby qualifying an ISP under the expression ‘any place’ used in the provision. The gist of the ISP liability is whether the ISP is making any profit and thereby benefiting out of the infringement. In the usual course, the users always pay the ISP for providing services. In addition ISPs also earn from advertisements by tying them up with material infringed. The only exception to liability is to prove that they did not know that their activities were causing harm to the copyright owner.

Under Section 63 of the Copyright Act, any person who knowingly infringes or abets the infringement of copyright will be criminally liable. Whether an ISP can be said to have abetted the infringement of copyright is a question of fact. But granting a wilful permission to the users brings liability on ISPs under Section 63 of the Copyright Act. Aiding and abetting the infringement is to be strictly proved in the court of law, as it is a penal provision.

- **Safe Harbour Provision under Indian Laws & ISP Liability for Copyright Infringement:**

The provision for secondary liability for copyright infringement under the Copyright Act, 1957 coupled with the specific ISP liability provisions³⁰⁸ present in the Information Technology Act, 2000, as amended in 2008, acted as the basis for ‘safe harbour’ for ISPs until the IT (Intermediary Guidelines) Rules 2011 (‘2011 Guidelines’) were enacted. Sec. 2 (w) of the IT Act defines

³⁰⁸ Sections 79 and 81, Act No. 21 of 2000, as amended by the IT (Amendment) Act, 2008.

‘intermediaries’.³⁰⁹ The exemption under Section 79 of the IT Act, 2000 includes telecom service providers, internet service provider, search engines, online market places, cyber cafes, etc. At the same time by Section 81 of the IT Act confers an overriding effect over all other Acts in force, provided that it did not prevent anyone from enforcing their rights under the Copyright Act or Patents Act.

The 2011 Guidelines extends the safe harbour provisions to copyright infringement particularly and all other forms of IP rights infringement generally. However, the ISP is required to observe the notice and takedown procedures and due diligence, mentioned section 79 as provided in the guidelines. Moreover, under the 2011 Guidelines, the intermediaries are required to set certain rules and regulations for the users, including a prohibition on posting infringing material over the internet. Any person can request the intermediary to take such material down when they feel aggrieved by the alleged infringing material online. But, these guidelines do not provide for the creator of the content to respond to this complaint. They do not even provide for the intermediaries to inform the user who posted the content regarding the complaint. Further, the intermediaries which do not comply with a take-down notice lose the protection of the ‘safe-harbour’ so created. Thus the safe harbour protection available to intermediaries under Section 79 is dependent on their observing due diligence in accordance with Rule 3 of 2011 Guidelines.

In the Parliamentary Standing Committee’s Recommendation it has been mentioned that, “The fact that both Sections 79 and 81 contain non obstante clauses has made it extremely difficult to interpret the two sections harmoniously, to pinpoint which provision supersedes the other and to understand what the law on the subject is” and it is because of this conflict over applicability of Section 79 to cases of copyright infringement, that there was a move to amend and introduce exceptions within the copyright law itself.

III.6.iv. Judicial interpretation on ISP liability in India:

³⁰⁹ “Intermediary with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message”.

The conflicting position of law regarding ISP liability is illustrated by two cases filed by Super Cassettes ('SCIL') against Yahoo and MySpace. The decisions given by the Delhi High Court in these cases explain the judicial attitude in this regard.

III.6.iv.a. Super Cassettes Industries Limited v. Yahoo Inc. and another³¹⁰

On 30 May 2008, the Delhi High Court issued a notice to Yahoo Inc. and its Indian subsidiary Yahoo web Services (India) Pvt. Ltd. on a suit filed by SCIL, owner of the largest Indian music label 'T-Series' for infringement of their copyright caused by unlicensed streaming of SCIL's copyright works on Yahoo's portal video.yahoo.com

III.6.iv.b. Super Cassettes Industries Ltd. v. MySpace Inc. & another³¹¹

The decision of the Delhi High Court in this case is an indicator to the direction that copyright litigation is likely to take in the coming years, in the context of content sharing and streaming sites. The plaintiff of this case, Super Cassettes Industries, is involved in the business of music distribution and film producing and claims to be the owner of several sound recordings, cinematograph films, songs etc. There are two defendants in this case; defendant no. 1 is MySpace Inc. which is based in the United States of America and it is stated to be a social networking and entertainment website. It is also said to offer a variety of applications for activities such as sharing; viewing music, images, cinematograph works etc. Defendant no. 2 is the owner of MySpace Inc, defendant no. 1, which is stated to be a division of News Corporation, Fox Interactive media which offers border free online network which caters to its customers by providing various tools.

In 2007 the plaintiff and the defendants entered into a non-disclosure agreement. The defendants sought to procure a license from the plaintiff to display the plaintiff's copyrighted material. However the discussion between the parties was not successful. It was found that the copyrighted material of plaintiff was still available on the website of the defendants without the consent from the plaintiff. The plaintiff sent legal notice to the defendants. While responding to the notice the defendants assumed that the copyrighted material of the plaintiff had been taken down from the

³¹⁰ CS (OS) No. 1124 of 2008, Delhi HC.

³¹¹ MIPR 2011 (2) 303, 2011 (48) PTC 49 (Del)

internet. Afterwards the plaintiff found that the defendants had not removed the plaintiff's copyrighted material from its website, although it was assured that that the alleged content would not be available on their website. Since the assurance given by the defendants were not fulfilled, the plaintiff initiated the suit before the Delhi High Court and the plaintiff also sought interim relief before the same court.

The defendants claimed that being an intermediary under Section 2 (w) of the IT Act, they are protected under Section 79 of the IT Act. It was also contended that they were merely enabling the content sharing on their website. Moreover, they had no knowledge of such sharing until and unless it was brought to their notice by the concerned content owner. To establish that specific measures had been undertaken to restrain infringement and they did not directly encourage or assist in infringing activity, the defendants attempted to establish that they had developed different technology in this regard. They are (a) 'The Hash Block Filter'; (b) 'Take Down stay Down' and (c) 'Rights management tool'. These tool prevents uploading of all flagged content, owned by the copyright holder, if there is a match of more than 30 seconds.

While referring to Section 81 of the IT Act the plaintiff contended that Section 79, or any other provision of the IT Act, cannot aid a copyright infringer. The copyright infringement was committed before the sending of notice and there is no remedy for the owners and the safe harbour provisions under the provisions of DMCA. Therefore DMCA was held to be not applicable in this case. Moreover the notice and take down system did not address the concern of the copyright owners and the case must be resolved on the basis of Indian law.

The court upheld the contention of the plaintiff. Moreover, the Delhi High Court observed that "the combined effect of reading Section 81 and the proviso was that the provisions of the IT Act may override other laws for the time being in force but they could not restrict the rights of the owner under the Copyright Act and the Patents Act." Further, it was held that in this case the defendant's conduct would not come within the purview of the immunity provided under Section 79 of the IT Act. The rationale behind this conclusion was illustrated by the Delhi High Court. The court held that while the fulfilment of either one of the conditions under Sections 79 (2) (a) or 79 (2) (b) would suffice, the immunity under Section 79 (1) would not be available unless the due

diligence requirement under Section 79 (2) (c) was mandatorily satisfied along with the condition in Sections 79 (2) (a) or 79 (2) (b).

Section 79 (2) (a) of the IT Act, 2000 was held not to be attracted in this case since the defendant activities were not restricted to facilitating access to the communication system where the third party information was hosted, transmitted or stored. Since it was concluded that the defendant was altering the content uploaded on its website, it was determined that the conditions stipulated in Section 79 (2) (b). However, the condition of non-modification of the information contained in the transmission was held not to be satisfied. The Court also illustrated that due diligence was required at the time of the discharge of the duties by the intermediary and consequently Section 79 (2) (c) was not inapplicable in the present context. Thus if the defendant was informed about the rights of the plaintiff in certain works, the defendant had to perform the preliminary check in all the cinematograph works relating to Indian titles before communicating the works to the public rather than falling back on post infringement measures. When the defendant uploaded the copyrighted contents of the user on their server and then modified the same, the due diligence was not held to be satisfied. This implies that the defendant had the opportunity to maintain a check on the copyright protected works. However the defendant did not making any use of them. The reason for the same, may be, known to them only.

III.7. Technological protection measures under copyright law

As discussed above, intellectual property is complementary to technology.³¹² It is an area of law that evolves with the development of technology to fulfil the social, political and economic needs. The emerging Information and Communication Technology along with the increasing use of computers have given rise to digital economy.³¹³ The new economy is changing the way the products are created, the nature of products themselves and how they are distributed and transacted. The accessibility of digital technology, with its various advantages especially quality, allowed more and more works to be converted into digital format and creation of newer works in digital format.³¹⁴ The more the works to be created in the digital format, the more became their

³¹² P Ghatak, R C Tripathi and A K Chakravarti, *Digital Rights Management: An Integrated Secure Digital Content Distribution Technology*, 9 Journal of Intellectual Property Right, 313, 314-15 (2004).

³¹³ Ibid.

³¹⁴ Arathi Ashok, *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 Journal of Intellectual Property Rights, 521, 522-23 (2012).

unauthorised use. The ease with which the authored works in digital form can be currently replicated poses a difficult problem for the law to handle.

This led to the creation of technological measures (TMs) which are capable of preventing these unauthorised uses either by preventing access to these works or by preventing access to these works or by preventing certain activities. These technologies are commonly known as access control technological measures³¹⁵ and copy control technological measures,³¹⁶ respectively.³¹⁷ But these technological measures employed by owners of the work, were not welcomed by consumers of goods and services in the digital market. This conflict of interest led to the creation of technology capable of circumventing the TMs applied by authors for the protection of their TMs applied by authors for the protection of their works which nevertheless resulted in the unauthorised use of the works. Consequently, authors lobbied to get protection for these technological measures that were being employed to protect copyrighted work.³¹⁸

III.7.i. Digital Rights Management - Meaning

Digital Rights Management (DRM) is a technology that lets right holders safely distribute and sell their content online in a digital form. With DRM content owners can configure access and usage rules for their own content. Access rules may address the price of the content, the frequency and duration of access and whether the user is authorised to save, print or transfer the content of the users. This allows for new business models such as trial before purchase, promotional previews, rentals based on play counts or expiration dates, subscriptions and purchases of streaming or downloadable media.

There are two elements of every DRM, “Technological protection measures (further referred to as TPM) defines in the Art. 6(3) of the INFOSOC Directive as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works

³¹⁵ Access control technological measures are of various types including: (1) control access at the outlet, e.g., ‘regional codes’; (2) control access at user level; (3) control access of acquired copy of the work, e.g., content scrambling system (CSS); and (4) control over subsequent access, e.g., serial copy management system (SCMS)

³¹⁶ They are called ‘copy control TMs’ because the majority of such TMs are used to prevent unauthorised copying though some are used to prevent other activities like unauthorised printing, etc. Examples of such TMs include CSS, CD Cops, key2Audio, MediaMax CD-3, etc.

³¹⁷ Arathi Ashok, *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 *Journal of Intellectual Property Rights*, 521, 523-24 (2012).

³¹⁸ *Ibid.*

or other subject matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law. Right management information (further referred as “RMI”) legally defined as information which identifies the work, or information about the terms and conditions of use of the work and any numbers or codes that represent such information when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to public.

Technological protection measures and Rights management information joined together fulfil the general definition of DRM, therefore DRM enjoy also the full protection of law. Almost every new DRM implementation has been compromised and hacked and thus another layer of protection, apart from the technological, was needed. For TPMs and RMIs to be effective, their source of power must be externally derived and this is where anti-circumvention laws come into play. Anti-circumvention laws make it illegal to tamper with, alter, or otherwise work around the technical (software or hardware) implementations of TPM or RMI.³¹⁹ Consequently the entertainment industry lobbied to put the force of law behind DRM and thus prohibit circumvention of TPM, removal of RMI and trading in circumvention tools.

III.7.ii. International Legal Framework

Like most of the technologies, DRM technologies are not fool-proof and many of the DRM applications have been subject to circumvention.³²⁰ The World Intellectual Property Organisation (WIPO) brought forward two internet treaties in 1996, representing the concerns of the international community to this emerging digital challenge. They are the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). Article 11 of the WCT³²¹ and Article 18 of the WPPT obligate the contracting parties to take adequate legal measures and effective legal remedies against the circumvention of “effective” technological measures used by the right

³¹⁹ Swaraj Paul Barooah, *Disruptive (Technology) Law? Examining TPMs and Anti-Circumvention Laws in the Copyright (Amendment) Act, 2012*, 5 NUJS Law Review, 583, 586-87 (2012).

³²⁰ Pamela Samuelson and Scotchmer Suzanne, *The Law of Economics of Reverse Engineering*, 111 Yale Law Journal, 1631 (2002).

³²¹ “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

holders. Similarly Art. 12 of the WCT³²² and Art. 19 of the WPPT obligate the contracting parties to take ‘adequate and effective’ legal remedies against unauthorised tampering of rights management information and certain dealings with works or copies of works with the knowledge that the electronic rights management information in those works have been tampered without authority. While these provisions have provided sufficient scope for flexible transposition of the spirit of these treaties into national legislation of contracting states, the general trend witnessed, particularly from the chief supporters of the treaty like the United States and the European Union, has been to take an approach highly in favour of right holders and information industries.³²³

III.7.iii. Digital Rights Management under Indian Legal Framework

After the amendment in 1994, the Indian Copyright Act, 1957 incorporated certain provisions related to protection of anti-circumvention technology. ‘Plate’ is defined to include those devices that aid or intend to aid the reproduction of works.³²⁴ The provision used the term ‘other devices’ after specifying certain other technologies that are used for reproducing existing works. In this context, the issue is whether the circumventing technology includes ‘plates’.³²⁵ For instance, DeCSS is a technology meant to circumvent a protective technology called content scrambling system (CSS) which constitutes a two part interlocking system between digital video disc (DVD) and the DVD player.³²⁶ If both these systems are authorised and complementary certain acts like copying will take place. Evidently, the technology is intended to stop unauthorised reproduction. As per the definition of ‘plates’ all the devices included therein are the ones capable of producing copies relating to different media in which they apply. Logically, the same is the case in respect of use of

³²² “(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.”

³²³ Dan Burk L and Julie Cohen E, *Fair Use infrastructure for rights management systems*, 15 Harvard Journal of Law and Technology, 49 (2001).

³²⁴ ‘Plate’ is defined under Section 2 (t) of the Indian Copyright Act, 1957

³²⁵ Arathi Ashok, *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 Journal of Intellectual Property Rights, 521, 524-25 (2012).

³²⁶ Id. at p. 521

De-CSS in relation to the work protected by CSS. Therefore, De-CSS can be concluded to come within the purview of definition of plate under Section 2 (t) of the Copyright Act.

Liability is attracted only when plates are made or kept in possession for the purpose of making infringing copies of the work.³²⁷ The term ‘infringing copy’ as per section 2 (m) of the Act means a copy made through reproduction in contravention of the provisions thereof. Therefore, an infringing copy is a copy which is the consequence of a reproduction prohibited by the Copyright Act. Therefore a clear connection has been established between the violation of the reproduction right and infringement of copyright. As long as the possession or manufacture of plates will not invite any liability. Applying this to the digital context, although the technology will require reproduction, as long as such reproduction for creating infringing copies, liability will not be attracted.

The Indian Copyright Act, 1957 permitted the use of works by third parties so as to ensure that the third parties can meaningfully enjoy their personal and social life.³²⁸ This enjoyment would be prejudicially affected by equating plates and circumventing technology. This is one of the reasons which led other countries to enact a separate set of principles to deal with circumvention technology. The lack of provisions related to ‘plates’ in the Indian Copyright Act in other jurisdictions, aims to accommodate the new technology meaningfully so that the owners of the work as well as the public can enjoy and attain benefits of the work in a beneficial manner.³²⁹ Expanding the scope of existing law so as to accommodate the latest technology, which itself has not been standardised nor for that matter completely evolved, will create a situation of further uncertainties leading to social disruption. This realisation appears to have paved way for the enactment of a new provision dealing exclusively with technological measures and its circumvention.³³⁰

III.7.iii.a. Technological Protection Measures under the Copyright (Amendment) Act, 2012

³²⁷ Id. at p. 522

³²⁸ Id. at p. 524

³²⁹ Ibid.

³³⁰ Ibid.

One of the most important changes made by the recent Copyright (Amendment) Act, 2012 is the introduction of specific provisions for protecting the technological measures applied by the copyright holder. As is evident from the statement of objects and reasons in the Copyright (Amendment) Bill, 2012 as well as debates in the Parliament, the DRM provisions were introduced primarily with the objective of facilitating India's membership in the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty.³³¹ According to Sec. 65 A (1) relating to protection of technological measures, if any person circumvents an effective technological measure used for the purpose of protecting any of the rights conferred under the Copyright Act, with the intention of infringing such rights, s/he shall be punished with imprisonment which may extend up to two years and shall also be fined.

A. Subject matter of the Provision: The provision attaches liability to every person who 'circumvents an effective technological measure'. However, it is to be noted that neither the term 'circumvention' nor the terms 'technological measure' or 'effective technological measures' have been defined in the Act. The insertion of the word 'effective' is initially confusing. The issue which deserves attention here is 'can a truly 'effective' technical measure be circumvented in the first place?'³³²

Strictly interpreted, the dictionary definition would mean that if a TPM can be circumvented, it is not an 'effective' measure. However, such a definition would be contradictory to the purpose of the legislation. Looking at the rest of the sentence, there is nothing else which helps in understanding the scope of the word 'effective'. In fact, the corresponding provisions in the WCT and the WIPO Performances and Phonograms Treaty ('WPPT') have also left these terms undefined so that their member countries could contextualize them according to their domestic needs. In US, § 1201(a) (3) of the Digital Millennium Copyright Act, 1998 ('DMCA'), defines technological measures that 'effectively' control access to a work, as measures that require application of information, process or treatment in ordinary course of operation, with authority of the copyright owner, to gain access to the work.

³³¹ Arul George Scaria, *Does India Need Digital Rights Management Provisions or Better Digital Business Management Strategies*, 17 *Journal of Intellectual property Rights*, 463, 463-64 (2012).

³³² Swaraj Paul Barooah, *Disruptive (Technology) Law? Examining TPMs and Anti-Circumvention Laws in the Copyright (Amendment) Act, 2012*, 5 *NUJS Law Review*, 583, 588-89 (2012).

In the EU, European Directive 2001/29/EC of the European Parliament defines 'effective' technological measures as those that are protected by access control or protection processes such as encryption, scrambling, or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective. The Indian legislation however has left it completely open with no guidance from the text other than specifying that it will only cover actual circumvention.

Looking at the provision again, it is seen that not all anti-circumvention measures, even when against 'effective' measures, are illegal. The circumvented TPMs also need to have been applied for the specific 'purpose of protecting' copyrights, and this circumvention needs to be done with the 'intention' of infringing upon these rights. This is important as it does not grant any legal sanction to technical measures that a company may include in its goods which simply provide the company with an extra measure of control over the goods after sale rather than protecting copyright. Furthermore, inserting the 'intention' requirement means that the accused must have both the knowledge and desire to infringe upon the copyright.³³³

B. Activities Covered and Actors targeted: The new Indian provision uses the term 'who circumvents' indicating that the activity covered is that of circumvention. The activity intended to be covered is the avoidance or bypassing of an effective technological measure. Moreover, the words in the provision imply that there must be an actual circumvention of an effective TM. This means that liability is imposed on the person who does the act of circumvention.³³⁴ The act of circumvention attracts liability only when there is an 'intention of infringing rights'. The activity of a person is covered only if he does the act with the desire to make an infringing copy.³³⁵ The only actor targeted is the person who actually circumvents an effective technological measure applied to protect the work. All preparatory activities are excluded and consequently all persons who make such preparation.

C. Rights Protected and Remedy Prescribed: Section 65A provides that it can be applied for the purposes of protecting any of the rights conferred by this Act". This provides that any technological

³³³ Ibid.

³³⁴ Arathi Ashok, *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 *Journal of Intellectual Property Rights*, 521, 526-27 (2012).

³³⁵ Ibid.

measure applied for the protection of any and all rights provided under this Act will be covered. The first category of rights protected under the Act is the economic right. Among the major rights guaranteed under the title of economic right, the right of communication of the work to the public that is most significant in the online digital context. The next set of rights guaranteed under the 1957 Act is moral rights. The protection of these rights implies that technological measures that are employed for safeguarding integrity of works also gets protection. Apart from these rights, the performers' rights and the broadcast reproduction rights also get protection. The only remedy provided under the proposed amendment is of a criminal nature. Any person against whom violation of this provision is proved shall be imprisoned for maximum two years and shall also be liable to pay a fine for which no limits have been fixed.³³⁶ The reason for this may be that the type of works could be totally different and the amount of loss that could potentially be caused to the owner is also likely to vary in magnitude.³³⁷

D. Express Exceptions: Section 65A (2) of the Copyright Act explicitly mentions that the provision shall not prevent any person from doing anything referred to therein for a purpose 'not expressly prohibited by the Copyright Act'. Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated.

This exception ensures the balance required to this provision.³³⁸ By expressly denying the applicability of this provision to anything not expressly prohibited by the Indian Copyright Act, 1957, it ensures that all the restrictions and limitations to copyright law continue to operate when TPMs are used. This is further supported by the phrase in the main provision – that TPMs must be for the “purpose of protecting” rights conferred by the Copyright Act. Thus the provision makes it quite clear that TPMs can be protected by legal sanction only when they are for the purposes of protecting rights conferred by the Copyright Act. Therefore the provision makes it explicit that

³³⁶ Copyright Act, 1957 § (1).

³³⁷ Arathi Ashok, *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 *Journal of Intellectual Property Rights*, 521, 525-26 (2012).

³³⁸ Swaraj Paul Barooah, *Disruptive (Technology) Law? Examining TPMs and Anti-Circumvention Laws in the Copyright (Amendment) Act, 2012*, 5 *NUJS Law Review*, 583, 589-90 (2012).

TPMs can be protected by legal sanction only when they are for the purposes of protecting rights conferred by the Copyright Act. To put this discussion into context, it is required to understand that copyright is a delicate balance between creator's rights and public interests. This balance is achieved by ensuring exceptions and limitations to copyrights even when TPMs are in place.

This proviso is one of the few legislations worldwide that explicitly mentions third parties who help circumvention and seems to exempt them from liability provided they fulfil certain conditions. These conditions include maintaining records of who seeks such help and the reasons they are circumventing the TPM. At the same time, these conditions carry privacy concerns. It is significant to realise that the anonymity that the internet brings, builds great value for the information produced when one removes this cloak of anonymity. There are primarily two privacy related concerns with TPMs. Firstly, in order to associate (digital) content with a purchaser, companies often require some sort of registration or submission of personal information. This allows companies to keep track of their user base, but also forces users to disclose their identity, which they may not always want to. The lack of viable alternatives to anonymously purchase such goods often means that the user does not have a 'real' choice as to whether she wants to disclose her identity or not.

Secondly, companies often introduce tracking mechanisms to follow up with the information gathered from step one. Tracking allows them to gather more information over their target audience as well as keep some measure of control over the digital file, thus allowing them to maximise rents. In addition to this, users who want to circumvent TPMs for fair dealing purposes or other legitimate reasons need to supply their personal details and/or reasons in order to be able to circumvent the TPM. In other words, personal information is required to be given to private companies, for an individual to take legitimate action that is outside the purview of copyright law.

Section 65A (2) provides exception dealing with encryption research.³³⁹ These sub-clause in the provision has provided welcome relief to programmers and computer engineers, as well as users

³³⁹ "(2) Nothing in sub-section (1) shall prevent any person from, (b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; (d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorisation of its owner; or (e) operator"

who take an interest in discovering and fixing security issues within TPMs as it explicitly provides them with a safe harbour. When it is read together with the fair dealing exceptions of research (§ 52), this allows one to not only examine and look into these security issues, but also to disclose and publish their research findings. As TPMs are externally 'imposed' technical measures which aren't always disclosed to the consumer, it is possible that the consumer may be using software/technology which may render them vulnerable to security risks without their knowledge. If the TPMs are properly disclosed to the consumer, this security risk can be reduced. The addition of a potential security risk to the previously mentioned privacy and interoperability concerns, is undesirable to say the least. Furthermore, as they attach liability to those who circumvent TPMs, anti-circumvention laws pose threats to those who seek to display the existence of, or solutions to security breaches caused by DRMs, thus disallowing means to address these concerns.

Section 65A (2) allow doing anything necessary to circumvent technological measures intended for identification or surveillance of a user.³⁴⁰ The legislative intent to prioritize privacy over copyrights is evident in this provision. As mentioned above, DRMs by their nature, tend to require identification and/or surveillance. When a software or hardware is linked to an authorization of some sort, then personal information of the user is required for the purpose of identification. However, it is possible to ensure that there are multiple layers of anonymity between the user and the authorization check, which allow a user to show that she is authorized without necessarily revealing details of her identity. As an example, all authorized persons can have a login key, which are coded a certain way when entered. This can be made more secure by, for instance, combining a login key with a machine specific serial number of an authorized machine in a way that, when combined, they cannot be correctly separated into their two component parts once again.

This ensures that companies must provide such multi layered levels of security, anonymity and protection, if they want to insert TPMs. This provision puts the onus on TPM makers to do so, if they wish to use §65A against circumventors. This current portion of the provision directly

³⁴⁰ “(2) Nothing in sub-section (1) shall prevent any person from, - (f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user.”

addresses the privacy concerns listed above, and to the extent of the privacy issues not created by the third party proviso mentioned above, this successfully addresses them.

E. Facilitating Circumvention: In respect of the liability of a person who facilitates the creation of technology to circumvent Section 65A has incorporated a novel feature. The Indian Copyright Act explicitly provides that a third party can help a person to circumvent a technological measure provided such circumvention is not to do any activity prohibited by the Act.³⁴¹ To facilitate such circumvention and to monitor the same, Section 65A obligates that a record has to be kept of the person seeking such circumvention and also the reason for it.³⁴² The provision is incorporated considering the fact that it is not within the capacity of every person to have the technical knowhow to circumvent a technological measure applied to a work so as to satisfy his personal legitimate needs. In most cases of circumvention, there is a requisite for a certain degree of professional expertise and the section ensures that this professional expertise is made available to the common man.

III.7.iii.b. Rights Management Information

Rights management information (RMI)³⁴³ is an information that identifies content protected by copyright or related rights, the rights owners in such content and the terms and conditions of use associated with it.³⁴⁴ RMI enables the authors to enforce their moral right of attribution. It is an important aspect of digital management of rights. RMI has formed the ground for new licensing systems and can certify the authenticity of works and phonograms and can be a powerful means against copyright infringements.³⁴⁵ The information found on the copy, booklet or cover of a

³⁴¹ Copyright Act, 1957 § 65A (2) (a): “Provided that any person facilitating circumvention by another person of a technological measure for such a person shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated.

³⁴² Ibid.

³⁴³ WPPT, 1996 § 19: ‘Rights management information’ means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

³⁴⁴ IFPI, The WIPO Treaties: Protection of Rights Management Information, March 2003.

³⁴⁵ Ibid, Executive Summary.

copyrighted product helped rights owners track and prove such illegal activity in the analogue world. RMI fulfils this function in the electronic environment.³⁴⁶

RMI often takes the form of an electronic watermark placed in protected content. Watermarks can exist on their own simply as a rights owner's 'label'³⁴⁷. Watermarks may also interact with devices that receive or play content. Digital watermarking is a technique that enables information to be embedded within digital content. This information can work as the copyright holder's identity or license rules that apply to the content. Watermarking is the direct embedding of additional information into the original content.³⁴⁸ Digital watermarks give consumers confidence in the authenticity of the source of a work or phonogram. The manipulation of RMI can lead consumers to draw wrong conclusions about permitted uses and thus can have an economic effect equivalent to common fraud. One of the main aims of protection of RMI is prohibition against manipulation of RMI. In this way RMI benefits consumers.

The WIPO Treaties protect all such RMI: information about works, phonograms and performances as well as the identification of authors, phonogram producers, performers or other right owners.³⁴⁹ Most countries are finding that their copyright laws require some modernising to deal adequately with the legal protection of RMI. In India the Copyright (Amendment) Act 2012 has incorporated a specific provision relating to protection of RMI in the Copyright Act, 1957.³⁵⁰ As per the newly inserted provision, Section 65B, manipulation of RMI will attract criminal

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ P Ghatak, R C Tripathi and A K Chakravarti, *Digital Rights Management: An Integrated Secure Digital Content Distribution Technology*, 9 *Journal of Intellectual Property Right*, 313, 330-331 (2004).

³⁴⁹ WIPO Performance and Phonogram Treaty § Art. 19: "Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority."

³⁵⁰ Copyright Act, 1957 § Section 65B. "Any person, who knowingly (i) removes or alters any rights management information without authority and (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority shall be punishable with imprisonment which may extend to two years and shall also be liable to fine."

liability and the same provision prescribes the criminal remedy in respect of unauthorised manipulation of RMI.³⁵¹

III.8. Chapter conclusion

In this juncture it becomes important to understand the implications of the rulings of MP3.com and Napster on the MP3 technology. The outcome of the above mentioned decisions has serious bearing on the issue of the adequacy of existing legal framework to deal with the new challenges that the electronic environment poses.³⁵² The copyright protection attempts to maintain a balance between the rights of the authors and copyright holders over their work and the right to public access to information.³⁵³ The increasing use of internet in the present society has disturbed this balance. It is evident in the way the unauthorised copying is facilitated. In many cases the idea of free access to information is overestimated. The government attempted to deal with the challenge posed by internet on law of copyright by way of institutional regulatory efforts.

The courts are enforcing the traditional copyright law to deal with the challenges faced by the recording industries because of the widespread use of MP3 technology. However, it is observed that the courts did not consider there are differences in respect of operation of copyright law in real space and cyber space.³⁵⁴ Internet has changed the way in which people access and receive information. Copyright should protect information. However, the main concern lies in respect of the scope and extent of copyright protection in the electronic environment. The existing legal standards are not able to cope with technological developments, since the legislators were not able to anticipate such technological advances at the time of drafting of law.³⁵⁵

The scholars who advocate widespread free dissemination of information points have emphasised the importance of the P2P file sharing systems. They have emphasised that the decentralised P2P system enable the user control the information over the internet and it has the capability of altering

³⁵¹ Ibid.

³⁵² 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, 326-27 (2001).

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Liptak, A, *Is litigation the best way to tame new technology?* (Aug. 10, 2014, 2 PM) <http://www.nytimes.com/library/tech/00/09/biztech/articles/02napster.html>.

the architecture of the internet.³⁵⁶ 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.³⁵⁷

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

³⁵⁶ Sony Corp. v. Universal Studios, 464 U.S. (1984).

³⁵⁷ 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.³⁵⁸

An effective intellectual property system presupposes adequately funded arrangements for the protection of rights.³⁵⁹ 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.³⁶⁰

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

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

³⁶⁰ *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.³⁶¹ 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.³⁶² 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

³⁶¹ Id. at p. 215.

³⁶² 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.³⁶³

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”³⁶⁴, 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.”³⁶⁵ 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.³⁶⁶ 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

³⁶³ Ibid.

³⁶⁴ Tape cassettes, CDs, VCDs and DVDs

³⁶⁵ 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>.

³⁶⁶ 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.³⁶⁷ 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.³⁶⁸ 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

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

³⁶⁸ *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.³⁶⁹

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”³⁷⁰. 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

³⁶⁹ Id., at p. 311.

³⁷⁰ 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.³⁷¹

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 measures³⁷²

Measures	Moving Party	Relevant IPR	Advantages	Disadvantages	Emerging Trends
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³⁷¹ *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.*

³⁷² 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.³⁷³ 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”.³⁷⁴ Piracy has brought worries to states, world-wide capital and media industries. Piracy had occupied technology’s cultural kingdom by mid 1980s.³⁷⁵ This scenario has been augmented speedily with the emergence of the digital period and high-quality

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

³⁷⁴ Ibid.

³⁷⁵ 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?”³⁷⁶ 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.³⁷⁷

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.³⁷⁸ 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.”

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

³⁷⁷ Ibid.

³⁷⁸ 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. 100.³⁷⁹

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).³⁸⁰

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)³⁸¹. 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.³⁸² The total estimated loss of employment to the industry is estimated to be 819, 712.³⁸³ 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

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

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

³⁸¹ Ernst & Young, The Effects of Counterfeiting and Piracy on India’s Entertainment Industry (Piracy Estimation Study) (2008).

³⁸² Ibid.

³⁸³ Ibid.

billion.³⁸⁴ 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:³⁸⁵

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:³⁸⁶

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

³⁸⁴ 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)/).

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

³⁸⁶ *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.³⁸⁷ 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.³⁸⁸

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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.³⁸⁹ 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

³⁸⁷ 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>.

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

³⁸⁹ 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.³⁹⁰

Both USTR and International Intellectual Property Alliance members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.³⁹¹ 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:³⁹² 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.³⁹³ USTR expressed serious concern over India's inadequate legal framework and ineffective enforcement.³⁹⁴

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

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

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

³⁹³ Id. at p 32.

³⁹⁴ 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

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, 2008.³⁹⁵

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).³⁹⁶

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,

³⁹⁵ 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>

³⁹⁶ 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.³⁹⁷

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, 2013,³⁹⁸ 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.³⁹⁹

IV.5.ii. Major Pirated Rackets in Delhi

³⁹⁷ April 2006 State wise raid reports published by Indian Music Industry.

³⁹⁸ Anandabazar Patrika, Siliguri Edition, March 14, 2013.

³⁹⁹ 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.⁴⁰⁰

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

⁴⁰⁰ 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.

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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.⁴⁰¹ 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.⁴⁰² The civil remedies limit the infringer instantly from further dealing with the infringing products.⁴⁰³ 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,

⁴⁰¹ 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.

⁴⁰² 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).

⁴⁰³ 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.’⁴⁰⁴ 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.*⁴⁰⁵, 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.*⁴⁰⁶ 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.

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

⁴⁰⁵ 2007 (34) PTC 668 Del.

⁴⁰⁶ [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*⁴⁰⁷, 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.⁴⁰⁸ 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.⁴⁰⁹

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 goods⁴¹⁰. 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'.⁴¹¹

⁴⁰⁷ [1996] FSR 273; See

⁴⁰⁸ 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"]

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

⁴¹⁰ *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).

⁴¹¹ *Id.*, at p. 489.

In *Anton Piller KG v. Manufacturing Process*⁴¹², 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*.⁴¹³

- 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

⁴¹² [1976] FSR 129.

⁴¹³ (1976) 2 All ER 330.

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

In *Autodesk Inc. v. A.V.T. Shankardass*⁴¹⁵, 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*⁴¹⁶, 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

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

⁴¹⁵ 2008 (37) PTC 58.

⁴¹⁶ 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*⁴¹⁷. 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*⁴¹⁸, 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,

⁴¹⁷ (1986) 3 All ER 338.

⁴¹⁸ (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’.⁴¹⁹

EMI Records Ltd. v. Kudhail⁴²⁰ 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 Company⁴²¹. 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

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

⁴²⁰ [1985] FSR 36.

⁴²¹ 499 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*⁴²² 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*⁴²³ 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

⁴²² [2003] FSR 22.

⁴²³ 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 others⁴²⁴ 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 Enterprise⁴²⁵, 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 others⁴²⁶, the plaintiff, producer of movie, ‘Players’, obtained John Doe order under Order 39 Rule 1 and Rule 3 of CPC

⁴²⁴ FAO (OS) No. 211 of 2010.

⁴²⁵ CS (OS) No. 384 of 2011.

⁴²⁶ 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.⁴²⁷ 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.”*⁴²⁸

The verdict given in Reliance Big Entertainment Pvt Ltd. v. Jyoti Cable Network & Others⁴²⁹ (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 others⁴³⁰, the plaintiff, producer of movie ‘Bodyguard’ obtained a John Doe order under Order 29 Rule 1 and Rule 3 of CPC, 1908

⁴²⁷ 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>.

⁴²⁸ Ibid.

⁴²⁹ CS (OS) No. 1724 of 2011.

⁴³⁰ 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*⁴³¹, 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 Court⁴³² dated 14th 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.*”⁴³³

⁴³¹ CS (OS) No. 821 of 2011.

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

⁴³³ 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*⁴³⁴, 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.⁴³⁵

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*.⁴³⁶ 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.⁴³⁷ In 2015, producers of movies like, ‘Bombay Velvet’ and ‘Piku’⁴³⁸ 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 Court⁴³⁹ 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

⁴³⁴ C.S. No. 208 of 2012.

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

⁴³⁶ *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>.

⁴³⁷ *Ibid*.

⁴³⁸ *‘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>.

⁴³⁹ *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.⁴⁴⁰ 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

⁴⁴⁰ 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*,⁴⁴¹ 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/CPUs 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/CPUs and the original hard discs are then sealed and handed over to the defendants.⁴⁴²

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.

⁴⁴¹ 171 (2010) DLT 791.

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

In *Pillalamarri Lakshikantham v. Ramakrishna Pictures*⁴⁴³ 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."⁴⁴⁴ 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 remedies⁴⁴⁵, 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.

⁴⁴³ AIR 1981 AP 224.

⁴⁴⁴ Ibid.

⁴⁴⁵ 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*⁴⁴⁶ 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.

⁴⁴⁶ 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*⁴⁴⁷ 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.

⁴⁴⁷ MIPR 2007 (1) 72.

In United States, in the case of *Blanch v. Koons*⁴⁴⁸, 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.”⁴⁴⁹

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.*⁴⁵⁰, 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.”⁴⁵¹

In *Sakku Bai Ammal v. Babu Reddiar*⁴⁵², 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

⁴⁴⁸ 329 F. Supp. 2d 568 (S.D.N.Y. 2003).

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

⁴⁵⁰ (1979) 1 MLJ 213.

⁴⁵¹ *Ibid.*

⁴⁵² 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.⁴⁵³

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.⁴⁵⁴ 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.⁴⁵⁵

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

⁴⁵³Shree 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).

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

⁴⁵⁵ 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.⁴⁵⁶ 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.”⁴⁵⁷ 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.⁴⁵⁸

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

⁴⁵⁶ 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).

⁴⁵⁷ 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>.

⁴⁵⁸ 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 63⁴⁵⁹ 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.⁴⁶⁰ 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.⁴⁶¹ 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

⁴⁵⁹ 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.

⁴⁶⁰ Copyright Act, 1957 § 63, proviso.

⁴⁶¹ 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 plate⁴⁶², 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 Nepali⁴⁶³ 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

⁴⁶² 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;

⁴⁶³ 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*⁴⁶⁴, 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*⁴⁶⁵. 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

⁴⁶⁴ 1994 (2) Crimes 488.

⁴⁶⁵ (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 1st 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 Assam⁴⁶⁶, 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

⁴⁶⁶ 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 Pradesh⁴⁶⁷, 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

⁴⁶⁷ 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.⁴⁶⁸

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

⁴⁶⁸ 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*⁴⁶⁹ 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

⁴⁶⁹ (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, 1957.⁴⁷⁰ 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

⁴⁷⁰ 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*.⁴⁷¹

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.⁴⁷² 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.⁴⁷³ 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*,⁴⁷⁴ which is a landmark authority

⁴⁷¹Swraj 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

⁴⁷² Copyright Act, 1957 § 53(1).

⁴⁷³ Copyright Act, 1957 § 53(4).

⁴⁷⁴ (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.⁴⁷⁵

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

⁴⁷⁵ 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*,⁴⁷⁶ 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.⁴⁷⁷ 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.

⁴⁷⁶ 1994 Cri.L.J. 421.

⁴⁷⁷ 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.⁴⁷⁸

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

⁴⁷⁸ 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.⁴⁷⁹

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 bargains⁴⁸⁰ 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 prosecutors⁴⁸¹ and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful.⁴⁸²

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

⁴⁷⁹ Ibid.

⁴⁸⁰ The recording industry reports more than 50 plea bargains in 2014

⁴⁸¹ There are no dedicated or IP expert prosecutors

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

law enforcement and are considered to be forerunners in protection of copyright. Though, different reports and statistics have portrayed a picture of ‘piracy’ affected entertainment and content industry in United Kingdom and United States of America in respect of online and physical world, resulting into trade, revenue, employment losses and many other implications. Both the jurisdictions have introduced specific legislations recently to curb copyright infringement over the internet. Online enforcement of copyright law has heralded a new turn with these attempts.

In the previous chapter, a detailed account of copyright enforcement under Indian legal framework has been given. Attempts have been made to identify the different issues arising out of enforcement of copyright law. Indian legal system is trying hard to make the copyright law enforcement compatible with the recent technological advances and ensure better copyright protection for the stakeholders. Law of copyright in India is, to a larger extent, based on the English copyright law. Striking similarity has been observed between Indian and American copyright enforcement mechanism. In this juncture, it becomes very much pertinent to understand the different issues, which the copyright enforcement mechanism in United Kingdom and United States of America, are facing. With the introduction of legislations specifically oriented towards determination of liability of the Internet Service Providers for prohibiting copyright infringement in Digital Millennium Copyright Act of United States of America and European Union Directives, the detailed analysis of the same in this chapter will help in developing a better and comprehensive understanding can be arrived into in respect of Indian legislative and judicial endeavours in identification of liability of the Internet Service Providers for copyright infringement in India.

THE FOCUS

The rationale behind studying the legal framework meant for enforcing copyright law in United Kingdom and United States of America is that legal system in both the jurisdiction falls under common law system. However, both the legal system 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 law enforcement and are considered to be forerunners in protection of copyright. Though, different reports and statistics have portrayed a picture of ‘piracy’ affected entertainment and content industry in United Kingdom and United

States of America in respect of online and physical world, resulting into trade, revenue, employment losses and many other implications. Both the jurisdictions have introduced specific legislations recently to curb copyright infringement over the internet. Online enforcement of copyright law has heralded a new turn with these attempts. Therefore, it becomes pertinent to have a comparative understanding of the present status of copyright enforcement in the above mentioned jurisdictions.

THE OBJECTIVE

The present chapter seeks to elaborate the existing legal status regarding enforcement of copyright in online medium, especially against the file sharing services in the specific jurisdictions of United Kingdom and United States of America. The legal framework specifically dedicated to the determination of the liability of Internet Service Providers for copyright infringement and the immunity given to them under the ‘safe harbour’ provisions will be analysed in details. In United Kingdom, the EU Directives as well as the Digital Economy Act and in United States of America, the provisions of Digital Millennium Act are intended to be examined in this regard. An attempt will made to understand the different implications of the recent cases of online copyright enforcement against major file sharing services. Various allied laws brought into force both under the jurisdiction of United Kingdom and United States of America for effective protection of copyrighted material over internet will also be studied.

V.1. Copyright Law Enforcement in United Kingdom

The present segment of this chapter focuses on the legal framework which enforces copyright law in United Kingdom. It starts with a brief description of present status relating to consumption of music in United Kingdom, especially an account of ‘pirated’ music shared among the file sharing services. Then it makes a detailed study of the civil and criminal remedies under the Copyright, Designs and Patents Act, 1988. Then efforts have been made to trace the liability of the ISPs for distribution of infringing copyrighted material and the immunity given to them for sharing third party contents under EU Directives. The last part of this statement gives a highlight of the recent introduction of graduated response system, the purpose of which is to prohibit online copyright infringement in United Kingdom.

V.1.i. Digital Music Landscape in United Kingdom

A significant moment in the history of the UK music business occurred in the first quarter of 2012⁴⁸³. The singles market is now 99.6% digital and in the albums market, almost a third of all albums in the UK were sold digitally in 2012. However, the piracy and counterfeit of music in Britain has pinned the British Music Industry and the music artists against the internet service providers, the government and the consumers. The BMI is blaming the internet service providers for not policing illegal downloads of music and has asked them to disconnect people who ignore requests to stop sharing music. Data from UKOM/Nielsen, who measure actual website usage monthly, shows that around 7 million individuals in the UK use at least one service where content is hosted illegally each month, from P2P networks and stream-ripping applications and unlicensed streaming services. Moreover, 40, 00,000 people regularly engages in file sharing in the UK; 14.5% of Brits use P2P networks to fileshare music.

Before the closure, Megaupload had more users than any other locker site in the UK, averaging 1.3 million each month in 2011. UKOM/Nielsen's data shows that in the UK at least 1.5 million use locker services each month. BitTorrent and P2P are the most popular methods of obtaining copyrighted material illegally with around 4 million people in the UK using them each month. 345, 000,000 tracks were downloaded using BitTorrent between January and June 2012. In February 2012, the High Court ordered UK ISPs to block access to The Pirate Bay and from April 2012 the blocks were implemented. According to UKOM/Nielsen data, usage of the site has plummeted by over 70% as a result.

Monitoring service MusicMetric's first Digital Music Index report estimated that over 43 million downloads were made via BitTorrent alone in just the first six months of 2012. Of these 78% were albums and 22% single tracks, equating to 345 million tracks downloaded illegally via BitTorrent. Over the same period 91.7 million tracks and 14.7 million albums were downloaded from iTunes, Amazon and other licensed services, which equate to 239 million tracks. Thus, it can be observed that, legally purchased tracks represented less than half the number of tracks downloaded in total from illegal sites and BitTorrent.

⁴⁸³ The British recorded Music Industry, Digital Music Nation - The UK's Digital Music Landscape (2013).

Illegal downloading is holding back the digital growth not just of music, but also of other creative sectors like publishing, sport, TV and film. The prevention of access to sites hosting illegal content has some precedent in the UK in the actions against Newzbin and The Pirate Bay. Support for this course of action is solid. Over half (56%) of respondents to a 2012 AudienceNet survey agreed that sites which distribute music illegally without paying artists should be blocked or closed down. 42% of file-sharers agreed that the blocking of a site would stop them acquiring infringing content. Two-thirds of respondents in the survey of 2, 000 adults believe search engines should direct people to legitimate sites ahead of illegal ones.

According to the British Music Industry, the people who download illegally generally spend less on music than people that don't. It results in undermining investment in new music. BMI attributes the increase in piracy to the piecemeal enforcement by the government. According to BMI, owners of markets where counterfeits are sold should be prosecuted. In addition, BMI wants stricter financial punishment for counterfeiters in order to have a sufficient deterrent effect in civil cases. BMI would like to see the trading standards officers granted the duty, power and resources to tackle copyright offences. BMI is of the opinion that the police and trading standards officers are operating with very limited resources. BMI attributes the problem of piracy to ISPs. BMI believes that if the ISPs do not help with the fight against music piracy, then the government will bring in legislation to make them cooperate which may include legal sanctions against the ISP firms.

V.1.ii. Enforcement of Copyright Law under Copyright, Designs and Patents Act, 1988

The Copyright, Designs and Patents Act, 1988 was enacted by the Parliament of the United Kingdom. The Act got Royal Assent on 15 November 1988. This 1988 Act repealed the whole of the Copyright Act, 1956. The 1988 Act included the previous ad hoc amendments to the 1956 Act which provided with the remedies against piracy and protection to computer software and cable programmes. Criminal provisions were incorporated to deal with piracy and counterfeiting. Chapter VI of the Copyright, Designs and Patents Act, 1988 provides with the remedies for copyright infringement. From the Copyright Act of 1709 till the end of the 19th century, infringers were no liable to be imprisoned. Under many of the previously existing copyright statutes infringers were liable in summary proceedings brought by the copyright owners to financial penalties and infringing copies were liable to be forfeited. The Musical (Summary Proceedings)

Copyright Act, 1902 which is considered to be the origin of the Musical Copyright Act, 1906 directed at pirated copies of musical works and particularly preventing the increasing practice of selling pirated sheet music in the streets at very low prices. The pirated copies did not carry the name of their printer and accordingly copyright owners experienced difficulties in finding a substantial person to proceed against. The 1902 Act provided for seizure of such copies by constables and for their destruction, forfeiture or delivery up by order of a court, although criminal liability was not established thereby. Under the 1906 Act, making or dealing with pirated copies of sheet music became punishable on summary conviction by a fine. Second offenders were liable to imprisonment for up to two months. The burden of proving lack of guilty knowledge was on the defendant.

In the 1986 White Paper, the Government asserted that the deterrent effect of the increased penalties for offences in relation to sound recordings, films and computer programs had been very successful, especially in case of video piracy and that it therefore proposed to extend the increased penalties to all categories of copyright materials. In accordance with the Whitford Committee Report, the Government proposed to make unauthorised public performance of sound recordings and films an offence and to make possession of infringing copies of any type of work an offence. The government also observed that, establishing guilty knowledge could be a major and costly obstacle for the prosecution, as for a plaintiff and this could discourage the initiation of proceedings. It accordingly proposed a “relaxation” of the requirements of guilty knowledge in criminal proceedings in identical terms to that proposed in civil proceedings for secondary infringements. Under the 1988 Act, copyright infringement is enforced by the copyright owner as the infringement of a property right. Sec. 96 of the 1988 Act provides for remedies by way of damages, injunctions and accounts. Moreover, Sec. 97A empowers the High Court in Scotland and the Court of Sessions to grant an injunction order against service provider, which has actual knowledge of another person utilising their service to violate copyright.

V.1.ii.a. Civil Remedies

A. Interim Injunction

Copinger and Skone James considers injunction to be the most important remedy for copyright infringement. Interim injunction applications are preferred in copyright infringement cases, since

in many cases damages are not considered to be a suitable relief for the injury sustained by the claimant.⁴⁸⁴ In order to apply for a quia timet injunction, claimant does not necessarily exhibit a real threat of future infringement. Evasion of the claimant's rights by the defendant may be enough.⁴⁸⁵ Interim injunction provides temporary protection to claimant against damage by the continuing violation of rights which cannot be satisfactorily compensated by damages in the action. This type of relief is temporary and discretionary in nature.

In *American Cyanamid v. Ethicon*⁴⁸⁶ the House of Lords laid down the general applications to be applied on applications for interim injunctions. Firstly, whether the claimant has shown that there is a serious question to be tried. If not, the application will be refused. If so, the next question is whether, if the claimant were to obtain a permanent injunction at trial, he would be adequately compensated by an award of damages for the loss he had sustained before the trial as a result of the continuing acts of the defendant. If damages would not be an adequate remedy for the claimant's claim appears to be.

In *Series 5 Software Ltd. v. Clarke, Laddie J.* refined the principles granting interim injunctions, which are as follows: (i) interim injunction is a discretionary relief, depending on the facts of the case; (ii) rules regarding grant of interim injunction should be kept flexible; (iii) chief factors to be kept in mind are: (a) the extent to which the remedies are likely to be an adequate remedy for each party and the ability of the other party to pay; (b) the balance of convenience, and (c) the maintenance of the status quo.

- Search Orders

On an application made to the court by a claimant without notice and in private, the High Court has jurisdiction to make a mandatory order requiring a defendant to permit or allow the claimant and his representatives to enter the defendant's premises in order to inspect articles and documents relevant to the proceeding and to remove them or take copies of them and even to take the proceeds of infringing articles. Regarding search orders the following points can be considered.

⁴⁸⁴ *Coral Index Ltd. v. Regent Index Ltd.* [1970] R.P.C. 147.

⁴⁸⁵ *Linpac Mouldings Ltd. v. Eagleton Direct Export Ltd.* [1994] F.S.R. 545.

⁴⁸⁶ [1975] A.C. 396.

Firstly, in many copyright cases, this form of order has proved to be one of the greatest efficacy, as the defendant is taken completely by surprise before he is able to deal further with the documents and articles relating to the offending acts. The defendant knows nothing of the proceedings until he is required by the order to admit the claimant and his representatives to the premises.

Secondly, three conditions must be satisfied before the courts make such an order: the claimant must show that he has an extremely strong prima facie case; the claimant must show that he has suffered, or is likely to suffer, very serious and irreparable injury if the order is not made; and there must be clear evidence that the defendant has in his possession incriminating documents or things and that there is a real possibility that he may destroy such material before any application can be made on notice.

Thirdly, the order must be served and carried out in the presence of a supervising solicitor, who is wholly independent of the claimant and his solicitors.

Fourthly, if the defendant wishes to apply to the court to discharge the order as having been obtained improperly, he is allowed to do so.

Fifthly, as a matter of the law of evidence, information derived or obtained as a result of a search order which ought never have to have been obtained is inadmissible.

Sixthly, the applicant is under a duty to make full disclosure to the court and to act in the utmost good faith.

Through this type of search order, in a copyright action the claimant can obtain from retailers the details of infringing goods as to the wholesale or manufacturing sources of supply. The jurisdiction to order disclosure exists if three conditions are satisfied: First, the third party has become mixed up in the transactions of which disclosure is required. It is sufficient to show that there is "a good indication" of wrongdoing but not every piece of a pleaded case is in position. Secondly, the order for disclosure must be for a legitimate purpose. It is not necessary for the applicant to show he intends to sue the person so identified. For instance, it is sufficient that he wants to dismiss a wrongdoer who is an employee. Thirdly, the procedure must not offend against the "mere witness" rule which prevents a person from obtaining disclosure from someone who would be compellable to give the information as a witness, either orally or on a summons to produce document.

The frequent use of search orders in proceedings for copyright infringement coupled with orders to give disclosure of names and addresses of suppliers and related documents used to give rise problems with the privilege against self-incrimination. The circumstances in which infringement takes place frequently involves the commission of criminal offences or subjects the defendant to penalties. The infringement may even involve a criminal conspiracy to defraud. In such cases, the defendant used to be able to claim the privilege against self-incrimination to set aside an order for disclosure or production of documents or information. To meet this circumstance the position as to the privilege against self-incrimination was altered by section 72 of the Supreme Court Act, 1981. The privilege has been withdrawn from a party and his or her spouse in the proceedings and circumstances specified in section 72. The withdrawal of the privilege applies to civil proceedings in the High Court for infringement of right pertaining to any “intellectual property” – i.e., “patent, trademark, copyright, design right, registered design, technical or commercial information or other intellectual property” – or for passing off. It also applies to proceedings to obtain disclosure of information relating to the infringement of such a right.

B. Permanent Injunction

If the claimant succeeds at the trial in establishing infringement of copyright, he will be entitled to a permanent injunction to restrain future infringements.⁴⁸⁷ There is no need for claimant to prove actual damage.⁴⁸⁸ An injunction is a discretionary remedy and general equitable principles will apply the “clean hands” principle.⁴⁸⁹ The claimant must show positively that the defendant is likely to continue his infringement in cases where the prima facie position is that the infringement has occurred once and for all and is finished and done with.⁴⁹⁰

However, in *Shelfer v. City of London Electric Lighting Co.*⁴⁹¹, the court observed that a “good working rule” will be that if the injury to the claimant’s rights is small and capable of being estimated in money and can be adequately compensated by a small money payment and the case

⁴⁸⁷ *Weatherby & Sons v. International Horse Agency and Exchange Ltd.* [1910] 2 Ch. 297.

⁴⁸⁸ *Smith v. Johnson* (1863) 33 L.J.Ch. 137; *Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd.* [1934] Ch 593.

⁴⁸⁹ *Ocular Sciences Ltd. v. Aspect Vision Care Ltd.* [1997] R.P.C. 289.

⁴⁹⁰ *Performing Rights Society Ltd. v. Berman* [1975] F.S.R. 400.

⁴⁹¹ [1895] 1 Ch. 287.

is one in which it would be oppressively to grant an injunction, the court may award damages in substitution for an injunction. In *Banks v. CBS Songs Ltd. (No. 2)*,⁴⁹² a record company argued that a songwriter's claim to an injunction should be refused. The court rejected this submission since the copyright might last another century it was impossible to say that the claimant could be adequately compensated by a small money payment.

C. Damages

A successful claimant is entitled to recover damages for the infringement of his right. Infringement of moral rights, performers' non-property rights and the rights of persons having recording rights are considered as breaches of statutory duty.⁴⁹³ The measure of damage for copyright infringement is the depreciation caused by the infringement to the value of the copyright as a chose in action.⁴⁹⁴ The principles set out in *General Tire and Rubber Co. v. Firestone Tyre and Rubber Company Ltd.*⁴⁹⁵ are held to be applicable in copyright cases.⁴⁹⁶ In the case of any 'economic tort', the general rule is that the measure of damages is to be that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong. There are two essential principles in valuing the claim: first, that the claimant has the burden of showing his loss and, secondly that the defendant being a wrongdoer, damages should be liberally assessed but that the object is to compensate the claimant and not punish the defendant.⁴⁹⁷

There are three main groups of reported cases which show the court's approach to such situations. The first is where the claimant is a manufacturer who exploits his right to make articles or products which he sells at a profit. The benefit of the right is realised through the sale of the article or product. In this way the infringement diverts sales from the right owner to the infringer. Usually, the measure of damages is the profit which would have been realised by the right owner if the sales had been made by him. The second group of cases is where the right is exploited by the grant of licences for royalty payments. If the infringer uses the right without a licence, the measure of

⁴⁹² [1996] E.M.L.R. 452.

⁴⁹³ Copyright, Designs and Patents Act, 1988 §103(1) and 194.

⁴⁹⁴ *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.* [1936] Ch. 323 at p. 336.

⁴⁹⁵ [1976] R.P.C. 197.

⁴⁹⁶ *Blayney v. Clogau St David's Gold Mines Ltd.* [2003] F.S.R. 19

⁴⁹⁷ *Pneumatic Tyre Co. Ltd. v. Puncture Proof Pneumatic Tyre Co. Ltd.* (1899) 16 R.P.C.209.

damages is the amount he would have had to pay by way of royalty instead of acting illegally.⁴⁹⁸ In the third group of cases the court seeks to assess the price which could reasonably have been charged for a licence. The assumption is that the actual licensor and the actual infringer are willing to negotiate with each other as they are, with their strengths and weaknesses, in the market as it exists.

However, the damages will not include loss suffered because of the commission by a third party of another tort, which has been facilitated, by the defendant's copyright infringement. The ordinary rules as to causation, foreseeability and remoteness will be applied. If it was reasonably foreseeable that the defendant's acts of infringement would cause a particular head of damage to the claimant, damages under that head ought to be recoverable. But the infringement must be an effective cause of the damage. In *Work Model Enterprises Ltd. v. Clix Interiors Ltd.*,⁴⁹⁹ the defendant copied the claimant's technical brochure and used the infringing copy for the purpose of the selling a competing product, it was held that the claimant's loss of sales was due to lawful competition and was not caused by the infringement. In *Columbia Pictures Industries v. Robinson*⁵⁰⁰, it was observed that the burden is on the claimant to prove damage, but not to a degree of certainty. Once it is shown that pirate marketing has taken place, some loss of sales will be assumed.

D. Additional Damages

In an action for copyright infringement, the court has the power to grant such additional damages as the justice of the case may require after having regard to all the circumstances and in particular to the flagrancy of the infringement and any benefit ensuing to the defendant because of infringement.⁵⁰¹ The remedy is discretionary and additional damages cannot be awarded to a claimant who has elected for account of profits.⁵⁰² 'Flagrancy' is not a necessary ingredient of additional damages, but it is a factor taken into account if it is present. It implies scandalous conduct or deceit, including deliberate and calculated infringement where a defendant reaps a pecuniary advantage in excess of the damages he would otherwise have to pay. Where the

⁴⁹⁸ Examples in copyright cases are *Brin Bros Ltd. v. Keene & Co. Ltd.* [1918] 2 Ch. 281 and *Columbia Pictures Industries v. Robinson* [1988] F.S.R.531.

⁴⁹⁹ [1996] F.S.R. 356; *Peninsular Businesses Services Ltd. v. Citation plc* [2004] F.S.R. 17.

⁵⁰⁰ [1988] F.S.R. 531.

⁵⁰¹ Copyright, Designs and Patents Act, 1988, § 97 (2).

⁵⁰² *Redrow Homes Ltd. v. Bett Brothers Plc* [1988] F.S.R. 345.

infringement has been carried out in breach of court order, it is described as ‘flagrant’.⁵⁰³ The ‘benefit to the defendant’ factor permits the court to incorporate an element of restitution in its award, having regard to the benefit gained by the defendant, for instance when the normal compensation awarded to the claimant leaves the defendant still enjoying the benefit of the infringing activities. Such a remedy sometimes overlaps to a certain extent with the remedy of an account of profits, but it is not co-extensive with it because it permits the court to take account of benefit which is not profit, for instance where a defendant has established himself in the market and generated a goodwill by a flagrant infringement.⁵⁰⁴

An award of additional damages may not necessarily contain a purely punitive damage. The rationales for this include the pertinent statutory offence and the risk that an infringer in case of concurrent copyrights be exposed to successive actions by the owners of different copyrights, each seeking punishment in respect of his own interest. However, exemplary damages may include a punitive element and are now available for infringement of copyright and the other rights covered in this work.

Sec. 97(2) of CDPA is a wide provision which allows the court to take account of the matters admitted as aggravation at common law that is damages purported to take account of injury to the claimant’s proper feelings of pride and dignity, humiliation, distress, insult or pain caused by defendant’s conduct. There are number of cases, reported under the 1988 Act where additional damages have been awarded. *Springsteen v. Flute International Ltd.*,⁵⁰⁵ was a case concerned with manufacture and sale of infringing CDs and the infringement had not been particularly beneficial to the defendants, the court had in mind a sum of one pound per infringing CD produced and not sold and five dollar per infringing CD sold. In *Nottinghamshire Healthcare National Services Trust v. News Group Newspapers Ltd.*⁵⁰⁶, when a newspaper had published a stolen photograph of an inmate of a mental hospital, ordinary damages were assessed at 450 pound and additional damages were assessed at 9,000 pound each.

E. Account of Profits

⁵⁰³ *Sony Computer Entertainment Inc. v. Owen* [2002] EWHC 45.

⁵⁰⁴ *ZYX Music Ltd. v. King* [1995] F.S.R. 566.

⁵⁰⁵ [1999] E.M.L.R. 180.

⁵⁰⁶ [2002] EWHC 409

An alternative remedy to damages is an account of profits, which was originally an equitable remedy incidental to the right of an injunction.⁵⁰⁷ The account is of net profit; for example, the sale price of the infringing article, less manufacturing and delivery costs.⁵⁰⁸ The court will grant an account where there has been deliberate, knowing infringement, but it appears that it may refuse an account if the infringement has been entirely innocent. The court will not refuse to grant an account merely because damages might be an adequate remedy.⁵⁰⁹ In *Colburn v. Simms*,⁵¹⁰ the principle of granting account was laid down. It was stated,

“It is true that the court does not by an account, accurately measure the damage sustained by the proprietor of an expensive work, from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account as the nearest approximation it can make to justice, takes from the wrongdoer all the profits he has made by his piracy and gives them to party who has been wronged. In doing this the court may often give the injured party more, in fact, than he is entitled to, for non constat, that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book and had not been committed. The court of equity, however, does not give anything beyond the account.”⁵¹¹

An account of profits will not extend to the matters not quantifiable as “profits”, such as the acquisition of an enhanced position in the market.⁵¹² For these purposes, the accounting defendant is treated as if he had carried on his business on behalf of the claimant. However, a claimant cannot increase his claim by arguing that the defendant could or should have generated higher profits. It is no answer to a claim for an account that the defendant could have made the same profits by following an alternative, non-infringing course.⁵¹³ Although an account of profits is an effective remedy, it is very difficult to take where part only of the defendant’s material infringes the claimant’s copyright. In those cases, attempt should be made to apportion profits according to the

⁵⁰⁷ Copyright, Designs and Patents Act, 1988 § 96(2).

⁵⁰⁸ *My Kinda Town v. Soll* [1983] R.P.C. 15.

⁵⁰⁹ *Wienerworld Ltd. v. Vision Video Ltd.* [1988] F.S.R, 832.

⁵¹⁰ (1843) 2 Ha. 543.

⁵¹¹ *Ibid.*

⁵¹² *Redrow Homes Ltd. v. Betts Brothers Plc.* [1999] 1 A. C. 197.

⁵¹³ *Celanese International Corp. v. B P Chemicals Ltd.* [1999] R.P.C. 203.

value of the infringing and non-infringing material. Where the infringement was only part of a larger enterprise which generated profits, it is for the defendant to show that it is inequitable to order an account of the whole profits, by demonstrating that only a proportion of the profits were made by means of the infringement.⁵¹⁴ If the defendant cannot establish that not all profits made were attributable to the infringement, the result will be that it must account for the whole of the profit made by the enterprise.⁵¹⁵

- Election between damages and account of profits:

A successful claimant is usually entitled to an inquiry as to damages, or at his election, an account of profits. He is not entitled to both, since the principle which lies behind the equitable remedy of an account of profits is that the claimant condones the infringement and takes the profits made by the infringer for the use of his property. The remedies are mutually inconsistent and the claimant must elect between the two. Furthermore, a claimant who has chosen to sue more than one member of a chain of distribution may not elect for damages against one defendant and profits against another. The election should be made at the latest when infringement is established, but the claimant cannot be forced to make an election before then.

F. Delivery up

The court has a statutory power to make an order for delivery up.⁵¹⁶ A copyright owner or exclusive licensee may apply for an order for delivery up to him or to such other person as the court may direct of (a) infringing copies in a person's possession, custody or control in the course of a business and (b) articles in a person's possession, custody or control specifically designed or adapted for making copies of a copyright work which that person knows or has to reason to believe have been used or are to be used to make infringing copies. There is no "guilty knowledge" provision under (a). An application for an order for delivery up may not be made after the end of six years from the date on which the infringing copy or article, illicit recording of infringing article or thing in question was made.⁵¹⁷ Delivery up is a discretionary remedy and will not be ordered in cases where its effect

⁵¹⁴ Zupanovich Pty Ltd. Beale Nominees Pty Ltd. [1995] FCA 561.

⁵¹⁵ Ibid.

⁵¹⁶ Copyright, Designs and Patents Act, 1988 § 99(1).

⁵¹⁷ Copyright, Designs and Patents Act, 1988 § 99(2).

is disproportionate and would cause greater harm than is necessary in order to safeguard the legitimate interests of the claimant.⁵¹⁸ The relief of delivery up should be limited to what is necessary for the protection of the claimant's rights, not the punishment of the defendant.⁵¹⁹ Thus the relief will not be granted if the articles can be rendered non-infringing, nor if the articles have been taken out of the jurisdiction and there is no evidence of an intention to reimport them.⁵²⁰ Where a defendant has mixed the claimant's work with work of his own, then, if it is physically possible to sever one from the other, the order for delivery up will apply only to the infringing material, but where the parts are physically inseparable the order for delivery up may extend to the whole of the article.

V.1.ii.b. Criminal Remedies

The parliamentary debates on the criminal remedies provided through 1988 Act show that while drafting the provision imposing criminal liability for copyright infringement, the government was concerned both to increase protection for the rights of the copyright owner and to protect consumers from poor quality counterfeit goods. Copyright infringement was considered to be equivalent of theft. As far as the government's concern regarding "infringement is equivalent to theft" is concerned, it had been echoed by the Court of Criminal Appeal in *R. v. Carter*, that the making and distribution of counterfeit video films in a serious offence amounting in effect to the theft of the copyright owner's intellectual property. In addition to that, it had been observed that, section 107 of the 1988 Act is not confined to cases of "piracy" and that the section may therefore be used by a collecting society against a person who is alleged to have distributed infringing copies of copyright works belonging to one of the society's members even though there has been a pre-existing commercial relationship between the society and the alleged infringer.⁵²¹

- Copyright Offences

Section 107 (1) of CDPA, 1988: Offences involving making, possession or dealing with infringing copies. A person commits an offence who, without the license of the copyright owner, does any of

⁵¹⁸ *Ocular Sciences Ltd. v. Aspect Vision Care Ltd.* (No. 2) [1997] R.P.C. 289.

⁵¹⁹ *Vavasseur v. Krupp* (1879) 9 Ch.D 351 at 360.

⁵²⁰ *Roussel Uclaf v. Pan Laboratories Pty Ltd* (1994) 29 I.P.R. 556.

⁵²¹ *Thames and Hudson Ltd. v. Design and Artists Copyright Society Ltd.* [1995] F.S.R. 153.

the acts in relation to an article which is and which he knows or has reason to believe is, an infringing copy of a copyright work. The acts in question are making for sale or hire; importing into the United Kingdom otherwise than for his private and domestic use; possessing in the course of a business to commit any act infringing the copyright; in the course of a business selling or letting for hire, offering or exposing for sale or hire, exhibiting in public or distributing; and distributing otherwise than in the course of business to such an extent which affect prejudicially the copyright owner.

The point to be understood here is that the only types of infringement which are considered as criminal offences are infringements with obvious commercial purposes. Moreover, no offence is committed by doing any act unless the accused has the requisite state of mind. Thirdly, the state of mind required to be proved by the prosecution is expressed in identical terms to that required to be proved by a claimant in a civil action for secondary infringement, namely knowledge or reason to believe that the copy is an infringing one.

Sec. 107 (2): Offences in relation to articles designed for making copies of copyright works. Other offences are committed by a person who makes an article specifically designed or adapted for making copies of a particular copyright work, or has such an article in his possession, if in either case he knows or has reason to believe that article is to be used to make infringing copies for sale or hire in the course of a business. In addition to that, section 107 (2A) makes it an offence to infringe the copyright in a work by communicating that work to the public either in the course of business or to such an extent as to affect prejudicially the copyright owner. The offence is only committed if the accused knew or had reason to believe that copyright in the work would thereby be infringed. Criminal offences may also be committed in relation to the public performance of works. Where copyright is infringed, otherwise than by reception of a communication to the public, by the public performance of a literary, dramatic or musical work or by the playing or showing in public of a sound recording or film, any person who caused the work to be so performed, played or shown is guilty of an offence if he knew or had reason to believe that copyright would be infringed.⁵²²

⁵²² Copyright, Designs and Patents Act, 1988, § 107 (3) (a) and (b).

The Dramatic Copyright Act, 1833 as extended by the Copyright Act, 1842 imposed liability on a person who caused a musical or a dramatic work to be represented without the license of the copyright owner and accordingly, these authorities are pertinent to the interpretation of section 107(3). A person is not liable for causing a work to be represented unless he was actually responsible for bringing the representation about. Thus, a company which made and supplied film versions of a dramatic work to music halls and theatres which were then shown to the public did not cause the dramatic work to be represented, even though the supplier knew that films would be so shown. This decision would no doubt be of equal application to be those who supply sound recordings to discotheques and nightclubs. Where the owner of a theatre let a play to a person who put on an infringing production of a play, the owner was held not to have caused the performance to be represented even though he had supplied equipment and scene shifters, had paid for printing and advertising and was paid by a share of gross receipts.⁵²³ However, where the owner of a theatre who also employed its company, including his son, who was the stage manager, let out the theatre and the company to his son, who put on an infringing production of a play to be represented because he retained control and because what was done with his permission.⁵²⁴ Where the owner of a music hall engaged a singer to sing whatever songs the singer wished and the singer performed a song without a licence to do so, the owner was held liable since the singer sang as its agent.⁵²⁵ In *French v. Day, Gregory and others*⁵²⁶, it was observed that the general manager of a theatre who had no power to engage or dismiss its artists, who acted at all times in accordance with the proprietor's instructions and who obtained no financial benefit from the production did not cause a work to be represented even though he had authority to stop it: he was merely the 'mouthpiece' of the proprietor.

Offences of making, dealing with and using illicit recordings under section 198 of the CDPA, 1988. These offences fall into three broad categories. First, a person commits an offence if, without sufficient consent, he does one of a number of acts in relation to a recording which is and which he knows or has reason to believe is an illicit recording. Those acts are: making for sale or hire;⁵²⁷

⁵²³ *Lyon v. Knowles* (1863) B & S 556.

⁵²⁴ *Marsh v. Conquest* (1864) 17 C.B.N.S. 418.

⁵²⁵ *Monaghan v. Taylor* (1886) 2 T.L.R. 685.

⁵²⁶ (1893) 9 T.L.R. 548.

⁵²⁷ Copyright, Designs and Patents Act, 1988 § 198(1) (a).

importing into the United Kingdom otherwise than for his private and domestic use,⁵²⁸ possessing in the course of a business with a view to infringing any of the rights conferred by Part II of the 1988 Act⁵²⁹ and in the course of a business selling or letting for hire, offering or exposing for sale or hire, or distributing.⁵³⁰ Secondly, a person who infringes a performer's making available after October 31, 2003 in the course of a business or otherwise, so as to affect prejudicially the owner of making available right, commits an offence if he knows or has reason to believe that by doing so he is infringing the making available right in the recording.⁵³¹ Thirdly, a person also commits an offence who causes a recording of performance made without sufficient consent to be shown or played in public or communicated to the public, thereby infringing any of the rights under Part II of the 1988 Act if he knows or has reason to know that those rights are thereby infringed.⁵³²

A recording is only illicit if it is a recording of the whole or a substantial part of the performance and has been made otherwise than for private purposes.⁵³³ If those pre-conditions are satisfied, then so far as concerns criminal proceedings, the recording is illicit whether it is 'illicit' for the purposes of a performer's rights or for the purposes of a person having recording rights in the performance.⁵³⁴ The extended definition of 'illicit recording' contained in section 197(5) applies to criminal proceedings. It is provided that for the purposes of determining whether a recording is an illicit one it is immaterial where it was made.⁵³⁵ The offences of making for sale or hire, importing and distributing are triable either way. They carry a maximum penalty on summary conviction of imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; but on conviction on indictment they carry a maximum penalty of imprisonment for ten years or an unlimited fine or both.⁵³⁶

Subsections (1) to (3) of section 198 of 1988 Act have the effect of making most civil infringements of rights in performances criminal offences. However, the main differences are as follows: Firstly, all the criminal offences require 'guilty knowledge'. Many civil infringements do not. Secondly,

⁵²⁸ Copyright, Designs and Patents Act, 1988 § 198(1) (b).

⁵²⁹ Copyright, Designs and Patents Act, 1988 § 198(1) (c).

⁵³⁰ Copyright, Designs and Patents Act, 1988 §198(1) (d).

⁵³¹ Copyright, Designs and Patents Act, 1988 §198 (1A).

⁵³² Copyright, Designs and Patents Act, 1988 § 198 (2).

⁵³³ Copyright, Designs and Patents Act, 1988 § 197(2) and (3).

⁵³⁴ Copyright, Designs and Patents Act, 1988 § 197 (4).

⁵³⁵ Copyright, Designs and Patents Act, 1988 § 197 (6).

⁵³⁶ Copyright, Designs and Patents Act, 1988 § 198 (5).

the civil infringement of broadcasting live a qualifying performance without consent is not made a criminal offence. Thirdly, rights at civil law are infringed by the possession of an illicit recording in the course of a business; a criminal offence is only committed by a person who possesses an illicit recording in the course of a business; a criminal offence is only committed by a person who possesses an illicit recording in the course of a business if that possession is with a view to infringing any rights in performances. Fourthly, there are no criminal provisions in relation to performers' property rights. Finally, the offence in the third broad category is committed in relation to recordings made without sufficient consent.

- Advantages of criminal proceedings

Criminal proceedings have two obvious advantages to a copyright owner faced with an infringement. For some defendants, a criminal conviction may be more of a deterrent to future infringement than an injunction limited to a particular work or works. It is recognised that penalties for second and further offences are generally greater than those for first offences. In addition the rules as to costs in respect of indictable offences are generally quite favourable to a prosecutor who is not a public authority. First, in any case the court may order the defendant to pay a successful prosecutor's costs. On the other hand, in determining the amount of any costs order, the court is obliged to take account of a number of factors which would not be relevant in a civil case. Secondly, however, in proceedings for an indictable offence, the court has the power to make an award of prosecution costs out of central funds whether the defendant is convicted or acquitted. The practice is that such an order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause.

- Disadvantages of criminal proceedings

Firstly, there is no entitlement to an injunction or to an inquiry as to damages or an account of profits. Secondly, subject to what is said below about the burden of proof, the prosecution must establish guilt beyond reasonable doubt rather than merely on the balance of probabilities. Thirdly, it is necessary in criminal proceedings for copyright offences to prove knowledge or reason to believe even in respect of primary infringements. Fourthly, the presumptions contained in sections 104 and 105 of the 1988 Act do not apply in criminal proceedings.

V.1.ii.c. Search Warrant under the 1988 Act

In enforcement of copyright law, search warrants were first introduced in the Musical Copyright Act 1906 which empowered justices to issue them in respect of pirated sheet music. Specific provision for the issue of search warrants in relation to other copyright offences was first made by the Copyright (Amendment) Act of 1983. It provided for the issue of warrants in respect of the offences of making, importing and distributing infringing copies of sound recordings and films. Sections 109 and 200 of the 1988 Act extended these powers to offences of making, importing and distributing infringing copies of copyright works of all types and illicit recordings. Sections 109 and 200 provide that where a justice of the peace is satisfied by information on oath given by a constable that there are reasonable grounds for believing that an offence of making, importing or distributing an infringing copy, communication to the public, making, importing or distributing an illicit recording or making available has been or is about to be committed in any premises and that evidence that such an offence has been or is about to be committed is in the premises, he may issue a search warrant.⁵³⁷

- Delivery up under section 108 of the 1988 Act

The court under section 108 of the 1988 Act may, if satisfied that at the time of his arrest or charge he had in his possession, custody or control in the course of a business an infringing copyright work, order the infringing copy to be delivered up to the copyright owner or to such other person as the court may direct.⁵³⁸ A conviction is not a pre-condition for the making of an order for delivery up. The same provision applies to articles specifically designed or adapted for making copies of a particular copyright work, provided the person knew or had reason to believe that the article had been or was to be used to make infringing copies.⁵³⁹

V.1.ii.d. Forfeiture in Criminal Proceedings

Statutory provisions as to forfeiture apply generally to all criminal cases. There are two regimes which are relevant to the offences under the 1988 Act. The first one applies where a person has

⁵³⁷ Copyright, Designs and Patents Act, 1988 § 109(1) and 200(1).

⁵³⁸ Copyright, Designs and Patents Act, 1988 § 108.

⁵³⁹ Ibid.

been convicted of an offence. In such a case the court may order forfeiture of any property which it is satisfied has been lawfully seized from that person or was in possession or control at the time when he was apprehended for the offence or when a summons was issued in respect of it. Before a forfeiture order may be made under this provision, the court must be satisfied that the property in question has been used for the purpose of committing or facilitating the commission of an offence or was intended by the defendant to be used for that purpose. The second regime applies where a person has been convicted of an offence and that offence, or another offence which has been taken into consideration on sentence, consists of the unlawful possession of property which has been lawfully seized from the defendant or was in his possession at the time of arrest or the issue of summons. In that case, the court may make a forfeiture order irrespective of whether the property had been or was intended to be used for the commission or to facilitate of an offence. Under each regime, the forfeiture power is discretionary and the court is obliged to have regard to the value of the property and to the likely effect of a forfeiture order on the offender. The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 introduced new provisions in respect of infringing copies, articles specifically designed for making copies, illicit recordings and unauthorised decoders.

Section 114A of the 1988 Act applies where infringing copies or articles specifically adapted or designed for making copies or articles specifically adapted or designed for making copies of a particular copyright work have come into the possession of any person in connection with the investigation or prosecution of a 'relevant' offence.⁵⁴⁰ Thus they apply not only where a police officer has seized an infringing copy in the course of an arrest but also where a private investigator has been handed an infringing copy by an informer. The provisions discussed here are applicable in respect of illicit recordings⁵⁴¹ and unauthorised decoders.⁵⁴²

The court may make only a forfeiture order if it is satisfied that a relevant offence has been committed in relation to the infringing copies or articles.⁵⁴³ In reaching its decision, the court is expressly permitted to infer that a relevant offence has been committed in respect of any infringing

⁵⁴⁰ Copyright, Designs and Patents Act, 1988 § 114A (1).

⁵⁴¹ Copyright, Designs and Patents Act, 1988 § 204A.

⁵⁴² Copyright, Designs and Patents Act, 1988 § 279C.

⁵⁴³ Copyright, Designs and Patents Act, 1988 § (4).

copies or articles if it is satisfied that such an offence has been committed in relation to the same of which the infringing copies or articles in question are representative. There is a lack of clarity regarding whether sec. 114A is intended to achieve, since even in the absence of such a provision there would be no obstacle to the court reaching its conclusions from inference. Moreover, the provision fails to make clear exactly what type of inferences may be drawn. For instance, a consignment of 1,000 counterfeit music CDs, found in defendant's possession. Assuming that a consignment is made up of 100 batches, each of which consists of 10 identical CDs. In this circumstance, practically the prosecution may be forced to limit the charges to possession of one CD from each of say 15 of the 100 batches. On conviction it will certainly be open to the court to order forfeiture of the whole contents of those 15 batches. However, does the mere fact that the court has found that the contents of those batches are counterfeit entitle it to infer that the contents of the other 85 batches are also counterfeit? In practice, defendants in this situation are seldom unduly concerned to retain possession of the goods in question and can frequently be persuaded to sign a disclaimer in respect of any of the rights they may have in them.

V.1.ii.e. Search by Customs of Imported Copies

Before the passing of 1911 Act, provision already existed for a copyright owner to notify Customs of his interest to prohibit the importation of infringing books. The 1911 Act extended this to copies of all copyright works. Similar provision was made by the 1956 Act, but this was expressly limited to infringing copies of published literary, dramatic and musical works. Sec. 111 of the 1988 Act re-enacted these provisions of the 1956 Act and extended them to infringing copies of sound recordings and films. The first Community legislation of this type was the Council Regulation of 1986 which was aimed at preventing the importation into the Community of goods which infringed a trade mark registered in a member state. The 1986 Regulation was repealed by Council Regulation 3295/94 ("the 1994 Regulation). The Counterfeit and Pirated Goods (Customs) Regulations 1995 ("the 1995 Customs Regulations) and the Counterfeit and Pirated (Consequential Provisions) Regulations 1995 ("the 1995 Consequential Regulations") contained provisions designed to implement the Council and Commission Regulations in the United Kingdom. Against a background of mounting concerns about the extent of the trade in counterfeit and pirated goods,

the 1994 Regulation was in turn replaced by a new Council Regulation (“the Council Regulation”) with effect from July 2, 2004.

Section 111 of the 1988 Act originally applied to all infringing printed copies of published literary, dramatic or musical works and to all infringing copies of sound recordings or films which were imported into the United Kingdom. However, in 1995, the scope of the section was curtailed to give effect to the Community obligation to establish the internal market. The owner of the copyright in any of published literary, dramatic or musical work may give notice to the Commissioner of Customs and Excise requesting them to treat as prohibited goods printed copies of the work which are infringing copies⁵⁴⁴. The notice must state that the person giving it is the owner of the copyright in the work and must specify the period during which the goods are to be treated as prohibited. The period must not exceed five years and shall not extend beyond the period for which copyright is to subsist.⁵⁴⁵ The owner of the copyright in a sound recording or film may also give notice in writing to the Commissioners with a view to prevent the importation of infringing copies. The notice must state that he is the owner of the copyright in the work that infringing copies of the work are expected to arrive in the United Kingdom at a time and place specified in the notice, and that he requests the Commissioner to treat the copies as prohibited goods.⁵⁴⁶

In all cases, a copy of the copyright work must be supplied to the Commissioners with the notice. At the same time or at the time the goods to which the notice relates are imported, the person giving the notice must provide the Commissioners with such evidence as they may reasonably require to enable them to establish that he is owner of the copyright in the work and that any goods detained are infringing copies. The person giving the notice must give the Commissioners such security as they may suffer as a result of the notice and must keep them indemnified against such liability and expense. When a notice under section 111 of the 1988 Act is in force, the importation of goods to which it applies is prohibited.⁵⁴⁷ However, the prohibition does not render the importer liable to any penalty other than the forfeiture of the goods.⁵⁴⁸

⁵⁴⁴ Copyright, Designs and Patents Act, 1988 § 111 (1).

⁵⁴⁵ Copyright, Designs and Patents Act, 1988 § 111 (2).

⁵⁴⁶ Copyright, Designs and Patents Act, 1988 § 111 (3).

⁵⁴⁷ Copyright, Designs and Patents Act, 1988 § 111 (4).

⁵⁴⁸ Ibid.

V.1.iii. Copyright Enforcement against Online File Sharing Services in United Kingdom

The law relating to copyright infringement in the UK is contained within the Copyright, Designs and Patents Act 1988⁵⁴⁹ (CDPA). It specifies the criminal offences and provides the means for rights holders to protect their rights through the civil court process in line with European legislation, namely European Union Directive on E-Commerce 2000/31/EC of the European Parliament.⁵⁵⁰ The United Kingdom was the first European country to specifically adopt legislation to limit online intermediary liability prior to the introduction of the E-Commerce Directive.⁵⁵¹ The Preamble to the Directive in Recital 50 explicitly states that the directive seeks to establish a clear framework of rules relevant to intermediary liability for copyright infringement.⁵⁵¹

There are two approaches to deal with the liability of an ISP. In a vertical approach, different liability regimes apply to different areas of the law.⁵⁵² This is the approach adopted by the United States. The Digital Millennium Act deals with copyright issues, whereas the Telecommunications Act of 1996 deals with liability derived from violations of other types of laws. In a horizontal approach, there is one liability regime applicable to any infringement regardless of the area of law. Thus the same regime will be applicable to any type of infringement, whether it is copyright, defamation or privacy rights. The horizontal approach is used by the EU Directive.⁵⁵³ Horizontal approach is argued to be favourable since ISPs do not have to monitor the content of the material published by their customers.⁵⁵⁴ In case of vertical approach, ISPs would have been obliged to decode the bits that form the data and analyse all the content (music, images, etc.) before posting. However, this would be an extremely weighty burden to place on the ISPs' shoulders.⁵⁵⁵

⁵⁴⁹ Elizabeth Jones, *The UK Experience of Tackling Online IP Infringement*, WIPO Advisory Committee Report on Enforcement, (Jan. 31, 2015, 8 PM) http://www.legislation.gov.uk/ukpga/1988/48/contents_

⁵⁵⁰ EU Study on the Legal Analysis of a Single Market for the Information Society – New rules for a new age? (Feb. 2, 2015, 6 PM) <https://ec.europa.eu/digital-single-market/en/news/legal-analysis-single-market-information-society-smart-20070037>.

⁵⁵¹ Aditya Gupta, *The Scope of Online Service Providers' Liability for Copyright Infringing Third Party Content under the Indian Laws – The Road Ahead*, 15 Journal of Intellectual Property Rights. 34, 35-36 (2010).

⁵⁵² Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, 19 Santa Clara High Technology Law Journal, 117 (2003).

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

The Directive does not establish a general liability regime applicable to ISPs. Instead it provides for a system of specific liability exemptions. Therefore, in cases where the ISPs provide a specific service (mere conduit, caching and hosting) and comply with a series of requirements, they will not be held liable for the services performed. The Directive only provides for a system of liability exemptions for ISPs. Thus, if an ISP does not qualify for an exemption under the Directive, its liability will be determined by the national laws of the respective Member States. The E Commerce Directive introduced a set of special liability rules, which are set forth in section 4 of the Directive (articles 12 to 15). It provides for a “safe heaven” regime, under which three types of service providers are exempt from liability under certain conditions.⁵⁵⁶

- “Mere conduit” service providers deliver either network access services or network transmission services.⁵⁵⁷ The service provider, involved here, are traditional internet access providers and backbone operators. The liability exemption only applies when the service provider is passively involved in the transmission of data. When the transmission would be initiated, selected or modified by the service provider, or when the receiver of the data would be selected by the service provider, the exemption does not apply.
- “Caching” providers temporarily and automatically store data in order to make the onward transmission of this information more efficient.⁵⁵⁸ The service envisaged here is a “proxy server”, which stores local copies of websites accessed by a customer. ISPs cannot be held liable when they perform caching on the condition that: the provider does not modify the information; the provider complies with conditions on access to the information; the provider must not interfere with the lawful use of technology that is widely recognised and used by industry to obtain data on the use of the information.
- Hosting providers store data provided by their users.⁵⁵⁹ The data being stored is specifically selected and uploaded by a user of the service and is intended to be stored for an unlimited point of time. Hosting providers can only benefit from the liability exemption when they

⁵⁵⁶ Elizabeth Jones, *The UK Experience of Tackling Online IP Infringement*, WIPO Advisory Committee Report on Enforcement, (Jan. 31, 2015, 8 PM) <http://www.legislation.gov.uk/ukpga/1988/48/contents>.

⁵⁵⁷ European Union Directive on E-Commerce 2000/31/EC § 12.

⁵⁵⁸ European Union Directive on E-Commerce 2000/31/EC § 13.

⁵⁵⁹ European Union Directive on E-Commerce 2000/31/EC § 14.

are “not aware of facts or circumstances from which the illegal activity or information is apparent” or they “do not have actual knowledge of illegal activity or information.”

- No general obligation to monitor. Article 15 of the Directive States shall not impose a general obligation on providers to monitor the information they transmit or store when they are performing one of the services analysed above, namely mere conduit, caching and hosting and also cannot compel them to seek facts or circumstances indicating illegal activity. The second paragraph imposes a duty of communication from the ISPs to the competent authorities in the case of suspected illegal activities.

It is contended that the EU Directive has some loopholes that need to be addressed. Specifically, there is a lack of a “notice and takedown” procedure, which threatens freedom of expression; and the fact that the current regime may actually promote unfair competition in some situations.⁵⁶⁰ The lack of a notice and take down procedure causes the ISPs to become a sort of censorship body, in order to avoid liability when they opt to take down a Web page upon receipt of a claim regarding the content on that page. This threatens freedom of expression as long as customers are without protection against unfounded complaints.⁵⁶¹

V.1.iv. Online Copyright Enforcement through Graduated Response Systems in United Kingdom

V.1.iv.a. Concept

The utter breakdown of public copyright enforcement mechanism has stimulated content owners to seek out their own solutions to piracy.⁵⁶² In the past few years, the entertainment industry has deployed different tactics towards individual end-users, Internet service providers⁵⁶³ and other third

⁵⁶⁰ Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, 19 Santa Clara High Technology Law Journal, 130 (2003).

⁵⁶¹ *Ibid.*

⁵⁶² Rachel Storch, *Copyright Vigilantism*, 16 Stanford Technology Law Review, 463 (2013).

⁵⁶³ In the view of International Federation of the Phonographic Industry (IFPI), “Actions against individual uploaders are onerous and expensive and we should not have to be taking them. That job should not be ours – it should be done by the gatekeepers of the web, the Internet Service Providers, who unquestionably have the technical means to deal with copyright infringement, if only they would take responsibility for doing so.” Further IFPI claimed that, “with cooperation from ISPs, it could make huge strides in tackling content piracy globally and argued that “disconnection of serious copyright offenders by ISP is the easiest and most practical response to illegal file sharing.” [International Federation of Phonographic Industry, Digital Music Report (2007)].

parties. In response to these copyright owners are increasingly adopting “graduated response” system. This system provides an alternative enforcement mechanism⁵⁶⁴ through which ISPs can take a wide variety of actions after giving users warnings about their potentially illegal online file sharing activities. These actions include, among others, suspension and termination of service, capping of bandwidth and blocking of sites, portals and protocols. This system seeks to strike a middle ground by providing sufficient warning to internet sites who might have engaged in illegal online file sharing activities, while also protecting the interests of copyright holders.⁵⁶⁵

V.1.iv.b. Justification

The push for graduated response comes as the copyright industry begins to move away from a strategy of suing individual file sharers. Copyright owners have sought to introduce graduated response schemes in two main ways: by direct legislative action, and linking them to the threat of secondary liability.⁵⁶⁶ This system have been or are in the process of being implemented in various forms through court sanctioned contractual arrangements; by administrative and Ministerial order; by legislatively supported industry code and by judicial determination supported by administrative bodies.⁵⁶⁷

The argument for the introduction of graduated response schemes rests on two main justifications: that they will provide a cheaper enforcement mechanism necessary to stem the tide of copyright infringement⁵⁶⁸ and that ISPs have a social obligation to participate in the enforcement process because they otherwise derive an unfair benefit from infringing behaviour on their network.⁵⁶⁹ The graduated response system provides benefits to three group of stakeholders in the copyright system: copyright holders, ISPs and those internet users who do not participate in illegal file-sharing activities. Since school and college age internet users highly value their internet connections, such

⁵⁶⁴ Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers – Is the “Graduated Response” a Good Reply?*, 1 WIPO Journal, 75 (2009).

⁵⁶⁵ Peter K. Yu, *The Graduate Response*, 62 Florida Law review, 75 (2010).

⁵⁶⁶ Nicolas Suzor and Brian Fitzgerald, *The Legitimacy of Graduated Response Schemes in Copyright Law*, 34 UNSW Law Journal, 3, 4-5 (2011).

⁵⁶⁷ Ibid.

⁵⁶⁸ Olivier Bomsel and Heritiana Ranaivosan, *Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response*, 6 Review of Economic Research on Copyright Issues, 13 (2009).

⁵⁶⁹ Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89, Oregon Law Review, 81, 83-84 (2010).

a system is likely to have a strong deterrent effect. The prospect of losing one's internet connections and the attendant embarrassment and social isolation may instil substantial fear among high school and college students. In United Kingdom, "a test of the graduated response system showed that 70% of customers stopped infringing in the six month period after receiving the first notice, with a further 16% stopping after the second notice."⁵⁷⁰

V.1.iv.c. Legal Framework

The framework for the United Kingdom's graduated response is contained in the Digital Economy Act 2010, which amended the Communications Act 2003. In 2014 the U.K. Government announced that representatives of the country's creative industries and ISPs had agreed to a new scheme, the Creative Content UK. The Creative Content UK has an educational purpose: to promote and notify the public of legal methods of obtaining digital entertainment. Its goal is to generate awareness of lawful means of obtaining copyrighted content and of the prevalence of internet copyright infringement. The government hopes that by educating the public about legal ways of obtaining copyrighted works, internet users will develop more 'confidence' when they purchase online content. The creative organisations and ISPs developed the notification system through a memorandum of understanding.

The UK scheme talks about a two-tiered response to allegations of repeat infringements. The 'initial obligations' require the ISPs to notify subscribers of allegations of infringement made by rights holders, in accordance with detailed procedures set out within the Act. The second obligation, 'technical obligations' is to maintain infringement lists, which must be provided to rights holders upon requests. The scheme utilises a 'notice and notice' framework, rather than a 'notice and sanction' one, as the initial obligations do not impose any penalties on repeat infringers.

Potential infringers will be sent a maximum of four alerts within a one-year timespan. After the first copyright infringement report for any given user is sent to an ISP by a rights holder, the ISP must match the IP address and send an "initial notification" to the associated subscriber. On the second occasion, an "intermediate notification" must be sent alerting the subscriber to the allegation and warning him that a third notification may result in his inclusion on a copyright

⁵⁷⁰ Peter K. Yu, *The Graduate Response*, 62 Florida Law review, 74 (2010).

infringement list. If a third copyright infringement report is made against the same subscriber within the twelve-month period, the ISP must notify the account holder of the allegation and explain that, upon request, a statement setting out the infringement reports made by a particular copyright owner in relation to them may be provided to that copyright owner. The notice must explain that, while the subscriber's identity will not be disclosed, the rights holder may seek a court order for disclosure and may bring legal action against the subscriber for infringement.

Fourth and subsequent notifications must be issued in a similar ways. Rights holders are permitted to seek a list of subscribers who have reached the "three strike" threshold from each ISP up to once a month, and ISPs must comply within ten working days. The lists will contain only the allegation(s) of infringement referable to the requesting rights holder. Copyright infringement reports will remain active for twelve months after receipt by the ISP.

The alert program will not involve a law enforcement feature nor will it implement any mitigating measures, such as the termination of Internet service. Rather, Creative Content UK focuses on tactics such as blocking access to websites and collaborating with advertisers to limit revenue to sites that illegally host copyrighted works. As a result, if account holders disregard the warnings, the ISPs will not take any additional action. Numerous commentators consider the Creative Content UK to be a "watered-down" version of the first graduated response system, the Digital Economy Act.

V.1.iv.d. Advantages

The graduated response system can help exact retribution for the infringers' wrongful conduct. By encouraging one to respect the intellectual assets of others, the system helps fosters respect for the rule of law and the legal rights of society's creative citizens. As shown by the copyright holders' long and unsuccessful fight against online file sharers, the system may be effective for couple of reasons. By doling out penalties, the system creates a disincentive for those internet users who make unauthorised downloads of copyrighted materials without thinking about legal consequences. Since a small minority of uploaders supplied the infringing materials for others to download, the system may greatly strengthen the protection for copyright holders by altering the behaviour of some active uploaders.

The goal of the graduated response system is not to eliminate once and for all massive online copyright infringement. Rather the goal is to reduce leakage to ensure reasonable and adequate compensation for the copyright holders' creative endeavours. As Professor Alain Strowel observed, "A solution that would eliminate all piracy would seem dangerous or at least dubious for both individual liberties and technological innovation."

The graduated response system helps ensure that ISPs can continue to develop and improve their service without worrying about the constant need to respond to lawsuits and the high costs of legal defense. The system acknowledges the fact ISPs often do not have control over the considerable amount of copyrighted materials stored on their websites or disseminated through their networks. In the words of Professor Strowel, "Graduated response..... goes beyond the classical 'notice and take down approach and implies an educational notification mechanism for alleged online infringers before more stringent measures can be imposed. The 'graduated response' is another word for improved ISP co-operation."⁵⁷¹ The system provides a win-win-win for copyright holders, ISPs and those users who do not participate in illegal file sharing activities.⁵⁷²

The graduated response system provides an attractive alternative to the lawsuits the entertainment industry has filed against more individual file sharers.⁵⁷³ This system helps alleviate some of the public concern over the lack of proportionality between the award of heavy statutory damages in some recent high profile cases⁵⁷⁴ and the harm caused by individual file sharing activities. The system provides an attractive alternative to many of the unpopular legal tactics employed in civil lawsuits and criminal prosecutions.⁵⁷⁵ The system is also rather different from a choice between the monetary settlement and internet disconnection. It can be considered as an improvement over what Professor Lawrence Lessig described as a "mafia-like choice" between a costly settlement and an outrageously high legal bill incurred in defending the lawsuit.⁵⁷⁶ Moreover, high costs of program to rehabilitate "copyright criminals" will be a burden on taxpayers with "no guarantee that

⁵⁷¹ Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers – Is the "Graduated Response" a Good Reply?*, 1 WIPO Journal, 75 (2009).

⁵⁷² Peter K. Yu, *The Graduate Response*, 62 Florida Law review, 74 (2010).

⁵⁷³ Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, (Feb. 4, 2015, 10 AM) <http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes> (Dec. 19, 2008)

⁵⁷⁴ Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 William & Mary Law. Review, 439, 440-41 (2009).

⁵⁷⁵ Peter K. Yu, *The Graduate Response*, 62 Florida Law review, 89 (2010).

⁵⁷⁶ LAWRENCE LESSIG, *FREE CULTURE* 51 (1st ed. 2004).

criminalisation would induce the creation of more socially beneficial works or that citizens could be more law-abiding outside the copyright world.”⁵⁷⁷

V.2. Copyright Law Enforcement in United States of America

This segment investigates the legal framework related to enforcement of copyright law in United States of America. Firstly, an overview of the overview of the copyright industry of USA is given along with some statistics depicting an estimate of the loss caused to the industry due to copyright infringement. The next segment comprehensively deliberates the different civil and criminal remedies as conferred by the Copyright Act of 1976. The related provisions of DMCA in respect of determination of ISP liability for copyright infringement has been analysed. The failure of the law in respect of enforcement against P2P networks have been highlighted. The litigation method adopted by the entertainment industry, especially RIAA, as a mode of enforcement against individual file-sharers have been stressed upon. Moreover, challenges in criminal enforcement of copyright law against online file sharing services have been elaborated. This segment delves with how the entertainment industry and internet service providers have entered into memorandum of understanding to privately enforce copyright law against the online file sharing services, accused of sharing illegal files. This private enforcement of copyright law is known as Copyright Alert System in USA. The implications arising out of such private enforcement mechanisms have been identified. The last part studies the recent legislative attempt, such as introduction of Stop Online Piracy Act and Protection of Online Piracy Act, to restrict access notorious P2P sites for better enforcement of copyright in the internet.

V.2.i. Overview of Copyright Industry in United States of America

Copyright Industries in the US Economy: The 2014 Report⁵⁷⁸, prepared on behalf of the IIPA, provided that the US copyright industries contribute significantly to the US. The creative industries continue to outpace the rest of the economy in real growth. In 2013 the value added by the core

⁵⁷⁷ Ibid.

⁵⁷⁸ This study reflects the use of industry data classifications adopted under the North American Industry Classification System (NAICS) which has been widely implemented by US statistical agencies. It also continues to follow the international standards and recommendations propounded by the World Intellectual Property Organisation in 2003 regarding the development of economic and statistical standards to measure the impact of domestic copyright industries on domestic economies.

copyright industries⁵⁷⁹ to US GDP reached more than \$1.1 trillion dollars (\$1,126.59 billion), accounting for 6.71% of the US economy. In 2013 the value added by the total copyright industries⁵⁸⁰ to GDP exceeded \$1.9 trillion (\$1,922 billion) accounting for 11.44% of the US economy. The total copyright industries employed more than 11.2 million workers in 2013, accounting for 8.26% of all US employment or 9.85% of all private employment in the United States. During 2009-2013, the core copyright industries grew at an aggregate annual rate of 3.9%.

The US recorded industry continued its transition to more digital and more diverse revenue streams in 2015.⁵⁸¹ Overall revenues in 2015 were up to 0.9% to \$7.0 billion at estimated retail value. The continued growth of revenues from streaming services offset declines in sales of digital downloads and physical product. 2015 was a milestone for streaming music.⁵⁸² For the first time, streaming was the largest component of industry revenues, comprising 34.3% of the market, just slightly higher than digital downloads. Digital music accounted for 70% of the overall market by value, compared with 67% in 2014. Even though digital download revenues declined 10% to \$2.3 billion, the total value of digitally distributed formats was up 6% to \$4.8 billion, compared to \$4.5 billion in 2014.

Overall the data for 2015 shows a music industry that continues to adopt digital distribution platforms for the majority of its revenues.⁵⁸³ While overall revenue levels were only up slightly, large shifts continued to occur under the surface as streaming continued to increase its market share. In 2015, the industry had the most balanced mix in recent history, with just about 1/3 of revenues coming from each of the major platform categories: streaming, permanent downloads and physical sales.

V.2.ii. Estimates of Sound Recording Piracy in United States of America

⁵⁷⁹ The “core” copyright industries whose primary purpose is to create, produce, distribute or exhibit copyright materials.

⁵⁸⁰ The “total” copyright industries include not only the core copyright but also partial copyright, non-dedicated support and interdependent industries.

⁵⁸¹ Joshua P. Friedlander, News and Notes on 2015 RIAA Shipment and Revenue Statistics (2015).

⁵⁸² Ibid.

⁵⁸³ Ibid.

“Piracy” of recorded music costs the US sound recording industries billions of dollars in lost revenue and profits.⁵⁸⁴ Piracy of these works harms the intellectual property owner, who loses the revenue that would have been gained had the legitimate recording been purchased. These “direct” losses represent only part of the story. Piracy also causes significant and measurable harm to the “upstream” suppliers and “downstream” purchasers who also would have benefited from the sale of legitimate, copyright protected sound recordings.⁵⁸⁵ The harms that flow from pirate activities produce a cascading effect throughout the economy as a whole. These harms include lost economic output, lost employee earnings, lost jobs and lost tax revenues. The true cost of sound recording piracy far exceeds its impact on US producers and distributors of sound recordings. Piracy harms not only the owners of intellectual property but also U.S. consumers and taxpayers.⁵⁸⁶

In the early 1980s, the annual output of the music industry was somewhere in the neighbourhood of 600 million units.⁵⁸⁷ Piracy, counterfeiting and bootlegging in the course of that year represented .02 percent of the whole, approximately one illegal object for every five thousand legal objects.⁵⁸⁸ In 1977 and 1978 sales soared, growing at a rate of 25% per year. No doubt there was some substantial amount of piracy going on.⁵⁸⁹ Then came a period of decline. Sales fell off about 12% in 1979 and then more or less at a flat annual rate until 1984, when growth assumed. However, the contribution of piracy in this regard was doubtful.⁵⁹⁰

In the mid-1980s the RIAA added a new category to its annual report, listing the number of labels seized.⁵⁹¹ This statistics by implication gave a larger volume to piracy actions, indicating in effect how many objects the pirates might have created if they had not been stopped before the labels were affixed to recorded objects. The period April 1984 to March 1985 was a quiet year for confiscation, roughly 60,000 objects and 5,55,000 labels. The next twelve month period was an active one: about 5,50,000 objects seized, together with 4 million labels.⁵⁹²

⁵⁸⁴ Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Policy Report No. 188 (2007).

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*

⁵⁸⁷ BARRY KERNFELD, *POP SONG PIRACY – DISOBEDIENT MUSIC DISTRIBUTION SINCE 1929 195* (1st ed. 2011).

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Id.*, at p.197

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Id.*, at p. 196

⁵⁹² *Ibid.*

The advent of the compact disc revitalised the recording industry⁵⁹³. As legitimate business flourished, so too did piracy flourish. For the first half of 1988, the RIAA reported seizures of just over three hundred thousand unauthorised recordings and 4 million labels, in the context of a legitimate volume of about 380 million units for the half year. This boils down to an intended piracy rate of about 1.1% (one piratical object or label seized for every ninety-five legitimate objects sold).⁵⁹⁴ A year later, for the six month period extending from January to June 1989, the numbers were 3,60,000 discs and tapes are confiscated, 4.6 million labels confiscated and 400 million legitimate units. This boils down to a rate of 1.15% (one piratical object or label for every eighty-seven legitimate objects).⁵⁹⁵ In 1990 the rate was higher still, as the RIAA reported unprecedented numbers of items seized. Beginning in 2000, the quantities of CDs sold declined. In 2002 the IFPI asserted that 40 million pirate recordings had been seized at the European Union's external borders during the previous years and the organisation claimed that levels of record piracy were in excess of 50% in Bolivia, Brazil, Bulgaria, China, Ecuador, Estonia, Greece, Indonesia, Kenya, Latvia, Lithuania, Malaysia, Mexico, Nigeria, Pakistan, Paraguay, Peru, the Philippines, Romania, Russia, the Ukraine and the former Yugoslavia. This report appeared in various sources under headlines such as the following: "CD Burning the Chief Cause of a \$3.3 Billion downturn in World Record Sales Last Year."

The full impact of sound recording piracy is not limited to the U.S. companies that create and sell copy protected music products. In particular, US retailers of CDs face reduced sales and lower profits as a result of private activities that occur in the United States. IFPI has reported that in 2005, US sales of recorded music generated record company "trade" revenues of \$7.012 billion. At the retail level, however, these same sales of recorded music in the US cost consumers \$12.270 billion. Clearly, in the US recorded music piracy hurts both producers and retailers of recorded music.

In "Digital Opportunity: A Review of Intellectual Property and Growth", released in May 2011, Ian Hargreaves, while summarised his finding, observed that: "No one doubts that a great deal of copyright is taking place, but reliable data about scale and trends is surprisingly scarce." The April 2010 Report, "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated

⁵⁹³ Id., at p. 198.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

Goods” sent to US Congressional Committees published by United States Government Accountability Office determined that the “US government did not systematically collect data and perform analysis on the impacts of counterfeiting and piracy on the U.S. economy and based on our review of literature and interviews with experts, we concluded that that it was not feasible to develop our own estimates or attempt to quantify the economic impact of counterfeiting and piracy on the US economy.”

The IP Commission Report on the Theft of American Intellectual Property, published by the National Bureau of Asian Research in May 2013 states that copyright infringement is the most costly form of IP loss for the United States. IP theft has hurt the information services industry the most with losses in 2009 of nearly \$26 billion. “The annual losses are likely to be comparable to the current annual level of US exports to Asia – over \$300 billion.” Yet the true cost remains unknown for numerous and sometimes contradictory reasons. “The exact figure is unknowable, but private and governmental studies tend to understate the impacts due to inadequacies in data or scope.”

Following in the footsteps of Former President George W. Bush, President Barack Obama has noted that “It’s been estimated that alone cyber criminals stole intellectual property from business worldwide worth up to \$1 trillion. In short, America’s economic prosperity in the 21st century will depend on cybersecurity.”⁵⁹⁶ While it is not clear where the \$1 trillion figure comes from and critics have often denounced such high numbers as being inaccurate,⁵⁹⁷ it should be noted that the facts have not gotten in the way of political rhetoric and the pirate remains an important “threat” to fight. In the popular pro-IP discourse of piracy, the pirate takes what isn’t theirs and their actions result in billions of dollars of loss to the victims – the IP industries. According to the argument, the pirate is among the most dire threats facing our economic security in the twenty-first century.⁵⁹⁸

Piracy has long been the evil against which pro-IP forces align and serve as the justification for enhanced protection. Piracy is what William Patry calls a “moral panic”.⁵⁹⁹ The Global Intellectual

⁵⁹⁶ DEBORA J. HALBERT, *THE STATE OF COPYRIGHT* 61 (1st ed. 2014).

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (1st ed. 2009).

Property Center, funded by the U.S. Chamber of Commerce, is at the forefront of identifying the threat to US business from piracy. In their report, “Intellectual Property: Creating Jobs, Saving Lives, Improving the World,” the GIPC claims that the current assault on IP is coming from two forces that must be countered. In the words of the GIPC, “The first threat comes from criminals who have built a \$600 billion global criminal enterprise of counterfeiting and piracy that destroys jobs, undermines innovation and endangers consumers.”⁶⁰⁰ The second threat comes from a growing movement of anti-IP activists, drawn from universities, foundations, non-governmental organisations, ideologically driven interest groups and even governments.⁶⁰¹ These activists promote the idea that IP rights should not be recognised and that the protection of IP impedes progress and hurts the poor. In a statement associated with the release of the 2010 Special 301 review United States Trade Representative Ambassador Ron Kirk commented about IP piracy: “Piracy and counterfeiting undermine the innovation and creativity that is vital to our global competitiveness. These notorious markets not only hurt American workers and business, but are threats to entrepreneurs and industries around the world...”⁶⁰²

The Policy Report No. 188, titled as “The True Cost of Sound Recording Piracy to the US Economy, published in August 2007 demonstrated that as a consequence of global and US based piracy of sound recordings, the US economy loses \$12.5 billion in total output annually. Output includes revenue and related measures of economic performance.”⁶⁰³

As a result of sound recording piracy, the US economy loses 71,060 jobs. Of this amount 26,820 jobs would have been added in the sound recording industry or in downstream retail industries, while 44,200 jobs would have been added in other US industries. Because of sound recording piracy, US workers lose \$2.7 billion in earnings annually. Of this total, \$1.1 billion would have been earned by workers in the sound recording or in downstream retail industries while \$1.6 billion would have been earned by workers in other US industries. As a consequence of piracy, US federal, state and local governments lose a minimum of \$422 million in tax revenues annually. Of this

⁶⁰⁰ DEBORA J. HALBERT, *THE STATE OF COPYRIGHT* 68 (1st ed. 2014).

⁶⁰¹ *Ibid.*

⁶⁰² Office of the United States Trade Representative, *USTR Announces Results of Special 301 Review of Notorious Markets* (2011).

⁶⁰³ Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Policy Report No. 188 (2007).

amount, \$291 million represents lost personal income taxes while \$131 million is lost corporate income and production taxes.⁶⁰⁴

The amount of total loss to US retail industries from piracy of sound recording products amount to \$1.041. Out of which physical format accounts for \$0.151 and digital format accounts for \$0.890. The US recorded music industries sustain losses not only from physical piracy but also increasingly from illegal downloads of recorded music. Many of these songs are downloaded from peer-to-peer (P2P) networks whose users increasingly are responsible for recent declines in the number of legitimate CD sales in the US. IFPI estimated that in 2005, 20 billion songs were illegally downloaded worldwide. As per the report the estimated download piracy losses to US integrated firms' counts for \$3.703.⁶⁰⁵

V.2.iii. Enforcement of Copyright Law under Copyright Act, 1976

In United States of America, the Copyright Act of 1976 provides for several coercive remedies, including temporary and final injunctive remedy, impoundment and destruction. Courts exercise their statutory authority to grant temporary injunctive relief more readily in copyright actions than in any other intellectual property cases. Final injunctive relief is also ordinarily available though it is similarly discretionary. A copyright plaintiff during the pending trial may obtain an order impounding allegedly infringing copies and phonorecords. Upon a final judgement in its favour, the plaintiff may obtain an order for the destruction or other reasonable disposition of these articles. The Copyright Act also authorises monetary and criminal sanctions to deter infringement. Courts will give declaratory relief to producers, distributors or performers who fear that their activities may later be held to infringe another's copyright and who wish to have their liability resolved before they invest further in the possibly infringing enterprise.

V.2.iii.a. Injunctive Relief

Sec. 502 (a) of the Copyright Act provides that "any court having jurisdiction of a civil action arising under this title may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain copyright infringement." The issuance of the injunction is

⁶⁰⁴ Ibid.

⁶⁰⁵ Id., at p. 7

discretionary with the court, except that no injunctions may be issued against the United States. In defining the scope of an injunction, a court must also be careful to consider what conduct may be prohibited or required as a practical matter. In *A&M Records, Inc. v. Napster*, Napster, a ‘peer-to-peer’ file sharing software allowed users to share and download MP3 music files with other users logged on to site. The Ninth circuit uphold the issuance of an injunction by the district court, but reversed on the grounds that the scope of the injunction was overly broad. The appellate court observed:

“The preliminary injunction which we stayed is overbroad because it places on Napster the entire burden of ensuring that no “copying, download, uploading, transmitting or distributing” of plaintiff’s works occur on the system. As stated, we place the burden on plaintiff to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. However, Napster also bears the burden of policing the system within the limits of the system. Here, we recognise that this is not an exact science in that the files are user named. In crafting the injunction on remand, the district court should recognise that Napster’s system does not currently appear to allow Napster access to users’ MP3 files.

V.2.iii.b. Temporary Relief – Preliminary Injunctions

Copyright owners frequently need more immediate protection than a final injunction entered after trial can offer. A copyright owner may need relief pending trial to protect against the unauthorised publication of an unpublished work; to protect against the loss of a seasonal market or to protect against injury to its reputation from shoddy pirated goods. The injunctive relief available under Sections 502 and 503 of the Copyright Act authorise courts to grant temporary restraining orders, temporary injunctions and impoundment orders.

- Temporary Restraining Order

A copyright owner that requires immediate relief and that can show that it will suffer irreparable harm from the delay entailed in giving notice to the infringer and participating in an adversary hearing, may obtain a temporary restraining order upon an *ex parte* application.⁶⁰⁶ To obtain a

⁶⁰⁶ Title 17 of the United States Code, Copyright Act, 1976 § 502 (a)

temporary restraining order for copyright infringement, the plaintiff must abide the requirements necessary for any type of temporary restraining order as set forth in the Federal Rules of Civil Procedure. Since the purpose of a temporary restraining order is to preserve the status quo until a preliminary injunction hearing can be held, cases indicate that the plaintiff must make a showing of at least the standards imposed for preliminary injunction.⁶⁰⁷ The extraordinary remedy of the remedy and the relative brevity of the plaintiff's injury before a preliminary injunction can be entered suggest that the irreparable harm standard for temporary restraining orders should be more rigorous than the irreparable harm standard for preliminary injunction.

- Temporary (Preliminary) Injunction

Section 502 (a) of the Copyright Act authorises a court having jurisdiction over a civil action arising under the Act to grant "temporary injunctions "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." To obtain a temporary injunction, a copyright owner ordinarily will file a motion together with a complaint, supporting affidavits, a memorandum of law, a proposed order and the certificate of registration for the copyright work in suit. The copyright owner must also serve notice on the adverse party. Section 502 (b) of the Copyright Act authorises nationwide service and enforcement of temporary injunctions. Courts in the Second and Ninth Circuits weigh three factors in deciding whether to grant a temporary injunction: whether the copyright owner is likely to succeed on merits, whether the injury is irreparable and whether the balance of hardships tips in the copyright owner's favour. Other circuits add a fourth factor – promotion of the public interest.

- a. Likelihood of success on merits

Probability of success on merits is the most important factor bearing on temporary injunctive relief. If the plaintiff can demonstrate a probability of success on the merits, it will usually obtain preliminary relief without a detailed factual showing of irreparable harm. In demonstrating likelihood of success on the merits, a copyright owner will not be required to make the same evidence showing that it would at trial. However, the plaintiff must at least establish some

⁶⁰⁷ Horn Abbot Ltd. v. Sarsaparilla Ltd. 601 F. Supp. 360; O'Neill Devs., Inc. v. Galen Kilburn, Inc. 524 F. Supp 710.

probability of success on the two elements of a copyright infringement case – that it owns a valid copyright and that the defendant has infringed the copyright.⁶⁰⁸

b. Irreparable harm

If a copyright owner establishes a reasonable probability of success on the merits a court will usually presume irreparable harm.⁶⁰⁹ In cases where preliminary relief is sought following breach of a copyright license or other agreement, the court must initially determine whether the breach was of a condition or other material contract term, or of an independent covenant. Courts do not consider all copyrighted works equal for purposes of the presumption of irreparable harm. Courts will more readily presume irreparable harm in cases involving works possessing limited original content.⁶¹⁰ Similarly courts will require a stronger showing of irreparable harm if the work infringed is peripheral to the copyright owner's business.⁶¹¹ In cases where the presumption of irreparable harm does not arise – either because the copyright owner has failed to prove likelihood of success on the merits or because the copyrighted work is one that does not enjoy the presumption – courts will determine whether, in fact, the plaintiff's harm cannot be redressed by monetary relief and by the eventual grant of a permanent injunction.⁶¹²

c. Balance of hardships

The principal factor that courts weigh in close cases to determine whether the balance of hardship tips in the plaintiff's or the defendant's favour is the nature of each party's competitive position. Courts will find that the balance tips in the defendant's favour where a temporary injunction would impair its ability to sell materials that do not infringe the plaintiff's copyrights or enter markets that the plaintiff is not likely to enter.⁶¹³ However, if the defendant's competitive position rests squarely on its appropriation of protected material from the plaintiff's work, thus hobbling the plaintiff's

⁶⁰⁸ *Midway Manufacturing v. Bandai-America Inc.* 546 F. Supp 125.

⁶⁰⁹ *Triad Sys. Corp. v. South-eastern Express Co.* 64 F.3d 1330.

⁶¹⁰ *Rice v. American Program Bureau* 446 F.2d 685.

⁶¹¹ *Marco v. Accent Publishing Co.* 969 F.2d 1547.

⁶¹² *Kontes Glass Co. v. Lab Glass Inc.*, 373 F.2d 319.

⁶¹³ *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044.

ability to compete in the marketplace, courts usually find that the balance tips in plaintiff's favour.⁶¹⁴

d. Public interest

In cases where the plaintiff has not demonstrated a probability of success on the merits, courts will sometime weigh a defendant's assertion that a competing public interest in the free dissemination of information, requires that the injunction not be issued.⁶¹⁵ But courts generally give these assertions no weight if the plaintiff has demonstrated a probability of success on the merits.⁶¹⁶

V.2.iii.c. Final (Permanent) Injunction

Section 502 (a) of the Copyright Act authorises a court having jurisdiction over a civil action arising under the Act to grant "final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." Courts generally grant final injunctions upon a finding of copyright infringement. Several reasons underlie the permissiveness in providing permanent injunctions in copyright cases. However, in unusual circumstances, courts have granted injunctions even before a finding of infringement. In *Leeds Music Ltd. v. Robin*,⁶¹⁷ permanent injunction was granted even defendants had plans to infringe copyrighted work and "intended to act on them unless restrained from doing so by court order."

Primarily copyright interests are difficult to value and an injunction can make the copyright owner whole while avoiding the time and expense of calculating future damages and profits that can only approximate the copyright owner's losses. When the defendant threatens to publish a yet-unpublished work, injunctive relief assures the copyright owner continued control over the often critical decision on when the work should be first exposed to the public. Unauthorised dissemination of a work, particularly in a shoddy edition or in questionable surroundings, may require injunctive relief to secure the copyright owner's reputation; injunctive relief will be doubly justified if the infringer is indigent.

⁶¹⁴ *West Publishing Co. v. Meta Data Cent., Inc.* 799 F.2d 1219.

⁶¹⁵ *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.* 457 F. Supp 957.

⁶¹⁶ *West Publishing Co. v. Mead Data Cent., Inc.* 616 F. Supp 1571.

⁶¹⁷ 358 F. Supp 650 (1973).

Once a court determines that the defendant has infringed the plaintiff's copyright and is likely to continue infringing the copyright in the future, it has limited discretion to withhold a final injunction.⁶¹⁸ The decision not to exercise this limited discretion is certainly appropriate in cases where the defendant has copied wholesale from the plaintiff's work and added no original expression of its own. From the standpoint of public policy, injunctive relief becomes more problematic when granted against works that draw only in part from the copyrighted work and contain substantial value of their own. The public policy problem raised by injunctions against works that only partially infringe a plaintiff's copyright is that injunctions in these cases can deprive the public of the original elements that the defendant added and that are unavailable from the plaintiff or from others. Armed with such an injunction, the copyright owner can extract not only the value of the infringing portion of the defendant's work, but also some part of the work's value that is attributable to the defendant's independent effort. An injunction in these circumstances gives the copyright owner a greater scope for exercising its exclusive rights than is justified by its investment and may inhibit others from investing independent effort in developing original works.

However, injunctive relief rewards a copyright owner for no more than the value than its work contributes to the defendant's work. It enables the courts to sidestep the all-or-nothing aspect of injunctive relief – an aspect that may lead a court to find against the infringement rather than to find infringement and order an injunction. In *Universal City Studios Inc. v. Sony Corp. of America*,⁶¹⁹ the Ninth Circuit Court of Appeals held the defendants to be liable for contributory infringement through the sale of videocassette recorders used in copying the plaintiff's works off the air from television broadcasts. The Court observed that “the relief in question is exceedingly complex and the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability in issue. The difficulty in fashioning relief cannot dissuade the federal courts from affording appropriate relief to those whose rights have been infringed.”

V.2.iii.d. Impoundment

Section 503 (a) of the Copyright Act provides that, at any time an action under the Act is pending “the court may order the impounding, on such terms as it may deem reasonable, of all copies or

⁶¹⁸ *A&M Records Inc. v. Napster Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

⁶¹⁹ 659 F. 2d 963 211 U.S.P.Q. 761 (9th Cir. 1981).

phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights and of all plates, moulds, matrices, masters, tapes, film, negatives or other articles by means of which such copies or phonorecords may be reproduced." According to the House Report on the 1976 Act, allegedly infringing articles may be seized "as soon as suit has been filed and without waiting for an injunction." Impoundment complements temporary restraining orders and injunctions. Temporary restraining orders and injunctions prohibit further infringement pending trial; impoundment secures that prohibition by sequestering the products and instruments of infringement.⁶²⁰

Section 503 (a) provides that a court "may" impound infringing and related materials leaves no doubt that the decision to issue the order lies within the court's discretion⁶²¹ as does the decision to vacate the order.⁶²² In exercising this discretion, courts have as general rule required the copyright owner to meet the same standards that courts impose for temporary restraining orders and injunctions. Although this is probably a satisfactory minimum standard, it is arguably unsatisfactory as an exclusive standard. Impoundment may represent a harsher remedy than a temporary restraining order or injunction if it requires the defendant to surrender copies or phonorecords that only partially infringe the copyrighted work or requires the defendant to surrender equipment or material that, though used in the alleged infringement, is itself non-infringing.

The purpose of section 503 (a) is to confiscate present and prospective infringing goods from commerce during the pendency of an infringement action and "to maintain the feasibility of the eventual destruction of items found at trial to violate the copyright laws by safeguarding them during the pendency of the action."⁶²³ Impoundment is "not meant to give the copyright holder a means to preserve evidence generally."⁶²⁴ In one case a court of appeals overturned an ex parte district court order that allowed the copyright owner not only to seize the defendant's allegedly computer software for impoundment, but also to copy the defendant's business records, including

⁶²⁰ PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, (3rd ed. 2007)

⁶²¹ RCA Records v. Allfast System Inc. 594 F. Supp 335 (S.D.N.Y. 1984).

⁶²² Midway Manufacturing Inc. v. Omni Video Games Inc., 668 F.2d 70 (1981).

⁶²³ Midway Manufacturing Inc. v. Omni Video Games Inc., 668 F.2d 70 (1981).

⁶²⁴ First Tech. Safety System Inc. v. Depinet, 11 F.3d 641 (1993).

invoices, purchase orders, customer lists and other customer related information held by the defendants.⁶²⁵

From a constitutional vantage, ex parte impoundment proceedings are open to serious question.⁶²⁶ At this outset, there is a substantial First Amendment question. It is clear that impoundment results in a suppression of “speech” in that further dissemination of the copies and phonorecords thereby seized is restrained. If the copies or phonorecords seized and impounded are indeed infringements, or if they have been performed or otherwise used in an infringing manner, their further suppression might not violate the right to free speech.⁶²⁷ But seizure and impounding, without a prior hearing, permits the suppression of materials as to which there is nothing more than a unilateral claim of infringement.⁶²⁸ Supreme Court decisions in other contexts strongly suggest that such a procedure violates the First Amendment. Given the fact that a large proportion of copyrightable works presumably contain expression protected by the First Amendment, the provisions allowing ex parte seizure of such works fly in the face of the fundamental freedom.⁶²⁹

It is also debatable that ex parte impoundment proceedings violate the Fifth Amendment guarantee against seizure of property without due process of law⁶³⁰. There are number of cases where it has been held that ex parte seizures of property violate due process. The invalidity holds true, moreover, even if the relevant provision allows for a prompt post-taking hearing. Accordingly, one court declined to order impoundment of allegedly pirated movies.⁶³¹ An additional argument arises that ex parte impoundment proceedings violate the Fourth Amendment prohibition against unreasonable searches and seizures, which applies to both civil and criminal actions.⁶³² Seizures extend to “other articles” by means of which the copies and phonorecords may be reproduced,

⁶²⁵ Ibid.

⁶²⁶ *Paramount Pictures Corp. v. Does*, 821 F. Supp 82 (E.D.N.Y. 1993).

⁶²⁷ In the context of copyright seizure, a court stated “The first amendment was not intended to protect infringers of copyrights or misappropriators.” *Dealer Adver. Dev., Inc. v. Barbara Allan Fin. Adver Inc.* 197 U.S.P.Q 611.

⁶²⁸ *Time Warner Entertainment Co. v. Does Nos. 1-2*, 876 F. Supp 407, 412 (E.D.N.Y. 1993).

⁶²⁹ *Fort Wayne Books Inc. v. Indiana* 489 U.S. 46, 109 S. Ct 916.

⁶³⁰ *Sniadach v. Family Finance Corporation* 395 U.S. 337, 89 S. Ct 1820.

⁶³¹ *Paramount Pictures Corp. v. Does*, 821 F. Supp 82 (E.D.N.Y. 1993).

⁶³² *Time Warner Entertainment Co. v. Does Nos. 1-2*, 876 F. Supp 407, 412 (E.D.N.Y. 1993).

potentially extending to such blank tapes and duplication equipment. It may be that seizure or destruction of such neutral devices constitutes a violation of the Fourth and Fifth Amendments.⁶³³

V.2.iii.e. Destruction of Infringing Articles

Sec. 503 (b) of the Copyright Act provides that, as part of a final judgment or decree, the court “may” order the destruction “or other reasonable disposition” of “all copies or phonorecords found to have been made or used in violation of the copyright owner’s exclusive rights and of all plates, moulds, matrices, masters, tapes, film negatives or other articles by means of which such copies or phonorecords may be reproduced.” Before such a remedy may be invoked it is of course, necessary that the infringement first be judicially established.⁶³⁴ Moreover, it seems clear that remedy of forfeiture and destruction is not available against an innocent third party who acquires infringing copies or articles, but does not himself engage in any act of infringement.⁶³⁵

In *Encyclopaedia Britannica Educational Corp. v. Crooks*,⁶³⁶ the court provided that, before ordering disposition of the infringing copies, “the parties should be afforded some opportunity to meet and determine whether some type of purchasing or other agreement can be reached concerning the collection of existing infringing copies.”⁶³⁷ As the infringing copies consisted of videotape, reproductions, the court indicated that, failing such an agreement within 30 days, it would order erasure, not destruction of the tapes. In *Jones Bros. Co. v. Underkoffler*,⁶³⁸ the court approved an award of separate damages as compensation for plaintiff’s waiver of the right of destruction. In other cases, instead of ordering destruction of infringing copies, the courts ordered that such copies be delivered to the possession of the plaintiff.⁶³⁹ Another court ordered counterfeit videocassettes destroyed and the seized TV/VCR units donated to local charity.⁶⁴⁰

⁶³³ *Porno Inc. v. Municipal Court of Los Angeles Judicial Dist.*, 33 Cal. App. 3d 122.

⁶³⁴ *Lampert v. Hollis Music Inc.* 105 F. Supp. 3 (E.D.N.Y. 1952).

⁶³⁵ *Foreign & Domestic Music Corp. v. Licht* 196 F.2d 627 (1952).

⁶³⁶ 542 F. Supp 1156 (W.D.N.Y.1982).

⁶³⁷ *Ibid.* at 1188; *CBS, Inc. v. Pennsylvania Record Outlet Inc.*, 598 F. Supp 1549 (1984).

⁶³⁸ 35 U.S.P.Q. 448 (1937).

⁶³⁹ *Cipes v. Mikasa Inc.* 404 F. Supp 2d 367 (2005).

⁶⁴⁰ *Universal City Studios Inc. v. Ahmed* 31 U.S.P.Q 2d 1839 (1994)

Another remedy was adopted in *Foreign Car Parts Inc. of New England v. Auto World Inc.*,⁶⁴¹ where only a small portion of defendant's publication consisted of infringing matter. In those circumstances, the court refused to order destruction and instead ordered the defendant to block out all infringing matter contained in the previously printed copies. However, all plates, moulds and matrices for making infringing copies were ordered delivered up for destruction of existing CDs of which only a small portion consisted of infringing content.⁶⁴² Instead it ordered defendant not to engage in future production of works containing the infringing content.⁶⁴³ In case neither the plaintiff nor the defendant any longer possesses any copies of the infringing work, in *Blue Pearl Music Corp. v. Bradford*,⁶⁴⁴ it was held that it is an abuse of discretion for a court to order the defendant to recreate a copy of the infringing work for the plaintiff. While rendering the obiter dicta, the court in this case suggested that such an order to recreate might be proper "if, for example, the record disclosed that the [defendant] had stolen the only copies of the musical works in question from the [plaintiff] and then destroyed them and the record further disclosed that she had committed the work to the memory, that she was technically competent to re-create them and that she was the only person in the world who could re-create the lost material."⁶⁴⁵

V.2.iii.f. Provisions for Monetary Recovery

The most important and most utilised remedies for copyright infringement are the provisions for monetary recovery. Three purposes are served by the damage provisions: compensation of the copyright owner, prevention of the infringer's unjust enrichment and deterrence of future infringement.

- Actual Damages and Profits

As per section 504 (a) of the Copyright Act, 17 USC, an infringer of copyright is liable for either the copyright owner's actual damages and any additional profits of the infringer; or statutory damages. The statute wording indicated that actual damages and infringer's profits are to be

⁶⁴¹ 366 F. Supp 977 (1973).

⁶⁴² *TVT Records v. Island Def Jam Music Group*, 279 F. Supp 2d 366 (S.D.N.Y. 2003).

⁶⁴³ *Ibid.*

⁶⁴⁴ 728 F. 2d 603 (1984).

⁶⁴⁵ *Ibid.*

cumulative rather than alternative and most courts have accepted this interpretation.⁶⁴⁶ The first sentence of section 504 (b) treats damages and profits as two different types of monetary recovery and then seemingly conflates profits with “damages” when it provides that the copyright owner is entitled to recover both damages and profits when profits attributable to the infringement are not taken into account in computing damages. However, when profits represent the whole of plaintiffs’ damages, the plaintiff cannot recover both. Plaintiff’s lost profits have been designated as damages because he or she arguably would have realised such profits absent defendant’s infringing conduct. While those profits realised by the defendants are categorised and treated solely as profits. The former type of profits are to compensate the plaintiff for its loss (therefore damages), while the latter is to force the defendant to disgorge the gains realised by its infringing acts.

- Actual Damages

The language of Section 504 (b) of the Act leaves it to the courts to provide a working definition of the term “actual damages” used in the statute.⁶⁴⁷ The term “actual” was employed to distinguish those damages from “statutory damages”. In the committee reports, The House Representative provide additional information to define damages by describing their purpose and how they differ from profits when it states that “damages are awarded to compensate the copyright owner for losses from the infringement and profits are awarded to prevent the infringer from unfairly benefitting from a wrongful act.” The basis for an award of damages is injury to the value of the infringed work. In establishing injury there are two basic theories on which an award may be based: (1) lost sales or revenues; and (2) an imputed license fee for the value of the work infringed.

It is the plaintiff’s burden to establish the proximate cause between the infringement and lost revenue. In *Data General Corporation v. Grumman Systems Support Corporation*⁶⁴⁸, the First Circuit employed such “tort law damage” principles in defining the plaintiff’s burden of proof when it observed that “it is useful to borrow familiar tort law principles of causation and damages.

⁶⁴⁶ *Peter Pan Fabrics Inc. v. Jobela Fabrics Inc.*, 329 F. 2d (2d. Cir. 1964).

⁶⁴⁷ Copyright Act, 1976 § 504 (b). The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue and the infringer is required to prove his or her deductible expenses and the elements of profits attributable to factors other than the copyrighted work.

⁶⁴⁸ 36 F. 3d 1147 (1st Cir. 1994).

Thus the plaintiff should first establish that the infringement was the cause-in-fact of its loss by showing with reasonable probability that, but for the defendant's infringement, the plaintiff would not have suffered the loss." It is also to be noted that when the infringer has destroyed the total value of the work, the award of damages will be for the full value of the infringed work.⁶⁴⁹

- Computation of Actual Damages

The Act provides that the "copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement."⁶⁵⁰ Yet neither its text nor the committee reports attempt to define the nature of those actual damages. A large number of cases have grappled with the standards for computing both plaintiff's damages and the defendant's profits.

A. Injury to market value of copyrighted work

Actual damages represent the extent to which infringement has injured or destroyed the market value of the copyrighted work at the time of infringement.⁶⁵¹ If the infringement has entirely destroyed the value of the work, the damages then equal the full value.⁶⁵² The copyright proprietor is competent to testify as to such value, except perhaps, where the proprietor manifestly has no knowledge about it. Damages may be reduced if it can be shown that plaintiff's work had been infringed by another work prior to its being infringed by defendant's work, to the extent that the evidence shows reduction of its value due to the third-party infringement at the time of defendant's infringement.⁶⁵³ Likewise damages may be reduced if, prior to infringement, a license agreement has been executed by the plaintiff that in itself reduces the market value of the copyrighted work to the plaintiff as of the time of infringement.

⁶⁴⁹ *Golding v. RKO Pictures Inc.*, 35 Cal. 2d 690, 221 P.2d 95 (1950).

⁶⁵⁰ Copyright Act, 1976 § 504 (b).

⁶⁵¹ *In Design v. K-Mart Apparel Corp.* 13 F.3d 559, 563 (2d Cir. 1994).

⁶⁵² *Golding v. RKO Pictures Inc.*, 35 Cal. 2d 690, 221 P.2d 95 (1950).

⁶⁵³ *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354 (9th Cir. 1947).

1. Lost Revenue: The basic rule for computing injury to the market value of a copyrighted work arising from infringement is to inquire what revenue would have accrued to plaintiff but for the infringement. The plaintiff has the burden “of establishing with reasonable probability the existence of a causal connection between defendant’s infringement and loss of anticipated revenue.”⁶⁵⁴ Once the plaintiff has met this burden of showing a causal connection, “the burden then properly shifts to the infringer to show that this damage would have occurred had there been no taking of the copyrighted expression.”⁶⁵⁵

The determination of injury to market value may be often most difficult.⁶⁵⁶ Courts are therefore inclined to look to indirect evidence.⁶⁵⁷ Thus the plaintiff’s damages may be said to equal the profits that the plaintiff might have accrued but for the defendant’s infringement.⁶⁵⁸ However, this measure is not to be confused with the right to recover defendant’s profits.⁶⁵⁹ The profits in fact accrued by the defendant are not necessarily equal to the profits that the defendant are not necessarily equal to the profits that the plaintiff would have derived but for the infringement. Because of different costs, production and selling techniques and goodwill the defendant’s actual profits may be either more or less than the plaintiff’s lost profits.⁶⁶⁰ If plaintiff’s lost profits are less than defendant’s actual profits, plaintiff may recover its lost profits under the rubric of actual damages and may further recover the difference between its lost profits and defendant’s actual profits under the rubric of defendant’s profits.⁶⁶¹ A plaintiff may not recover its full lost profits plus all of the defendant’s profits, for this would constitute a forbidden double recovery.⁶⁶²

2. Indirect Damage: In addition to the primary measure of value of the work infringed, the plaintiff may be able to recover certain supplemental items of actual damages. One example is the cost of making changes in plaintiff’s publication necessitated by their prior

⁶⁵⁴ *Banff Ltd. v. Express Inc.* 921 F. Supp 1065, 1068 (S.D.N.Y. 1995).

⁶⁵⁵ *Harper & Row, Publishers Inc. v. Nation Enterprises* 471 U.S. 539, 567 2d 588 (1985).

⁶⁵⁶ *Fitzgerald Publication Co. v. Baylor Publication Co.* 807 F. 2d 1110, 1118 (2d Cir. 1986).

⁶⁵⁷ *Davis v. The Gap, Inc.*, 246 F. 3d 152 (2d Cir. 2001).

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *United States v. King Features Entertainment Inc.* 843 F.2d 394, 400 (9th Cir. 1988).

⁶⁶⁰ *Peter Pan Fabrics Inc. v. Jobela Fabrics Inc.* 329 F. 2d 194 (2d. Cir. 1964).

⁶⁶¹ *Taylor v. Meirick* 712 F. 2d 1112 (7th Cir. 1983).

⁶⁶² *Hamil Am Inc. v. GFI* 193 F. 3d 92, 108 (2d Cir. 1999).

appearance of defendant's infringing work.⁶⁶³ A plaintiff who has produced a completed work, even if unpublished may be entitled to reimbursement of travel and research expenses.⁶⁶⁴ If a plaintiff is a professional writer, he may be entitled to reimbursement for the value of the time expended in writing his work.

3. Ability to Quantify: Uncertainty will not preclude recovery of actual damages if the uncertainty is as to amount, not as to whether actual damages are attributable to the infringement.⁶⁶⁵ The courts make the best possible appraisal of value,⁶⁶⁶ looking if necessary to such additional factors as inherent value of the work and utility value. If the special value of the work to the plaintiff is greater than its market value, he may claim such greater measure. In determining such special value to the plaintiff, the court may look to the nature of the work itself, its particular utility to the plaintiff and to whether it can be reproduced. However, actual damages may be particularly difficult to ascertain and hence statutory damages particularly appropriate to the extent that the value of the copyrighted work resides not in its intrinsic value, but rather in its tendency to promote sales of other products

B. Value of Use of the Copyrighted Work (The Imputed License Fee)

When losses to the copyright owner are difficult to quantify, it is better to look to defendant's profits. When the infringement produces no gain to the infringer, the circumstances are ripe for awarding statutory damages. To the extent that all those circumstances merge, the spectre arises of the copyright owner being unable to win any recovery at all, even if the infringer acted wilfully and deliberately.

a. Profits

Since the term "profit" is not defined in the Copyright Act, the word has been given its usual meaning, such as excess of return over expenditures realised from the conduct of a business or the

⁶⁶³ *Atlantic Monthly Co. v. Post Publishing Co.* 27 F.2d 556 (D. Mass 1928).

⁶⁶⁴ *Smith v. Little Brown & Co.* 273 F. Supp 870 (S.D.N.Y. 1967).

⁶⁶⁵ *Davis v. The Gap, Inc.*, 246 F. 3d 152 (2d Cir. 2001).

⁶⁶⁶ *Computer Associates International Inc. v. Altai Inc.* 775 F. Supp 544, 571 (E.D.N.Y 1991).

gain derived from an investment represented by the difference between its selling price above its cost.⁶⁶⁷ Procedurally, section 504 (b) provides the order of proof: (1) to establish the infringer's profits the copyright holder need only present proof of the infringer's gross revenues; (2) the burden of proof then shifts to the infringer to prove "his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."⁶⁶⁸ This unadorned language of Section 504(b) of the Act thus leaves it to the courts to provide working definitions of the terms "actual damages" and "profits" used in the statute. The term "actual," one may conclude, was employed to distinguish those damages from "statutory damages."⁶⁶⁹

Indirect Profits

Indirect profits flow directly from the infringement and require a causal link to the infringement before they can be recovered. The language of section 504 (b) provides that "the copyright owner is entitled to recover any profits of the infringer that are attributable to the infringement." In using the words "any profits" Congress drew no distinction between direct and indirect profits. The courts, however, in applying tort principals of proximate cause, have provided a sufficient body of law to apply to this issue. Its application often depends on the business involved in the infringement and the factual situation, which in effect are built into the conduct of those businesses.

In *Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc.*,⁶⁷⁰ involving a musical revue that used songs from plaintiff's play, the City of Las Vegas, Nevada, was a serendipitously perfect setting provided by a city whose main industry is gambling with the added inducements of headline entertainers and hit shows. In that case, plaintiff music publisher claimed that MGM had infringed its copyrights to several songs from the Broadway musical *Kismet* by having them performed without authorization in *Hallelujah Hollywood*, a musical revue show presented at the MGM Grand Hotel in Las Vegas. In addition to direct profits, plaintiff sought recovery of indirect profits from MGM's earnings from hotel and gaming operations in qualifying the amount of profits attributable to the infringement. The lower court declined to award actual damages as it was not convinced that

⁶⁶⁷ In *Design v. K-Mart Apparel Corp.* 13 F. 3d 559, 563 (2d Cir. 1994).

⁶⁶⁸ Copyright Act, 1976 § 504 (b)

⁶⁶⁹ RONALD S. ROSEN, *MUSIC AND COPYRIGHT* 77 (1st ed. 2008).

⁶⁷⁰ 772 F.2d 505 (9th Cir. 1985).

the value of plaintiff's work was diminished as a result of defendant's infringement and instead, based its computation of the recovery solely on profits earned on the production of Hallelujah Hollywood.

In rebuffing the defendant's claim that Hallelujah Hollywood was a profit center, just as their objective was to turn a profit from all their operations, the Ninth Circuit court stated, "that fact does not retract from the promotional purposes of the show – to draw people to the hotel and the gaming tables..... Given the promotional nature of 'Hallelujah Hollywood', we conclude indirect profits from the show itself, are recoverable if ascertainable."⁶⁷¹ The court also cautioned that "at the same time, a court may deny recovery of a defendant's profits if they are only remotely or speculatively accountable to the infringement."⁶⁷²

In *Cream Records Inc. v. Jos Schlitz Brewing Company*, the Ninth Circuit affirmed an award for profits from Schlitz's unauthorised use of the song "Shaft" in a television commercial. In *Cream Records*, the plaintiff also introduced evidence that another advertiser requesting a license for the same from "Shaft" backed out when the Schlitz commercial aired on television. The jury returned a verdict of \$12, 000 that was reversed by the Ninth Circuit, which concluded that the award was insufficient.

V.2.iii.g. Computation of Defendant's Profits

The copyright owner prevailing in a statutory infringement action is entitled to recover "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."⁶⁷³ The purpose of the award of the defendant's profit is "to prevent the infringer from unfairly benefiting from a wrongful act."⁶⁷⁴

- A. Basic Standards for Establishing Profits: Once the factfinder deducts appropriate expenses and apportions the amounts due to the infringement, the balance represents defendant's profits.⁶⁷⁵ It has been held that "profits" for purposes of the Copyright Act refer to

⁶⁷¹ Ibid.

⁶⁷² Ibid.

⁶⁷³ Copyright Act, 1976 § 504 (b).

⁶⁷⁴ *In re Independent Service Organisations Antitrust Litigation*, 23 F. Supp. 2d 1242, 1250 (D. Kan 1998).

⁶⁷⁵ NIMMER'S COPYRIGHT, (Indian Reprint 2013).

“entrepreneurial or employer income as distinguished from wages or rent.”⁶⁷⁶ Thus, a salary paid to one liable as an infringer is not subject to recovery as infringer’s profits.⁶⁷⁷

- B. Gross Receipts: The Copyright Act provides that, “in establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenues and the infringer is required to prove his or her deductible expenses.”⁶⁷⁸ Accordingly, “all gross revenue is presumed to be profit ‘attributable to the infringement,’ unless the infringer is able to demonstrate otherwise.” What is the reason for displacing the plaintiff’s normal burden of proof onto the shoulders of the defendant? In *Johnson v. Jones*,⁶⁷⁹ the court recognises the rationale for this reversal as follows:

“Very often the act of infringement allows the infringer to pocket as net profit a much larger percentage of his gross revenue than he could have absent the infringement. It is for precisely this reason that the Copyright Act shifts the burden of proving deductible expenses to the defendant after the plaintiff has proven gross revenue.”⁶⁸⁰

- C. Extent of Deductible Amounts: Defendant may deduct the amount of royalties paid to defendant’s writer, though such writer may himself be liable to pay such royalties to the plaintiff in a separate action.⁶⁸¹ Defendant’s publication costs may not be reduced by the full cost of its printing plates, if such plates are salvageable.⁶⁸² Defendant may not deduct the cost of those infringing copies from which no gross revenues were derived because they either were not “sold” or were later returned.⁶⁸³ In general, it may be said that only those expenses that are proven with some speciality to relate to the infringing work may be

⁶⁷⁶ *MCA Inc. v. Wilson* 677 F. 2d 180 (2d. Cir. 1981).

⁶⁷⁷ *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F. 2d 1545, 1555 (9th Cir. 1989).

⁶⁷⁸ Copyright Act, 1976 § 504 (b).

⁶⁷⁹ 149 F. 3d 494, 506 (6th Cir. 1998).

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Smith v. Little Brown & Co.* 273 F. Supp 870 (S.D.N.Y. 1967).

⁶⁸² *Ibid.*

⁶⁸³ *Dolori Fabrics Inc. v. Limited Inc.*, 662 F. Supp 1347, 1356, 1357 (S.D.N.Y. 1987).

deducted in determining the profits attributable to such work.⁶⁸⁴ However, expenses incurred in order to conceal an infringement are not deductible.⁶⁸⁵

D. Apportionment of Profits: Regarding computation of profits for which the defendant is liable under section 504 (b) the problem arises when the infringing work inextricably intermingles non infringing material with the plaintiff's protectable material with the plaintiff's protectable material. For example, a motion picture may be based on the plaintiff's story and hence constitute an infringing work. Nevertheless a substantial portion of the revenue derived from the picture may due to non-infringing elements such as the talent and popularity of the actors and the artistic and technical contributions made by the director, the producer and many others.⁶⁸⁶

It was formerly of the view that, if the infringing and non-infringing elements could not readily be separated, then plaintiff should recover all profits.⁶⁸⁷ *Callaghan v. Myers*⁶⁸⁸ reasoned that the defendant must bear the burden of paying all profits, given that he caused the mingling of the infringing and non-infringing elements. *Sheldon v. Metro-Goldwyn Pictures Corp*⁶⁸⁹ modified this rule. The Supreme Court there approved an apportionment of twenty percent of defendant's profits from the motion picture *Letty Lynton* to plaintiff's work, holding plaintiff entitled to that portion of the total profits. However, *Sheldon* did not purport to overrule *Callaghan* decision.⁶⁹⁰ Rather it construed *Callaghan* as prohibiting apportionment of profits only when the evidence is not "sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him."⁶⁹¹

⁶⁸⁴ *Caffey v. Cook* 409 F. Supp 2d 484, 503-504 (S.D.N.Y. 2006).

⁶⁸⁵ *Syigma Photo News Inc. v. High Society Magazine Inc.*, 778 F. 2d 89, 93 (2d Cir. 1985).

⁶⁸⁶ *Abend v. MCA Inc.*, 863 F. 2d 1465, 1478 (1978).

⁶⁸⁷ *Belford v. Scribner* 144 U.S. 488 (1892).

⁶⁸⁸ 128 U.S. 617, 9 S. Ct 177 (1888).

⁶⁸⁹ 309 U.S. 390, 60 S. Ct 681 (1940).

⁶⁹⁰ 128 U.S. 617, 9 S. Ct 177 (1888).

⁶⁹¹ 309 U.S. 390, 60 S. Ct 681 (1940).

Following the decision of Sheldon, in *Bruce v. Weekly World News Inc.*,⁶⁹² the court allocated to plaintiff's photograph of Pres. Clinton, 50% of defendant's profits, allowing defendant to ascribe the other half to its own efforts at developing the "star power" of The Space Alien with whom the president was depicted shaking hands. In affirming the First Circuit tracked the various species of actual damages and non-duplicative profits. In *Three Boys Music Corp. v. Bolton*,⁶⁹³ the jury awarded \$5.4 million in profits from a single infringing song on a particular album. The Ninth Circuit sustained its verdict "that 28% of the album's profits derived from the song and that 66% of the song's profit resulted from infringing elements."⁶⁹⁴

IV.2.iii.h. Statutory Damages

Under section 504 (c) of the 1976 Act, the plaintiff may elect under the terms of the statute, elect statutory damages as the remedy instead of actual damages and defendant's profits "for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally."⁶⁹⁵ In addition the election of statutory damages as the remedy is within the sole discretion of the copyright owner who may make his or her election "at any time before final judgement is rendered."⁶⁹⁶ However, he may make such an election regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant's profits and even if he has intentionally declined to offer such evidence, although it was available.

A question of timing arises here. According to the statute, the copyright owner may elect to recover statutory damages at any time before the final judgement is rendered. Accordingly a plaintiff who does not affirmatively make such an election prior to judgement will be limited to monetary recovery of actual damages and defendant's profits.⁶⁹⁷ Now, what if the plaintiff is unsatisfied with the jury award and so thereafter elects statutory damages instead? In *Branch v. Ogilvy & Mather*

⁶⁹² 150 F. Supp 2d 313318 (D. Mass 2001).

⁶⁹³ 212 F. 3d 477, 480 (9th Cir. 2000).

⁶⁹⁴ *Ibid.*

⁶⁹⁵ Copyright Act, 1976 § 504 (c) (1)

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Oboler v. Goldin* 714 F. 2d 211 (2d Cir. 1983).

Inc.⁶⁹⁸ after the jury awarded only \$1 in nominal damages, the court allowed plaintiff to choose statutory damages. But in 1998, the Supreme Court ruled that there is a constitutional right to jury trial on the question of statutory damages. It accordingly invalidated contrary features of the statute.

The Copyright Act of 1976 allows an award of statutory damages in such amount “as the court considers just.”⁶⁹⁹ Presently, the Copyright Act allows an award for knowing infringement in the range from \$750 to \$30,000.⁷⁰⁰ Congress arrived at those figures via the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999. At its passage the current Act set the minimum statutory damages for knowing infringement of the copyright in any work at \$250⁷⁰¹ and the maximum statutory damages at \$10,000.⁷⁰² However, if the defendant sustains the burden of proving that she was not aware and had no reason to believe that her acts constituted a copyright infringement and the courts so finds, the court may reduce the applicable minimum. One case declined to find innocence based on advice of counsel, when defendant declined to furnish its attorney’s written opinion.⁷⁰³ In any event, the reduction is discretionary; even for an innocent defendant, the court may still choose to award damages up to the maximum amount.⁷⁰⁴

- Enhanced and Remitted Statutory Damages

In keeping with one of the objectives of awards of statutory damages, the courts are given a range of damages to provide each judge with the discretion to accomplish the following: (1) to make an award approximating actual damages and/or profits; or (2) where both are difficult to prove or profits are non-existent to make a reasonable award, given the facts of each case. In addition to the range permissible for ordinary infringements - \$750 to \$30,000, section 504 (c) (2) provides for enhanced damages to a maximum of \$1, 50,000 per work when the infringement is “wilful”. At the other end of the continuum are reduced or remitted damages of not less than \$200 when the

⁶⁹⁸ 772 F. Supp 1359 (S.D.N.Y. 1991).

⁶⁹⁹ Copyright Act, 1976 § 504 (c) (1)

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ NFL v. Primetime 24 Joint Venture 131 F. Supp 2d 458 (S.D.N.Y. 2001).

⁷⁰⁴ Ibid.

infringement is innocent.⁷⁰⁵ In *UMG Recordings Inc. v. MP3.Com Inc.*,⁷⁰⁶ the defendant copies unlicensed music onto MP3 files for downloading by its subscribers over the internet. The court held that the defendant's copying was not a fair use. Thereafter, in a final judgement and order, the court found MP3.Com's conduct wilful and awarded plaintiff's \$25,000 per CD infringed, or \$1,18,000,000 in statutory damages.⁷⁰⁷

In a case where the infringer sustains the burden of proving and the court finds that such infringer was not aware and had no reason to believe that his or her act constitute copyright infringement, the court may reduce the award of statutory damages to a sum of not less than \$200.⁷⁰⁸ Immediately prior to the release of the motion picture 'Batman', Warner Bros. discovered that two categories of two defendants – three retail stores and two flea markets – were selling Batman merchandise in violation of the plaintiff's copyrights.⁷⁰⁹ Warner Bros. commenced separate actions against the retail store and flea markets. Some of the defendants defaulted while others consented to “an injunction ‘permanently prohibiting [them] from dealing in goods that display or depict the Batman symbol.’”⁷¹⁰ The district court explained to the defendants, who were Asian immigrants who spoke little or no English, the effect of the injunction and of the plaintiff's request for damages and attorney's fees. The district court found the defendants to be innocent infringers in that they barely understood English, if at all, and did not have the sophistication to “make [an] inquiry for the purpose of determining whether [they are] or [are] not violating some copyright law.”⁷¹¹ Therefore the trial judge found all of the infringements to be innocent and awarded \$200 statutory damages against both the consenting and defaulted defendants. The appellate court reversed as to the defaulted defendants because, having defaulted they did not meet their burden to prove that the infringements were innocent as required under Section 505 (c) (2) of the Act. The court vacated the award of damages against the defaulted defendants, increasing the statutory damage award to \$500 and affirmed the judgment as modified. The court did not award costs to any of the parties.⁷¹²

⁷⁰⁵ Copyright Act, 1976 § 504 (c) (2).

⁷⁰⁶ 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

⁷⁰⁷ *Ibid.*

⁷⁰⁸ Copyright Act, 1976 § 504 (c) (2).

⁷⁰⁹ *D. C. Comics v. Mini Gift Shop* 912 F. 2d 29 (2d Cir. 1990).

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² *Ibid.*

The statute also provides a safe harbour for particular classes of employees and entities who “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use.”⁷¹³

V.2.iii.i. Criminal Infringement of Copyright

Criminal punishments for copyright infringement have been provided with for a long time.⁷¹⁴ Congress adopted the first criminal provision in 1897. The 1897 provision applied only to unauthorised performances of plays and music, not to the reproduction of books or maps. Later the owners of copyrighted plays had complained about the futility of trying to enforce their copyright when “the performances are usually given at points remote from the location or headquarters of the dramatic author or producer and by irresponsible persons, who jump their companies nightly from town to town.” Given the difficulty of detecting and punishing these very localised and very mobile infringements, Congress acted in 1897 to increase the applicable penalties.⁷¹⁵ Congress broadened the range of infringements that qualified as criminal violations in 1909, including within the criminally prohibited reach all types of infringements, not just performances.⁷¹⁶

As originally enacted in 1976, the statute conferred misdemeanour status – a fine of not more than \$25,000 and imprisonment for not more than one year – on criminal copyright infringement of either the reproduction, distribution or performance right in motion pictures, or of the reproductions, adaptation or distribution right in sound recordings.⁷¹⁷ All other acts of criminal copyright infringement (of motion pictures, or sound recordings or of any other works) constituted misdemeanours of even less magnitude – subject to a maximum fine of \$10,000 and likewise imprisonment for not more than one year.⁷¹⁸

Amendment in 1982 raised the maximum fine vis-à-vis sound recordings and motion pictures to \$2,50,000, limited to infringement of the reproduction and distribution rights.⁷¹⁹ In terms of

⁷¹³ Copyright Act, 1976 § 504 (c) (2).

⁷¹⁴ Trotter Hardy, *Criminal Copyright Infringement*, 11 William & Mary Bill of Rights Journal, 305, 314-15 (2002).

⁷¹⁵ House Representative Report No. 91 -53 (1894).

⁷¹⁶ Copyright Act of 1909.

⁷¹⁷ Copyright Act, 1976 § 506 (a).

⁷¹⁸ Ibid.

⁷¹⁹ Copyright Act, 1976 § 506 (a).

criminal conduct undertaken prior to the 1992 amendment the law imposed a fine of not more than \$2,50,000 or imprisonment for not more than two years, or both, so long as the offence “involves the reproduction or distribution, during any 180 day period of not more than 100 but less than 1000 phonorecords or copies infringing the copyright in one or more sound recordings; or . . . involves the reproduction or distribution, during any 180 period of more than seven but less than 65 copies infringing the copyright in one or more motion pictures or other audio-visual works.”⁷²⁰ The same maximum fine of \$2,50,000, but a more severe sentence of not more than 5 years’ imprisonment applies if the offense “involves the reproduction or distribution, during any 180 period, of at least 1000 phonorecords or copies infringing the copyright in one or more sound recordings; [or] involves the reproduction or distribution, during any 180 period, or at least 65 copies infringing the copyright in one or more motion pictures or other audio-visual works” or constitutes a second or subsequent offense if the fine for the prior offense(s) could have been a maximum of \$2,50,000.⁷²¹

After 1984, computers and computer software exploded in growth with the development and rapid adoption of desktop “personal computers.” That same decade saw comparable growth in consumer digital audio equipment from the development of the “compact digital” or “CD” recording format. Both developments consequently paralleled the similar explosion of home video and home analog music recording equipment – with VCRs and cassette tape recorders – that had happened a decade earlier.⁷²² This growth caused Congress once again to turn its attention to criminal copyright infringement. This time, the previously different treatments of infringement according to the different types of copyrighted works at issue were made consistent.

In 1992 Congress again altered the penalties for criminal copyright infringement. Under this new scheme, the basic offense, warranting imprisonment for up to five years, consist of the reproduction or distribution, during any 180 day period of at last 10 copies or phonorecords, of one or more copyrighted works, with a retail value of more than \$2,500.⁷²³ For second or subsequent offenses

⁷²⁰ Copyright Act, 1976 § 2319 (b) (2).

⁷²¹ Copyright Act, 1976 § 2319 (b) (2).

⁷²² *United States v. LaMacchia* 871 F. Supp 535, 540 (D. Mass 1994); The home computing and software industry underwent a period of explosive growth paralleling the expansion in the 1960s and 1970s of the recording and motion picture industries.”

⁷²³ Copyright Act, 1976 § 2319 (b) (1) (1992)

of that same provision, the penalty is heightened to imprisonment for up to 10 years.⁷²⁴ All other criminal violations remain misdemeanours, punishable by imprisonment for not more than one year.⁷²⁵

The primary difference between this 1992 amendment and previous law is its elimination of any distinction between audio and video piracy, on the one hand and all other types, on the other.⁷²⁶ Under the scheme of 1992, the same penalty applies, even to bootlegging software or books, for instance, as would apply to film or music piracy.⁷²⁷

By the mid-1990s, the “new breed” of copyright infringer, which is characterised as falling between “good” and “bad” ones clearly appeared on the scene. University student Brian LaMacchia paved the arrival. LaMacchia started an online computer service with commonly available file uploading and downloading facilities. He encouraged his users to upload commercial software packages for the privilege of being able to download still other commercial packages that other users had uploaded. He did not charge any fee or receive monetary compensation for this entirely unauthorised service. The lack of any purpose of “commercial advantage or private financial gain” meant that LaMacchia, although responsible for the production of perhaps thousands of infringing copies of commercial software, could not be charged with criminal copyright infringement. He was charged with the closest applicable criminal offense – wire fraud. The trial court found that the government could not establish the elements of that offense and so he was exonerated. In reaching the conclusion, the court essentially invited Congress to correct the problem of the inapplicability of criminal copyright infringement statutes to activities like those undertaken by LaMacchia.

Most applications of the criminal sanction during the first two decades of the Copyright Act applied to large-scale sound recording or film piracy.⁷²⁸ Otherwise application of the criminal copyright provision was rare⁷²⁹. As the copyright law started to rotate around a new dimension with the

⁷²⁴ Copyright Act, 1976 § 2319 (b) (2) (1992)

⁷²⁵ Copyright Act, 1976 § 2319 (b) (3) (1992)

⁷²⁶ S. Rep No. 102-268, 102d Cong., 2d Sess. 2 (1992).

⁷²⁷ 138 Cong. Rec H111130 (1992).

⁷²⁸ *United States v. Sam Goody Inc.* 675 F. 2d 17 92d Cir. 1982).

⁷²⁹ DAVID NIMMER, *NIMMER’S COPYRIGHT*, (Indian Reprint 2013), 15.01.

emergence of the digital era, so the availability of electronic bulletin boards from which infringing products could be downloaded gratis⁷³⁰ challenged the criminal sanction to adapt to new times.

The Congress responded by passing the “No Electronic Theft” (NET Act). The purpose of this statute was to reverse the practical consequences of *United States v. LaMacchia*. Congress accepted the court’s suggestion for additional penalties applicable to the type of conduct evidenced in *LaMacchia* case by adopting this statute. The House Representative Report No. 105-339 of 1997 provides for the rationale behind the statute.

“It criminalises computer theft of copyrighted works, whether or not the defendant derives a direct financial benefit from the act(s) of misappropriation thereby preventing such willful conduct from destroying business, especially small business that depend on licensing agreements and royalties for survival.”

The NET Act provides for the two historic prerequisites for criminal copyright infringement, wilfulness and commerciality. Regarding the first point, previous amendments to criminal copyright doctrine had left the necessary conduct that qualifies as “willful” enunciated.⁷³¹ But the NET Act departs from tradition.⁷³² In particular, it explicitly provides: For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish wilful infringement.⁷³³

As to the second prerequisite for criminal liability, the NET Act likewise works a significant change. Prior law limited criminal conduct to that undertaken “for purposes of commercial advantage or private financial gain.”⁷³⁴ That standard continues under the NET Act.⁷³⁵ The NET Act redefines “financial gain” to include “receipt, or expectation of receipt of anything of value, including the receipt of other copyrighted works.”⁷³⁶ This language was intended to “enable

⁷³⁰ 143 Cong. Rec. H9885 (1997); “This situation has developed because the authors of our copyright laws could not have anticipated the nature of the Internet; which has made the theft of copyrighted works virtually cost-free and anonymous.”

⁷³¹ House Representatives Report No. 102-997, 102d Cong. 2d Sess. 5 (1992).

⁷³² Nimmer on Copyright, 15-17

⁷³³ Copyright Act, 1976 § 506 (a)

⁷³⁴ Copyright Act, 1976 § 506 (a) (1978)

⁷³⁵ Copyright Act, 1976 § 506 (a) (1) (1997)

⁷³⁶ Copyright Act, 1976 § 101 (1997)

authorities to prosecute someone who steals or helps others to steal copyrighted works but who otherwise does not profit financially from the theft.”⁷³⁷

V.2.iv. Digital Millennium Copyright Act and Online Copyright Enforcement

The Digital Millennium Copyright Act was enacted in 1988 to minimise obstacles growth for both content providers, who would not expand the digital distribution of their works without assurances that they would be protected from “massive piracy” and “service providers”,⁷³⁸ who would not expand their sites and networks without assurances that they would be protected from massive liability for copyright infringement.⁷³⁹ It can be understood as a mechanism for simultaneously scaling up online copyright enforcement and scaling back online copyright liability. It is a unified solution designed to give right owners the security necessary to expand content distribution and service providers the security necessary to expand applications and network infrastructure.⁷⁴⁰

The DMCA scales up enforcement while scaling back liability through provisions in Title I that prohibit circumvention of technological protection measures⁷⁴¹ and provisions in Title II that create safe harbours for service providers, conditioned on their assisting rights owners in the expeditious resolution of online copyright infringement disputes.⁷⁴² There are two provisions from Title II on which copyright owners have relied heavily in their efforts to make enforcement scale for digital environment. The second title of the DMCA is entitled the “Online Copyright Infringement Liability Limitation Act. Sec. 512 (c) of DMCA establishes the notice and take down framework

⁷³⁷ House Representative Report No. 105-339, 105th Congress, (1997)

⁷³⁸ In the statute, the term “service provider” is defined broadly to include both providers of Internet access (ISPs) and providers of online services. See 17 USC, section 512(k)

⁷³⁹ Refer S. Rep No. 105-190 (1998) [“Due to ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet, without reasonable assurance that they will be protected against massive piracy.... At the same time, without clarification of their liability, service providers may hesitate to make necessary investment in the expansion of the speed and capacity of the Internet.”]

⁷⁴⁰ Annemarie Brindy, *Is Online Copyright Enforcement Scalable?*, 13 Entertainment and Technology Law, 712 (2011).

⁷⁴¹ Copyright Act, 1976 § 1201

⁷⁴² Copyright Act, 1976 § 512(a)

for which the DMCA is most well-known⁷⁴³ and Sec. 512 (h) allows rights owners to serve subpoenas on service providers outside of litigation to obtain the identities of alleged infringers.⁷⁴⁴

Section 512 (c) of the DMCA contains procedures wherein the service provider is required to remove or disable access to material that is claimed to infringing or subject of infringing activity. The procedural requirements for notification under DMCA are elaborate, in that the specific contents of the notification are provided for under Section 512 (c)(3)(A). Further the DMCA recognises the immense potential for abuse posed by the notice and take down procedure⁷⁴⁵ and in this regard the DMCA contains counter notification procedures, stating essentially that service provider is legally obligated to restore access to material at the direction of an alleged infringer who feels he or she has been wronged by an infringement allegation.⁷⁴⁶ Where the alleged infringer receives notice from the service provider that his or her material is going to be removed due to a claim of infringement alleged by another party, or where the material has already been removed, the alleged infringer may send the service provider a counter notice that the material in question is not infringing. On the receipt of counter notification the service provider must then inform the copyright holder that the counter notice has been filed and that the material will be replaced or restored, it must then file a suit in an appropriate federal district court within 10 days. If the copyright holder intends to pursue the matter and prevent the material from being replaced or restored, it must then file suit in an appropriate federal district court within 10 day period and obtain an order restraining the subscriber from engaging in infringing activity. In absence of any notice by the complainant regarding the filing of such a suit, the service provider is required to replace the removed material and cease disabling access to the material in not less than 10 days and not more than 14 days from the receipt of the counter notice.

⁷⁴³ Copyright Act, 1976 § 512(c)

⁷⁴⁴ Copyright Act, 1976 § 512 (h): “A copyright owner or a person authorised to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer.... The request may be made by filing with the clerk.... a copy of a notification described in subsection (c) (3)(A); a proposed subpoena; and a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting the rights under this title.”

⁷⁴⁵ Aditya Gupta, *The Scope of Online Service Providers’ Liability for Copyright Infringing Third Party Content under the Indian Laws – The Road Ahead*, 15 Journal of Intellectual Property Rights, 35, 38-39 (2010).

⁷⁴⁶ Id., at p. 39.

- Conditions required for limiting liability of Service Provider

Sec 512 sets forth at some length three conditions in order for a service provider to limit its liability for responding to user requests. The first two deal with knowledge and financial benefit. The third introduces an innovation into the copyright world by regulating the removal or disabling of access to copyrighted material.⁷⁴⁷

[1] Knowledge of Infringement: The first condition for an ISP to take advantage of this exemption is that it must lack knowledge that it is carrying infringing material. Three components apply here:

(a) The service provider must ‘not have actual knowledge that the material or an activity using the material on the system or network is infringing.’⁷⁴⁸

(b) The statute adds that “in the absence of such actual knowledge, [the service provider must not be] aware of facts or circumstances from which infringing activity is apparent.”⁷⁴⁹ This standard “can be best described as a ‘red flag’ test.”⁷⁵⁰ It differs from previous standards “under which a defendant may be liable for contributory infringement if it knows or should have known the material was infringing.” In other words, the standard is not what a reasonable person would have deduced given all the circumstances; it is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.

(c) Although a service provider “need not monitor its service or affirmatively seek facts indicating infringing activity,”⁷⁵¹ it nonetheless cannot simply adopt struthious behaviour by leaving its head permanently buried in the sand.

[2] Benefit/Control: The first requirement here is that the service provider cannot “receive a financial benefit directly attributable to the activity.”⁷⁵² The second requirement applicable here is

⁷⁴⁷ DAVID NIMMER, NIMMER’S COPYRIGHT, (Indian Reprint 2013) 12B.51

⁷⁴⁸ Copyright Act, 1976 § 512 (c)(1)(A)(i)

⁷⁴⁹ Copyright Act, 1976 § 512 (c)(1)(A)(ii)

⁷⁵⁰ DAVID NIMMER, NIMMER’S COPYRIGHT, (Indian Reprint 2013) 12B.53

⁷⁵¹ Ibid.

⁷⁵² Copyright Act, 1976 § 512(c)(1)(B)

that the safe harbour applies only “in a case in which the service provider has the right and ability to control such [infringing] activity.” Thus even an entity that receives a direct financial benefit from infringement falls within the safe harbour, so long as it has no right to control that conduct.

[3] Disabling Access: On receiving notification of that claimed infringement in proper form, the service provider must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or be the subject of infringing activity.” This “notice and take-down” procedure represents “a formalisation and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”⁷⁵³ “Copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.” They may instead prevail if they prove that a provider ignored a “red flag” that was waving in its face – or if they shoulder the even greater challenge of showing the service provider’s actual knowledge.

The first sustained battle under the Online Copyright Infringement Liability Limitation Act occurred in *A&M Records Inc. v. Napster Inc.*⁷⁵⁴ A consortium of eighteen record companies (later joined by various music publishers) banded together as plaintiffs to sue “an Internet start-up that enables users to download MP3 music files without payment. Napster offered on its website file sharing software; those who downloaded that proprietary software to their own personal computers could then log onto the Napster system and share MP3 files with anyone else simultaneously logged on. In granting a preliminary injunction, the district court reviewed the evidence of market harm to plaintiffs from defendant’s service.⁷⁵⁵ It found that “Napster use is likely to reduce CD purchases by college students, whom defendant admits constitute a key demographic.” Although plaintiffs’ expert conceded that college students’ use of Napster “helped them make a better selection or decide what to buy,” her overall conclusion was that Napster usage decreased their music purchases. In reply, defendant maintained that Napster actually stimulated record sales; the district court rejected defendant’s expert’s report based on methodological flaws. It concluded that in

⁷⁵³ DAVID NIMMER, *NIMMER’S COPYRIGHT*, (Indian Reprint 2013) 12B.59

⁷⁵⁴ 114 F. Supp. 2d 896 (N. D. Cal. 2000)

⁷⁵⁵ Preliminarily, the court noted that Napster invested nothing in the content of music, whereas the record companies invested millions. Those plaintiffs relied on the revenue from 10-15% of their recordings that become “hits,” essentially all of which recordings were available for free on Napster. In addition, the court recited that the record companies had invested millions in schemes to allow digital downloads for a fee, as well as promotional samples (i.e., less than an entire song), also for a fee.

choosing between the free Napster service and pay-per-download sites, consumers are likely to choose Napster.” The district court concluded that Napster users engaged in direct copyright infringement, unexcused by a valid fair use defense. It concluded that Napster was both vicariously liable for its users’ infringement and a contributory infringer with them, outside the protection of the staple article of commerce doctrine.

The district court also found that Napster actually knew about the infringing uses to which its service was being put, given its executives’ references to “pirated music”,⁷⁵⁶ had actual notice of infringement via notices served by the RIAA, trade association for the record companies; and “at the very least ... had constructive knowledge of its users’ illegal conduct.” The constructive knowledge consisted of filing a trademark suit against a rock band that had copied the Napster logo, Napster executives’ downloading infringing materials to their own PCs, and their promotion of a “website with screen shots listing infringing files.” Based on such constructive knowledge, the court dismissed Napster’s “persistent attempts to invoke the protection” of Section 512.

The Ninth Circuit promptly stayed the preliminary injunctions. But after months of consideration, it affirmed the district court’s substantive rulings, modifying only the scope of the injunction. The Ninth Circuit concluded that evidence of Napster’s “actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material and that it failed to remove the material” likely rendered it a contributory infringer. The district court concluded that Napster’s status as a contributory infringer rendered it outside the protection of the instant section 512(d) safe harbour added by the Online Copyright Infringement Liability Limitation Act. The Ninth Court disagreed with that blanket pronouncement.

With the demise of Napster, digital song sharing became decentralised.⁷⁵⁷ A single popular host for song sharing was replaced by choice of a new hosts and the new hosts used software programs that did away with the concept of a hub and instead spread MP3 files throughout the world. The most prominent unauthorised successors to Napster lacked central servers and thus eliminated

⁷⁵⁶ “Napster co-founder Sean Parker mentioned the need to remain ignorant of users’ real names and IP addresses since they are exchanging pirated music” 239 F. 3d at p. 1020.

⁷⁵⁷ BARRY KERNFELD, POP SONG PIRACY – DISOBEDIENT MUSIC DISTRIBUTION SINCE 1929 208 (1st ed. 2011).

identifiable distributors for their musical components. The rival song-sharing sites included, among others, MusicCity's Morpheus, Audiogalaxy, KaZaa, BearShare and LimeWire. LimeWire and BearShare utilised the Gnutella network. It did away with centralised company computers together, instead connected personal computers directly from one to the next.

Even if MP3 files were scattered through the electronic ether, each of these sites still functioned in some sense as a conceptual hub and the recording industry attempted to suppress them by pursuing an argument similar to that applied to Napster. But this path to prosecution hit a temporary roadblock in April 2003 when Federal District Court Judge Stephen Wilson ruled in Los Angeles that SteamCast Networks and the file sharing company Grokster were not to be held legally responsible if individuals used their products to infringe on copyright. While upholding the decision in the Court of Appeals, Judge Sidney R. Thomas supplied an unusual judicial acknowledgment of the role of new products play in challenging copyright owners. "The introduction of that new technology is always disruptive to old markets and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine or an MP3 player. Thus it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude." However, the Grokster decision was overturned.

Another complication was the relationship between physical retail outlets and "virtual" Internet outlets. How could subscriptions to songs be priced without threatening price structures at record stores that were, at that time, the retail backbone of the industry? As it turned out, record stores were dying, giving way to the acquisition of songs over the Internet in either format, CD or MP3, legitimate or not. By mid-decade most record stores would go out of business, with CD sales transferring to Internet-based corporations such as CD-Now, Amazon and Half.com.

In mid-2003 iTunes made its debut. Steve Jobs, the head of Apple Computer tried to win recording industry executives over to his conception of an unauthorised song sharing service. Apart from the legitimacy that downloading from iTunes offered, and the question of whether the general public actually cared about that legitimacy, the service provided a reliability that the world of uncontrolled

and unauthorised song sharing could not match. Apple rose in the distribution of recorded songs to a position of power that made the major companies uncomfortable and they continued to attempt to develop alternatives. Apple's iTunes dominated the legal market, but by 2008 its growth had begun to level off. Meanwhile, unauthorised song sharing has persisted through the decade.

V.2.v. Copyright Enforcement against Online File-sharing Services in United States of America

With the development of internet, copyright infringement resulting from "online file sharing has become a serious problem."⁷⁵⁸ Reliable and independent numbers are elusive when it comes to measuring file sharing's economic impact on the copyright industries and the US economy as a whole. The MPAA asserted that online infringement costs U.S. creative industries billions of dollars and hundreds of thousands of jobs annually. As required by the Prioritising Resources and Organisation for Intellectual Property Act of 2008 (PRO-IP Act), the General Accounting Office examined existing research on the economic effects of counterfeiting and piracy. In a report released in 2010, the GAO concluded that economic loss estimates widely cited by the government could not be substantiated due to the absence of underlying studies. In attempting to discover the origin of the estimates, the GAO learned from governmental officials that the numbers came directly from industry; they were neither independently reviewed nor supported by any disclosure of data or methodology. The GAO report stands as a reminder to policy makers of the need for disinterested data gathering and assessment.

However, there is truth behind hype. Notwithstanding the copyright industries' propensity to exaggerate their losses or the fastness and looseness with which their statistics are (re)circulated by uncritical government officials and media outlets, there can be little question that P2P networks have facilitated large-scale infringement or that the volume of files traded illegally by means of such networks has been and remains large and revenue-depleting. As the GAO concluded, without factitious precision, "the problem is sizeable."

Peer-to-peer systems especially have become bastions of Internet piracy. Based on a sample of 1021 BitTorrent files from the Mainline DHT system, a study found that 99% of the sample was

⁷⁵⁸ Capital Records, Inc. v. Thomas-Rasset, 692 F. 3d 899, 908 (8th Cir. 2012).

likely infringing. A different study used server scrapes to gather information on one thousand BitTorrent transfers and found that 97.9% of non-pornographic torrents were likely infringing. In *Arista Records LLC v Lime Group LLC*, Dr. Richard P. Waterman testified to his findings that nearly 98.8% of files on the LimeWire peer-to-peer system were copyrighted and likely distributed without authorisation. In *Columbia Pictures Industries Inc. v. Fung*, Dr. Waterman testified for the plaintiffs that approximately 95% of downloads through the Torrentbox and IShonut sites infringed copyright. The Digital Music Report of 2012, published by International Federation of the Phonographic Industry, estimated that 28% of the internet users access unauthorised content services each month. Copyright infringing exchanges have been accounted for more than 17% of all U.S. internet traffic.

However, as discussed previously there is wide-ranging disagreement about the effects such piracy on content owners and on creativity in general. A study prepared for the Computer and Communications Industry Association attempted to show that losses from piracy are largely offset by economic gains in industries making uncompensated “fair use” of copyrighted material. It found that fair use industries accounted for 16.2% of US GDP in 2007.

As discussed above, in 1997, No Electronic Theft Act was passed and the impetus of this law was filesharing services that allowed free downloads. The prosecution of the popular online storage website, ‘Megaupload’, for criminal copyright infringement is the latest in a series of recent criminal prosecutions of online file-sharing services. The success of The Pirate Bay prosecution has been called a harbinger of actions like the one against Megaupload. Yet criminal prosecution of filesharing services is a new development in the United States. The future holds many questions. What pushes a legitimate online filesharing business into the territory of criminal enterprise? How might criminal copyright enforcement differ materially from civil enforcement?⁷⁵⁹

In 2005, Kim Dotcom founded Megaupload⁷⁶⁰, an online Hong Kong based company operating a number of online services related to file storage related to file storage, viewing and sharing.⁷⁶¹

⁷⁵⁹ Benton Martin and Jeremiah Newhall, *Criminal Copyright Enforcement against Filesharing Services*, 15, North Carolina Journal of Law and Technology, 101, 105-06 (2013).

⁷⁶⁰ Known for the high traffic websites, like megaupload.com and megavideo.com.

⁷⁶¹ Daniel Levin, Samuel Doran and Leslie A. Maria, *Megaupload and Criminal Charges*, (Feb. 12, 2015, 6 PM) peri.difusionjuridica.es/index.php/RERI/article/download/44/42.

Users could upload material to Megaupload's sites, which then would create a link that could be distributed by the users. The sites included video, music, etc. It did not provide search capabilities but rather relied on others to publish the links. At one point, megaupload.com was estimated to be the 13th most frequently visited website on the Internet. Megaupload's income derived from premium subscriptions and online advertising, which generated more than \$175 million annually.⁷⁶² The FBI said Dotcom personally made \$40 million from Megaupload in 2010 alone.⁷⁶³

Megaupload's domain names were seized and the sites were shut down by the United States Department of Justice on January 19, 2012, following the indictment and arrests of Dotcom and six other executives in New Zealand.⁷⁶⁴ The DOJ alleged that Megaupload ran a massive online piracy scheme by facilitating and encouraging the copying and sharing of pirated material. It is claimed that Megaupload fostered copyright infringement of movies "often before their theatrical release, music, television programs, electronic books and business and entertainment software on a massive scale."⁷⁶⁵ The DOJ estimated that the harm to copyright holders caused by Megaupload's file sharing was "well in excess of \$500 million."⁷⁶⁶ It was contended that Megaupload had numerous servers in the United States and that these servers were aware that these servers were hosting and distributing copyrighted material. These servers and payments from individuals in America, appear to be the primary connection Megaupload has with the United States. It was contended that the defendants are liable to plaintiffs for direct copyright infringement; for inducement of infringement, contributory infringement and vicarious infringement and also for actively promoting, enabling and profiting from the copyright infringement of Megaupload users.

The arrest of Kim Dotcom and his fellow Megaupload executives raise a series of challenging questions about the future of copyright enforcement, the challenges of extradition and about the reach of national criminal laws in an increasingly interconnected and information based world.

⁷⁶² United States v. Dotcom, et al. E.D. Va, Criminal No. 1:12-CR 3.

⁷⁶³ Ibid.

⁷⁶⁴ The indictment was handed down in the United States District Court for the Eastern District of Virginia. United States v. Dotcom, et al. E.D. Va, Criminal No. 1:12-CR 3.

⁷⁶⁵ David Kravets, *Feds Shutter Megaupload, Arrest Executives*, WIRED, (Jan 19, 2012, 10 AM) <http://www.wired.com/threatlevel/2012/01/megaupload-indicted-shuttered/>.

⁷⁶⁶ Ibid.

Criminal enforcement of copyright should proceed only on established theories of liability.⁷⁶⁷ The theory of secondary liability is established to proceed with prosecution against services like Megaupload. The government should target prominent services. Megaupload is a good example. When indicted, the company claimed to be pulling in 4% of all Internet traffic and averaging 50 million daily visits. This notoriety, or “big fish” factor, is important because many users of filesharing services are low-cost infringers, using search-engines to pirate 99% songs or \$10 movies.⁷⁶⁸ Criminal copyright enforcement has to be limited to circumstances where there is evidence that civil litigation will be futile. The most obvious way that this futility arises is when operators of a file sharing service refuse to respond to civil means of copyright enforcement.

The file sharing services, which demonstrates an egregious disregard for copyright law, should be criminally demonstrated. What shows prosecutable contempt for the law are the steps the operators took to scorn takedown complaints and profiteer from blatant infringement. Megaupload made millions by selling ads on infringing content while its employees allegedly joked about aiding piracy and dodged takedown requests by reposting links to infringing content. Although potentially necessary, imprisonment of copyright infringers is not ideal. Prison creates a host of societal losses. The expense of running jails, the lockup of wage earners, the potential for civil-rights violations. Moreover, when imprisonment is rarely imposed, as in copyright cases, the deterrent effect is decreased.⁷⁶⁹

The potential for imprisonment is not the only reason why prosecutors might choose to pursue file sharing services through a criminal rather than civil proceeding. There are five procedural benefits to the government in criminal proceedings and they presents hardships for file sharing services.⁷⁷⁰ Firstly, many of the file sharing services are headquarters overseas, making civil litigation against them difficult. Second, the federal government has the authority to quickly shutter infringing sites.in a criminal. Thirdly, the government is able to freeze or seize all sorts of assets it believes are instruments or proceeds of criminal activity. Moreover, there are potential benefits to pursue criminal restitution rather than civil damages. In a criminal copyright case, criminal restitution may

⁷⁶⁷ Benton Martin and Jeremiah Newhall, *Criminal Copyright Enforcement against Filesharing Services*, 15, North Carolina Journal of Law and Technology, 101, 138-39 (2013).

⁷⁶⁸ Id., at p.141.

⁷⁶⁹ Id., at p. 143.

⁷⁷⁰ Id., at p. 144.

limit an injured part's recovery. The Mandatory Victim Recovery Act in USA authorised compensation only for victims' actual losses; recovery of an infringer's profit is saved for civil means. Moreover, actual losses can be especially hard to prove in copyright infringement cases because the number of people who download free or reduced-price infringing products may not accurately reflect the size of those products' legitimate customer base. Restitution may be preferable when the potential victims are numerous, as is the case with file-sharing services.

There are advantages and efficiencies to criminal prosecutions over civil lawsuits.⁷⁷¹ The federal government wields power to seize sites, to extradite, to freeze assets, and to record internal conversations surreptitiously as means to deter those file sharing services refusing to comply with civil enforcement efforts. Prosecutors should look for situations where liability under civil law is clearly established and civil enforcement is likely to be futile and they should aim to prosecute the most prominent infringing services fitting those criteria.

However, it is also observed that the prosecution seeks to hold Megaupload and its executives responsible on the theory of criminal secondary copyright infringement. The problem with the theory is that secondary copyright infringement is not – nor has it ever been a crime in the United States.⁷⁷² The federal courts lack any power to criminalise secondary copyright infringement. The U.S. Congress alone has such authority and it has not done so. This Megaupload prosecution is unprecedented. Previous instances in which courts have imposed civil liability for secondary copyright infringement, do not apply in criminal proceedings, as federal crimes are 'solely creature of statute.' The Copyright Act creates civil and criminal liability for various acts of copyright infringement, but it does not expressly give rise to liability for infringement committed by third parties.

In Sony Betamax case⁷⁷³ U.S. Supreme Court established that distributors of products or services capable of substantial non-infringing uses are not liable for secondary infringement. It is contended that the vast scope and scale of non-infringing uses for Megaupload's cloud storage service are so

⁷⁷¹ Id., at p. 151.

⁷⁷² Robert R. Amsterdam and Ira P. Rothken, *Megaupload the Copyright Lobby and the future of Digital Rights – The U.S. v. You (and Kim Dotcom)* (Mar. 15, 2015, 11 AM) <http://kim.com/whitepaper.pdf>.

⁷⁷³ Sony Corp. of America v. Universal City Studios, Inc., 464, U. S. 417 (1984).

obvious that they should require no further elucidation. Most of Megaupload's hundreds of millions of hosted files were downloaded less than 10 times,⁷⁷⁴ many of them are not at all contrary to the picture portrayed by the U.S. government- indicates a very high level of protected and lawful use. The plaintiffs in this case contended that Megaupload's "Uploader Rewards" program aimed to provide "financial incentives to its premium subscribers to upload copies of popular works" to the site and thereby encourage or contribute to infringement. This argument is countered by observing that this program was not designed to facilitate piracy and its purpose was to grow the user base of the cloud storage site and attract new paying premium members in a copyright-agonistic manner.

Moreover, it is argued that the U.S. government is wrong to assert that DMCA's safe harbour provisions do not apply to Megaupload. Conversely, Megaupload went well beyond legal compliance procedure with the DMCA's safe harbour provisions.. Megaupload cooperated with copyright owners by following the "notice and takedown" procedures described in DMCA and it designated an agent to receive notices from copyright owners. Megaupload has a number of strong potential defences for its users' activities including section 512(c). The U.S. government's takedown of Megaupload and Kim Dotcom have been criticised to give rise to alarming precedent for regulation of the Internet, freedom of expression, privacy rights and the very rule of law.⁷⁷⁵

V.2.vi. Enforcement against Individual File-sharers

In autumn 2003 the RIAA initiated a campaign designed to intimidate the general public, by filing civil suits against individuals who made large numbers of MP3 song files available for downloading. RIAA filed suits seeking large monetary awards for copyright infringement. In September 2003 a suit was filed against Sarah Ward, a 66 year old Newbury, Massachusetts, resident whom the RIAA threatened with a liability of \$1, 50,000 per song for more than 2000 songs she had allegedly downloaded through KaZaa. The charge was not only because she had done it, but because she had a Macintosh computer and KaZaa only ran on Windows system.

In 2005 the RIAA sued Patti Santangelo for illegal downloading. She denied any wrongdoing. In November 2006 the organisation claimed that two of her children, Michelle, then 19 years of age

⁷⁷⁴ Id., at p. 24.

⁷⁷⁵ Id., at p. 48.

and Robert, aged 15 years, were the offenders and RIAA charged Patti with 'secondary infringement' for allowing her children to take the alleged actions. Michelle, not responding to the lawsuits was then hit with a \$30,750 fine in absentia. In January 2007 Robert denied the charges and demanded a trial by jury. Among many other things, it was claimed that the major corporations were acting in collusion as a conspiracy to defraud American courts and as a cartel to prosecute individuals "in an identical manner and through common lawyers," and that the RIAA was seeking damages that were excessive, in violation of the Constitution. In March 2007 Judge Colleen McMahon denied a motion from the RIAA's lawyers to dismiss the case against Patti Santangelo "without prejudice", that is to say, with neither side responsible for legal fees. Two years later the Santangelo family and the RIAA reached a confidential settlement. So the outcome of the contest is unknown, but the substantial publicity that it received showed that there might be viable paths to opposing the institutional campaign.

Here a case of two other wrongfully accused individuals is noteworthy. Initially the case was filed against Debbie Foster. In the first case, discovering an initial mistake in the charges against Debbie Foster, the RIAA shifted its accusations to her adult daughter, Amanda, but refused to drop the charges against Debbie and she was charged as a 'secondary infringer'. Amanda failed to answer the suit and the RIAA was awarded a default judgement in her name. The RIAA then moved to drop its suit against Debbie, but she filed a counterclaim. In mid-2006 judge Lee R. west dismissed both suits, while declaring Debbie Foster the prevailing party, with prejudice, and awarding her around \$68, 000 in attorneys' fees.

In another case, Tanya Anderson was wrongly accused of downloading illicit copies of "gangsta rap." After the RIAA agreed to settle the suit in her favour, "with prejudice," Anderson filed a class action countersuit. Both the suits were dismissed and Anderson got a rule in her favour, with prejudice, which obliged the RIAA to pay her approximately \$1, 08,000 in legal fees.

During the same period RIAA charged Jammie Thomas with downloading 24 songs through KaZaa. Found guilty in a trial, she was fined \$2, 22, 000. In 2008, Federal District Judge Michael J. Davis reconsidered his ruling and ordered a new trial. Judge Davis decided that he had been mistakenly convinced by arguments from lawyers for the RIAA that Jasmine Thomas's actions constituted "making available" and an "offer to distribute" the songs that she downloaded. Without

contesting that she had participated in infringement by downloading songs from KaZaa, the judge noted that she neither sought nor gained from that activity.

Whether the cases of Santangelo, Foster, Andersen and Thomas had caused the RIAA to rethink its policies, is unknown, but it seems likely. In any event, the organisation said that it would turn its attention toward trying to compel Internet service providers to monitor their traffic in songs. This track had already been re-enabled in 2005, when the U.S. Supreme Court overturned the Grokster and StreamCast decision. They had distributed technology that promoted copyright infringement and therefore the court ruled that, they were liable for the resulting infringement, even if their products also had lawful uses. Grokster stopped distributing its software and maintaining its network late in 2005. StreamCast continued on. In a related case, Sherman Networks, the owners of KaZaa reached a settlement in which it agreed to pay \$115 million to the RIAA, while installing filters on its networks that would somehow prevent users from sharing copyrighted songs.

Recording industry's copyright enforcement through litigation continued. In 2012 *Capitol Records Inc. v. Thomas-Rasset*,⁷⁷⁶ the defendant argued that her children or boyfriend might have illegally downloaded and shared songs under her username and that she was not liable. However, the English Circuit upheld Thomas-Rasset's conviction for wilfully infringing the recording companies' rights under the Copyright Act, and held that the record companies were entitled to "damages of \$2, 22,000 and a broadened injunction. The court originally ordered her to pay a \$1.5 million fine, which it later reduced to @2, 22,000, the equivalent of \$9, 250 per song. Subsequently in *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit affirmed the decision that damages of \$6, 75,000 or \$22, 500 for each of the thirty pirated songs, was appropriate. Tenenbaum appealed the award of damages and argued that the sum was disproportionate to the actual injury – which he estimated at a maximum of \$450, and thus violated his due process rights. However, the court opined that the damage was appropriate because Tenenbaum had unlawfully shared copyrighted music. Similarly, in *Atlantic v. Howell*, seven major record labels sued KaZaa to share 4000 songs. United States District Court for the District of Arizona found Howell liable for distributing fifty four copyrighted songs and awarded the plaintiffs \$40, 500 or \$750 per song.

⁷⁷⁶ 692 F.3d 899 (8th Cir. 2012).

The first RIAA case targeted 261 John Doe defendants and by late 2008, it had sued more than 30,000 individuals. The total number of new copyright cases filed between 2001 and 2003 was 6,599. Between 2004 and 2006, that number swelled to 12,736. New copyright case filings at just under 14,000 between 2006 and 2008.⁷⁷⁷ Operating as the U.S. Copyright Group, the D.C. area firm of Dunlap, Grubb & Weaver filed suits in 2010 on behalf of a handful of independent filmmakers alleging infringement by over 14,000 individual John Doe file sharers. In a single filing over 4,500 individuals were sued for using BitTorrent to download the film *Far Cry*⁷⁷⁸. In another case 5,000 Does were accused of illegally downloading *The Hurt Locker*. Attempting to enhance copyright infringement litigation by naming hundreds or thousands of John Doe defendants in a single action created insoluble due process problems relating to joinder, venue and personal jurisdiction.

V.2.vii. Copyright Alert System - Online Copyright Enforcement through “Graduated Response”

In the online world, the anonymity of the internet and the architecture of peer-to-peer networks create frustrating procedural barriers to enforcement.⁷⁷⁹ Moreover, direct lawsuits against online infringers are negatively perceived by the public, who see them as instances of media corporations ganging up against vulnerable consumers to force easy settlements. One possible mechanism for uncovering an infringer’s identity is the ISP subpoena provided for in section 512(h) of DMCA.⁷⁸⁰ However, section 512(h) only allows a subpoena to be issued to an ISP that is storing infringing content on their servers, not to an ISP that merely carried infringing traffic on their network. Although early P2P networks did store information about infringing files on a centralised server, later decentralised P2P networks and modern BitTorrent networks connect users to each other without storing information on the ISP’s servers. This change in architecture enables ISPs to avoid secondary copyright liability. Thus, deprived of the DMCA subpoena as a tool to identify infringers, the challenges to discovering the identities of direct infringers and getting them into court form a rigorous procedural labyrinth.

⁷⁷⁷ Id., at p. 724.

⁷⁷⁸ Ibid.

⁷⁷⁹ Rachel Storch, *Copyright Vigilantism*, 16 *Stanford Technology Law Review*, 463 (2013).

⁷⁸⁰ Id., at p. 458.

In December 2008, the Recording industry Association of America (RIAA) made a formal public announcement of its change of focus toward greater cooperation with ISPs. This new collaborative effort seeks to replace the highly unpopular lawsuits the industry has filed against individual file-sharers. Subsequently, in 2011, content industries in U.S. adopted a new strategy.⁷⁸¹ At the behest of the Obama and Cuomo administrations,⁷⁸² the largest internet service providers entered into a Memorandum of Understanding with the major entertainment industries and firms to implement a Copyright Alert System.⁷⁸³ The Copyright Alert System is popularly known as “six strikes” program. Unlike graduated response programs in other countries, Copyright Alert is an entirely private and contractual scheme, not an administrative program instituted through legislation. The MOU was signed on July 6 2011. This six stage graduated response is coupled with creation of Center for Copyright Information, a private regulatory body.

The responsibility for detecting instances of online infringement falls on the RIAA and MPAA. These organisations are empowered to send notices to the signatory ISPs containing the IP addresses and other identifying information of alleged infringers. The notifications must contain a detailed description of the work allegedly infringed and the basis for believing it was infringed. In addition, the Content Owner Representatives agree to identify infringement only through methodologies that have been reviewed by an independent expert and to avoid cases of de minimus infringement. These safeguards are designed to provide some measure of protection to internet users by minimising wrongful or arbitrary notices.

On receiving a notice from a Content Owner Representative, ISPs are required to respond in accordance with the Copyright Alert System.⁷⁸⁴ By requiring the ISPs to independently enforce the program, Copyright Alert addresses few privacy concerns that have attended copyright

⁷⁸¹ Ban Depoorter and Alain Van Hiel, *Copyright Enforcement: Six Strikes and Privacy Harms*, 39 Columbia Journal of Law and the Arts, 245 (2015).

⁷⁸² Although it is a self-regulatory body, the CAS program is a part of informal guidance by government officials. The Governor of New York, Andrew Cuomo, enabled the negotiations and the Obama Administration endorsed the plan. Justice Department officials informally vetted the program.

⁷⁸³ Content owner parties to the agreement are Walt Disney Studios Motion Pictures Corp.; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corp.; Universal City Studios LLC; Warner Bros. Entertainment Inc.; UMG Recordings, Inc.; Warner Music Group; Sony Music Entertainment; and EMI Music North America. The ISP parties to the agreement are AT&T Inc.; Verizon; Comcast Cable Communications Management, LLC; Time Warner Cable Inc.; and the New York, New Jersey, and Connecticut cable systems operated by CSC Holdings, LLC

⁷⁸⁴ Rachel Storch, *Copyright Vigilantism*, 16 Stanford Technology Law Review, 453, 465-66 (2013).

infringement litigation. ISP can simply match IP addresses from received notices to subscriber names and implement an appropriate response on their own. Every CAS consists of six graduated responses to infringement. For the first two notices, ISPs will do no more than send a warning to the subscriber. This is called the “Initial Educational Step.” The next two responses are known as “Acknowledgment Step” and it entails warnings to the subscriber. The second warning will require subscribers to “acknowledge” receipt of the warning. This acknowledgment is treated as consent for the ISP to release subscriber information to copyright owners or law enforcement in the event that further instances of alleged infringement lead to a review proceeding.

After sending of five notices relating to the same account, the ISP will move to the “Mitigation Measures Step.” The ISP will take disciplinary action against the subscriber, including throttling Internet speeds, stepping down the subscriber’s service tier, or restricting Internet access. The sixth step, “Post Mitigation Measures Step,” warns them of the possibility of legal action under the DMCA. Subscribers are given a seven day grace period between alerts and a year without any notices will “reset” a given subscriber’s account back to the Initial Educational Step. The details of each ISP’s CAS are to be included in the Acceptable Use Policies or Terms of Service between the ISP and their subscribers. It will bind the Internet users to the contractual scheme.

- **Challenges to Copyright Alert System**

CAS raises the question of whether private actors are competent to enforce copyright because it is argued that they cannot adequately address sophisticated equitable concerns, such as those involved in the defense of fair use, or because they are biased and thus unable to fairly assess infringement.⁷⁸⁵ Either variety of incompetence could lead to under – or more likely over – enforcement of copyright. The competence of private actors to enforce copyright law could also be undermined by bias. Both CAS itself and the private review program provided for in the MOU are overseen and funded by copyright owners and ISPs. Each of these groups may have the incentive to over-enforce a copyright, punishing internet users who have not violated the law actually. In the realm of DMCA takedown requests, a study cited by Google in their Transparency Report found that 31% of sampled takedown requests presented a substantive copyright law question, such as a fair use or

⁷⁸⁵ Id., at p. 469.

uncopyrightable subject matter argument. The participation of ISPs in the CAS is not likely to counterbalance over-enforcement by copyright owners. Concerns about fairness and over-enforcement also have the potential to tarnish the reputations of copyright owners and ISPs, harming their relationships with their customers. CAS is unlikely to change public attitudes towards the morality of piracy if users feel that it unfairly punishes them.

The CAS has also raised concerns of fairness and prejudice to small business owners.⁷⁸⁶ Its focus is solely on residential Internet access, rather than all types of internet access, including business class. The CAS could harm numerous types of small businesses including cafes, coffee shops, restaurants, bars, hair salons, bookstores and more.⁷⁸⁷ These types of establishments often use residential Internet accounts. CAS could create a situation in which local small businesses are seen as hotbeds of internet pirates.⁷⁸⁸ While consumers could remain anonymous at large businesses, customers would likely to flock to the larger establishments simply because they do not have speed or landing page issues as they are not subjected to the ISPs mitigating measures. In addition, a small business owner cannot always prevent illegal internet use.⁷⁸⁹ Unless the business has a sophisticated IT department, it is nearly impossible for it to supervise and regulate what its customers do on the internet. Another shortcoming of the CAS is that it identifies alleged infringers through IP addresses, which does not automatically imply guilt to the owner of the IP address.⁷⁹⁰ This is more problematic in case of small business owners. Large businesses have already certain advantages due to their size and are not within the scope of CAS. In contrast small businesses may be subjected to CAS alerts and their ability to maintain fast and reliable internet access could be disadvantaged.⁷⁹¹

In its first annual report, the non-profit Center for Copyright Information (CCI) reported that CAS sent more than 1.3 million Copyright Alerts to account holders in the first ten months of operation. The vast majority of the notifications delivered to account holders (more than 70%) were limited

⁷⁸⁶ Rachel Schneidman, *The Copyright Alert System: A Potential Unfair Burden on Small Business Owners*, *Journal of Law and Policy*, 397, 433-34 (2014).

⁷⁸⁷ *Id.*, at p. 436

⁷⁸⁸ *Id.*, at p. 437

⁷⁸⁹ *Id.*, at p. 438

⁷⁹⁰ *Id.*, at p. 439

⁷⁹¹ *Id.*, at p. 440.

to the initial educational stages, with less than 3% of the notifications reaching the final mitigation stage. According to survey data gathered by CCI, the majority of surveyed users reported that they would stop their copyright infringing activities upon receiving an alert, while 62% of respondents believe that “it is never acceptable to engage in infringing activity.”⁷⁹² However, according to Rebecca Giblin of Monash University, the six strike policy in US has not been effective in reducing copyright infringement, but rather it has pushed infringers to seek alternative ways to make their IP addresses private.⁷⁹³ Such a threat to deterrence was likely, which is why solely going after consumers is a flawed approach and the incorporation and/or balance between user targeted and website blocking should be taken. Furthermore, the prior point that preventing even some infringers, current or near-future, whether it is through fear of receiving alerts or punishment imposed, is far more beneficial to societal values of fairness in business practices through copyright protection and compensation than no deterrence or compensation at all.

V.2.viii. Recent Legislative Efforts to Restrict Access to P2P networks

The problem of online piracy continues to grow in the absence of stronger government action. As discussed previously, online piracy is not only limited to college students trading files in their hostel rooms, it has grown into a multi-million dollar international business and widely affects the producers of movies, music, software, books, video games and other forms of digital content. In this backdrop, in September 2010, Senators Patrick Leahy and Orrin Hatch introduced section 3804, the Combating Online Infringement and Counterfeits Act (COICA).⁷⁹⁴ A modified version of COICA was introduced in 2011 in section 968, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP Act or PIPA). Most recently, Rep. Lamar Smith and his co-sponsors introduced the Stop Online Piracy Act (SOPA).⁷⁹⁵

V.2.viii.a. Stop Online Piracy Act

⁷⁹² Ban Depoorter and Alain Van Hiel, *Copyright Enforcement: Six Strikes and Privacy Harms*, 39 *Columbia Journal of Law and the Arts*, 245, 246-47 (2015).

⁷⁹³ Rebecca Giblin, *Evaluating Graduated Response*, 37 *Columbia Journal of Law and Arts*, 147, 149-50 (2014).

⁷⁹⁴ Daniel Castro, *PIPA/SOPA: Responding to Critics and Finding a Path Forward*, The Information Technology and Innovation Foundation, December 2011, available at <http://www.itif.org/files/2011-pipa-sopa-respond-critics.pdf>

⁷⁹⁵ *Id.*, at p. 2

The proposed ‘SOPA’ intends to “To promote prosperity, creativity, entrepreneurship and innovation by combating the theft of U.S. property and for other purposes.” It provides that an Internet site is “dedicated to theft of U.S. property” if it “is marketed by its operator for use, in offering goods or services in a manner that engages in, enables, or facilitates” copyright infringement.⁷⁹⁶

This “enable or facilitate” language is broad. It would punish not only sites that themselves directly infringe the copyright laws but also those that help others infringe. It would do so in a manner expansive enough to target any computer, communication tool, user-generated-content website, search engine, e-mail and storage locker. Any means making it easier for others to access copyrighted content could be punished.⁷⁹⁷

SOPA is divided into two parts. Title I provides mechanisms for Internet intermediaries to directly combat online piracy and grants immunity to Internet intermediaries that take voluntary action against sites infringing on U.S. I.P. Title I also contains provision directing the U.S. Intellectual Property Enforcement Coordinator to report to Congress specify policy recommendation to deter “notorious foreign infringers.” Title II includes a number of provisions that increase the penalties and sentencing guidelines for those convicted of illegally streaming copyrighted works, trafficking inherently dangerous counterfeit goods and conducting foreign and economic espionage.

The supporters of the Bill include American Society of Composers, Authors and Publishers (ASCAP), Disney Publishing Worldwide, Inc., Recording Industry Association of America (RIAA), Motion Pictures Association of America (MPAA), National Cable and Telecommunications Association (NCTA), CBS.com, Warner Music Group and several hundred other businesses. They have argued this broad power was necessary to avert persuasive copyright piracy. They claimed that creative advancements and jobs in “content-creating industries” were vulnerable to prevalent piracy. They contended that these overseas websites acted as asylum for internet pirates.

⁷⁹⁶ Draft Stop Online Piracy Act § 103(a)(1)(B) .

⁷⁹⁷ Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 North Western Journal of Technology and Intellectual Property, 22 (2013).

V.2.viii.b. Protection of IP Act:

PROTECT IP Act (PIPA), a Senate version bill that was introduced was introduced with the goal of curbing access to rogue websites registered outside the US that are dedicated to the sale of infringing or counterfeit goods.⁷⁹⁸ This bill would potentially allow the IP right holder or Attorney General to file an action against of a registrant of a domain name used by an allegedly infringing website, the owner or operator of the infringing website, or against the domain registrar. If enacted, it would also allow the court, after receiving the filing, to issue a temporary restraining order or an injunction against the domain name registrant, or owner and operator of the website, requiring him to cease or desist infringing activity if the domain name is used for accessing infringing website from US and directing business to US residents and harming US. I.P. right holders.⁷⁹⁹

SOPA/PIPA and DMCA both enforce secondary liability on indirect infringing parties who facilitate the direct infringing party with or without knowledge. However, there are also differences among the approaches and intended objectives of these statutes.

DMCA focus narrowly on accused parties posting infringing materials on websites and holds all relevant third parties liable unless they are shielded by the safe harbour. DMCA does not specify whether the contents are domestic or overseas. As a matter of fact, 37% of notices sent to Google target sites outside of the U.S. Along that line, SOPA/PIPA similarly target non-U.S. websites that are designed and dedicated to conducting infringing activities while engaging U.S. internet users, yet relevant non-US parties could not be reached by conventional U.S. law enforcement. This problem is not being addressed by DMCA's safe harbour provisions. SOPA/PIPA proposes to track down to the source of the domain name used by the infringing website and if the domain name is outside U.S., to trace to the end U.S. customer who requests access to the website. The approach is more stringent than DMCA.

V.2.viii.c. Issues Concerning SOPA/PIPA

⁷⁹⁸ Yue Mathew Ma, *Stop Online Piracy Act: The Next Step in Copyright Protection or Censorship of Online Expression*, (Mar. 14, 2015, 7 PM) http://scholarship.shu.edu/student_scholarship/655.

⁷⁹⁹ *Id.*, at p. 4

While most supports are from IP right holders, e.g., entertainment industry including media content providers, cable companies and pharmaceuticals who vested in their own interest of protecting from infringing activities, the majority of the internet community is quite negative.⁸⁰⁰ Some of the major concerns are:

- The proposed bill could lead to censorship on the internet and other constitutional issues. It gives individuals and corporations unprecedented power to silence online speech.⁸⁰¹ It is argued that under SOPA/PIPA, the traditional powerful copyright holders would be able to label sites as persistent infringement inducers and shut them out from the most lucrative market in the world. Domain name is a property, thus the removal of web sites from the internet would be considered property seizure with the accused website or domain name owners being unrepresented. This raises the issue of government removing protected speech from the internet.
- The proposed bill is taking away the DMCA safe harbour provisions.⁸⁰² Under DMCA, copyright owners who object to the use of their specific content may trigger an individual response by issuing a take-down notice, whereas a significant minority of copyright owners are now happy to share their work online without receiving remuneration or requiring advance approval. User driven sites have flourished under the DMCA, which exempts online service providers from liability should they promptly follow the notice and take-down procedure. Opponents of the SOPA/PIPA argue that DMCA has already achieved the effect intended by the new bill, and therefore, the new bill is argued to be taking away safe harbour protection for service providers.
- SOPA would chill the growth of social media and force sites to adopt a new role as content police. Under SOPA, general –purpose social media sites with no bad intent could be argued to “facilitate” infringement – and thus get tagged as theft sites – simply by virtue of providing the platforms for users’ content.

⁸⁰⁰ Yue Mathew Ma, Stop Online Piracy Act: The Next Step in Copyright Protection or Censorship of Online Expression, Law school Student Scholarship, 2015, (Mar. 15, 2014, 6 PM) http://scholarship.shu.edu/student_scholarship/655.

⁸⁰¹ Center for Democracy and Technology, The Stop Online Piracy Act: Summary, Problems and Implications (Apr. 18, 2014, 4 PM) <https://cdt.org/insight/the-stop-online-piracy-act-summary-problems-and-implications-1/>.

⁸⁰² Ibid.

- SOPA would not stop online piracy. The powerful tools granted to the Attorney General would present major obstacles to casual users, but would be trivial for dedicated and technically savvy users to circumvent.⁸⁰³

V.2.viii.d. Opposition against SOPA/PIPA

The bills faced fierce hostility from individuals and P2P websites. In opposition to the bills, more than one hundred thousand websites joined forces in an internet strike.⁸⁰⁴ Some sites temporarily shut down while others posted information about SOPA and PIPA, and provided directions on how users could contact Congress about their concerns with the bills. Taking this hint, internet subscribers, fervently protested the bills through phone calls to Congress, social media postings, online petitions and emails. These objections were effective “as the stated positions by members of Congress on SOPA and PIPA shifted overnight from 80 for 31 against to 55 for and 205 against.”⁸⁰⁵ The Senate postponed its votes on PIPA because of the demonstration. Subsequently, Congress temporarily shelved the legislation, but negotiation on the bill continued.⁸⁰⁶

V.3. Chapter conclusion

As far as the civil and criminal remedies conferred by codified copyright law is concerned, the laws in India, UK and USA are almost very close to each other. The principal form of remedies for copyright law are at par in all the jurisdictions. However, some insight is required as far as the online enforcement of copyright and determination of ISP liability is concerned. Enforcement of copyright over internet can be improved by graduated response. Graduated response can harness their respective powers to create an enforcement scheme that aims at protecting the rights of copyright owners as well as fair treatment of the internet users. By bringing together copyright owners and ISPs under the watchful eyes of the State

⁸⁰³ Ibid.

⁸⁰⁴ Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 Harvard Journal of Law and Technology, 203 (2013).

⁸⁰⁵ Ibid.

⁸⁰⁶ Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 North Western Journal of Technology and Intellectual Property, 22 (2013).

Regarding determination of ISPs' liability and their immunity is concerned in respect of Indian and USA laws, some important observations are pertinent here. Under Indian law, the scope of ISP liability for copyright infringing third party content has seen a paradigm shift with the Information Technology (Amendment) Act, coming into force.⁸⁰⁷ In the amended IT Act, under sec. 79 India has its own 'safe harbour provision' which provides immunity to intermediaries for third party information, data or communication link hosted or made available. It is important to note that the immunity given to ISPs in section 79(2) of the It Act is largely based on Regulation 17 of the Electronic Commerce (EC Directives) Regulations, 2002. However, the ISPs cannot claim blanket immunity under section 79 of the IT Act. At the same time the proviso to section 81 of the amended IT Act⁸⁰⁸ has to be analysed while considering the question of intermediary liability in the copyright context. The purpose of this amendment will be defeated if section 81 is read as having overriding effect over section 79 to the extent that the immunity under section 79 shall not be available in cases of liability for copyright infringement. The scope of the provision is likely to become unduly narrow if the intermediaries are disentitled to avail the immunity for copyright infringing third party content.

As discussed previously, section 512(c) of DMCA in USA contains procedures wherein the service provider is required to remove or disable access to material that is claimed to be infringing or subject of infringing activity. However, the procedural requirements of notification are provided for under section 512(c) (3) (A) of DMCA. The IT (Amendment) Act, 2008 lacks similar provisions, thereby failing to strike a balance between the interests of right holders and those of the ISPs and presents immense potential for abuse. Though the IT (Amendment) Act has significantly clarified the position regarding immunities available to ISPs, it provides only limited immunity to ISPs with respect to materials hosted or transmitted by them. However, the Copyright Act, 1957 remains unamended and the imposition of liability on ISPs in cases where the immunities are not available remains a tedious task, which requires expansive interpretation to traditional sections not intended to be applied in cases of ISPs liability.⁸⁰⁹

⁸⁰⁷ Aditya Gupta, *The Scope of Online Service Providers' Liability for Copyright infringing Third Party Content under the Indian Laws – The Road Ahead*, 15 *Journal of Intellectual Property Rights*. 34, 43-44 (2010).

⁸⁰⁸ The proviso to section 81 of the Information Technology Act, 2000 provides that as 'nothing contained in this Act shall restrict any person from exercising any right under the Copyright Act, 1957 or the Patents Act, 1970.

⁸⁰⁹ *Id.*, at p. 43

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.⁸¹⁰ Furthermore the Indian legal system should distinguish liability of ISPs relying on concepts of direct, contributory and vicarious infringement.⁸¹¹

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.⁸¹² 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

⁸¹⁰ 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).

⁸¹¹ *Ibid.*

⁸¹² Ruse, H G Khan, *IP Protection and enforcement – A barrier to 'legitimate trade'?*, 30th 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%).⁸¹³ 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

⁸¹³ International Federation of Phonographic Industry Digital Music Report 2015.

Indian music industry from 55% in 2014 to 72% in 2017.⁸¹⁴ 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

⁸¹⁴ *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.⁸¹⁵ 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.⁸¹⁶ 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.⁸¹⁷

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

⁸¹⁵ 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).

⁸¹⁶ Ibid.

⁸¹⁷ 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.⁸¹⁸

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

⁸¹⁸ *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

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’.⁸¹⁹ 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

⁸¹⁹ 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 12th 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

1. How do you procure music / what is the source?

- Television
- Radio
- I-pod
- MP3
- CD / VCD / DVD
- Tape Recorder
- Mobile

2. How frequently do you purchase or acquire music from the following sources?

	Daily	2-3/week	Once/week	Occasionally	Never
Physical Music Store					
Online Music Store					
File Sharing Services					
Other Sources					

- What percentage of your total music collection consists of music downloads that you obtained at no cost via file sharing?
Specify an approximate percentage (from 0 – 100%) ____
 - What percentage of your new music (music you obtained in the last six months) consists of downloads that you obtained at no cost via file sharing?
Specify an approximate percentage (from 0 – 100%) ____
 - What percentage of your music downloads did you purchase from a fee based Internet music service:
Specify an approximate percentage (from 0 – 100%) ____
 - Why do you download music form the Internet?
To save money ____ To save time ____ To obtain hard-to-find music ____
3. What do you do with the music so downloaded / procured?
- A. Created an audio CD from MP3 files
 - B. Made an MP3 file myself (from an audio CD or from another sound source)
 - C. Both of the above
 - D. None of the above
4. With my MP3 files or CDs/VCDs/DVDs, I do the following:
- A. Listen to them on my computer
 - B. Listen to them after burning them to CD or transferring them to a portable MP3 player
 - C. Both of the above
 - D. None of the above (but I do have MP3 files)

E. I don't have any MP3 files

5. Do you believe that receiving or providing MP3s should be illegal?
A. Yes
B. No
6. From your perspective, downloading or uploading MP3s is:
A. Completely appropriate (ethically, morally, legally)
B. Unethical/Immoral but still appropriate
C. Unethical/Immoral and thereby inappropriate
D. Illegal but Ethical/Moral and thereby appropriate
E. Unethical/Immoral/Illegal and thereby inappropriate
7. Do you refrain from obtaining MP3s because you believe it is illegal?
A. Yes, I refrain because I believe it is illegal
B. No, I participate even though I believe it is illegal
C. Yes, I refrain but not because I believe it is illegal, but for other reasons such as the fact it hurts artists/bands, recording labels, and the music industry, or the fact that it does not sit well with me
D. No, I participate because I do not believe it is illegal
8. Do you think Internet sites that allow individuals to download music for free (without the permission of the artist) should be shut down? **Yes** ___ **No** ___
9. Do you believe downloading / copying music is wrong? **Yes** ___ **No** ___
10. If yes, do you believe copying music or using file-sharing services is unfair to?
• Music artists? **Yes** ___ **No** ___
• Music distributors? **Yes** ___ **No** ___
• Music stores? **Yes** ___ **No** ___
11. If the internet music service allows you to download any music for a fee, what price (if any) would you be willing to pay per song, on average?
Specify an approximate amount ___
12. Do you think that free downloading and file sharing should be punished? **Yes** ___ **No** ___
13. Are you well informed about copyright law? **Yes** ___ **No** ___
14. Will you be supportive if the government implements stricter copyright law to control the file sharing and to cancel free-downloading services?
Yes ___ **No** ___

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Future of Indian Music Business: In “Music World” or “Palika Bazaar”?

I. Prologue:

The first decade of the twenty-first century has been a tumultuous time for the music industry. A rash of technological developments, including file sharing, satellite radio and social networks have changed the face of the industry. Since the late 1800s, when the general public started buying recorded music for entertainment, the music industry has been there to provide it and profit from it. The last half of the twentieth century was the zenith for the record industry. Consumers spent enough money on music to fund a slew of high-paying music-related jobs, including those for producers, recording studio engineers, entertainment lawyers, album art designers and publicists.

An important consequence of the seismic shifts in the landscape of the music industry was the development of Compact Disk (CD). As Fantel has noted the CD was the real foundational evolution in audio technology since Edison. It was not an analog or mechanical model of audio reproduction, but a digital one. Now the entire music industry is in flux. Technology has changed how music is delivered, how people listen to it and how it is promoted. One huge factor has been the advent of digital downloading. Illegal downloading is a challenging issue. File sharing and P2P (peer-to-peer) technology has made it easier than ever for people to find and trade music without ever paying anyone. It is not just record companies that are concerned – many artists and other workers in the music industry are worried about illegal downloading because it affects their bottom-line as well. The big question is whether with so much music available for free, music will become so devalued that people will not pay for it. Social networking sites like MySpace and video sites like YouTube have changed the way consumer discover music. All of these changes make for an unpredictable future for the music industry raising big issues facing the industry today, including illegal downloading, whether or not social networking sites should pay royalties and whether or not CDs are dead.

Physical music album sales have been declining for a decade with an average of 8% every year. Several studies found a negative correlation between physical album sales and online piracy and they attribute the decline of physical album sales to the increase in online piracy.⁸²⁰ International Federation of Phonographic Industry in their report, “Recording Industry in Numbers 2013” stated that shares of physical format sales declined from 74% in 2008 to 57% in 2012. Recently, IFPI published “Top 20 Markets Summary” of recorded music sales in its Annual Report, “Recording Industry in Numbers 2013”. In that report India ranked 14th amongst the top 20 countries in terms of trade value, generated by recorded music sales. In 2012 Indian music industry generated trade value of US\$ 146.7 (7,888.5 INR). Among the total trade value, 31% was attributed to physical sales, whereas 60% was the contribution of digital sales. Moreover, according to FICCI-KPMG Report

⁸²⁰ Byungwan Koh, B.P.S. Murthi and Srinivasan Raghunathan, Shift in Demand for Music: Effect of Online Music Piracy and Digital Music on Album Sales

2013 in India physical music continues to de-grow in terms of sales⁸²¹ as share of industry revenue due to consumers shifting to the newer technology platforms (online and music) and continued piracy. The Indian music industry witnessed a decline of 12% year over year in 2012 (KPMG analysis) in the sale of physical sales format.

While making an endeavor to trace the recent transition in music sales, the focus of the present paper would be on analyzing the phenomenon of diminishing physical music sales both nationally and internationally, and its consequential effects on the music industry. The paper would also embark on highlighting the recent closure of “Music World” Flagship Store at Park Street, Kolkata and would try to comprehend how the sale of counterfeit/pirated music products affects on the retail music business. The core of this paper would devote on finding out the future of Indian music business. Whether it will rest in “Music World” or in “Palika Bazaar”?

II. Previous Studies:

Presently in India there are no authentic estimates to ascertain the contribution of music copyright industries to the national economy. Moreover no significant studies have been made to study the phenomenon of declining physical music sales and its consequential damage on the music industry. However, few related literatures are available which provide insight to the present study. In 2005, *Lonnie K. Stevans* and *David N. Sessions* made an empirical investigation into the Effect of Music Downloading on the Consumer Expenditure of Recorded Music using a time series approach and found that the proliferation of peer-to-peer file sharing networks has led to a significant decline in music format sales and downloaded music has reduced spending on recorded music.⁸²² In 2006, *Alejandro Zenter* estimated the effect of music downloads on the probability of purchasing music using a European individual-level cross section of 15000 people from 2001. The results suggested that peer-to-peer usage reduces the probability of buying music by 30%. On the basis of estimation, back-of-the-envelope calculations indicated that without downloads sales would have been around 7.8% higher.⁸²³ In 2010, the study made by *Byungwah Koh*, *B.P.S. Murthi* and *Srinivisan Raghunathan* showed that availability of iTunes like legal channels for digital music has blunted the effect of online music piracy on physical album sales and in the presence of those legal channels for digital music, digital music, not online music piracy substitutes for physical album sales.⁸²⁴

⁸²¹ Physical music sales include sales of all physical formats, including CD, vinyl, cassettes and other CD sales ordered via the Internet (e.g. Amazon) are reported as physical sales.

⁸²² Lonnie K. Stevans and David N. Sessions, An Empirical Investigation into the Effect of Music Downloading on the Consumer Expenditure of Recorded Music: A Time Series Approach, *Journal of Consumer Policy* (2005) 28:311-324.

⁸²³ Alejandro Zenter, Measuring the Effect of File Sharing on Music Purchases, *Journal of Law and Economics*, Vol. XLIX (April 2006).

⁸²⁴ Byungwan Koh, B.P.S. Murthi and Srinivisan Raghunathan, Shift in Demand for Music: Causal Effect of Online Music Piracy and Digital Music on Album Sales.

David Blackburn investigated the effects of file sharing on the sales of recorded music in the United States. He found that file sharing had strong effects on the sales of music. The study estimated that if files available online were reduced across the board by 30%, industry sales would have been approximately 10% higher in 2003.⁸²⁵ *Martin Peitz* and *Patrick Waelbroeck* analyzed the role of music downloading on the current downturn in CD sales. They provided 2000-01 cross-country evidence in support of the claim of losses due to internet piracy made by the industry. For the United States they assessed the potential loss from internet piracy. They concluded the empirical analysis by forecasting CD sales for 2002. The results suggested that internet piracy played a significant role in the decline in the CD sales.⁸²⁶ *Siwat Auampradit* attempted to measure the effect of music piracy on CDs purchases in Thailand. The econometric result showed that expected quantity of the original CDs individual purchased decreases by 0.001 albums when the quantity of pirated albums individual consumers increased by one album. *Duchene and Waelbroeck* claimed that internet piracy has reduced sales of original CDs and that illegal MP3 files have become a substitute to legal CDs purchases.⁸²⁷ Several more studies found a negative correlation between physical album sales and online music piracy and they attribute the cause of decline of physical album sales to the amplified online music piracy.⁸²⁸

III. Evolution of the Music Recording Industry:

For centuries man had dreamed of capturing the sounds and music of his environment. Many had attempted it but no one had succeeded until Thomas Alva Edison discovered a method of recording and playing back sound. On December 24, 1877, Edison applied for the US Patent 200 521 which covered talking machines and sound writers to be known as Phonographs.⁸²⁹ The first phonographs used tin foil cylinders. The earliest system used was cylinders on which sound waves were scribed. In the 19th century, sheet-music publishers started to dominate the music industry.⁸³⁰

At the dawn of the early 20th century, the recording of sound began to function as a disruptive technology to the commercial interests publishing sheet music. The original industry standard was overtaken around 1914 by flat disks, the manufacture of which was less costly per unit

⁸²⁵ David Blackburn, Online Piracy and Recorded Music Sales.

⁸²⁶ Martin Peitz and Patrick Waelbroeck, The Effect of Internet piracy on CD Sales: Cross-Section Evidence, Review of Economic Research on Copyright Issues, 2004, vol. 1(2), pp. 71-79.

⁸²⁷ Duchene Anne and Patrick Waelbroeck (2005). "Peer-to-peer, Piracy and the Copyright Law: Implications for Consumers and Artist." Developments in the Economics of Copyright, Cheltenham, UK, Edward Elgar: 60-79.

⁸²⁸ N.J. Michel, The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis, Topics in Economic Analysis & Policy, 2006, Vol. 6(1), pp. 1-22; see also S.J. Liebowitz, Testing File Sharing's Impact on Music Album Sales in Cities, Management Science, 2008 Vol. 54(4), pp. 852-859 and S. Hong, The Recent Growth of the Internet and Changes in Household-level Demand for Entertainment, Information Economics and Policy, 2007, Vol. 19(3-4), pp. 304-318.

⁸²⁹ The History of Recorded Music, see <http://www.soc.duke.edu/~s142tm01/history.html>, visited on 10.7.2013 at 6 p.m.

⁸³⁰ Music Industry, see http://en.wikipedia.org/wiki/Music_industry, visited on 10.7.2013 at 6 p.m.

than wax cylinders. This change in standard led to increasing but still modest levels of competition in the industry. Real competition in the industry would arise in the 1950s with the advent of magnetic tape recording. Magnetic tape was easy to edit unlike recording technology prior to the development of tape and the recording devices themselves were inexpensive to purchase. Moreover the introduction of magnetic tape production technology coincided with the popular introduction of a genre of music generally known as rock-and-roll. During this period concentration in the industry fell dramatically and the number of new firms increased rapidly.⁸³¹

The music industry remained largely unchanged throughout the 1970s and 1980s with album sales hovering around 650 million. In the early 1990s CDs started gaining popularity and in a span of 6 years—1992 to 1998—CD shipments from the manufacturer doubled from 408 million (Recording Industry Association of America). CDs were extremely popular because of their convenience and flexibility. Music listeners could repeat songs, shuffle, skip, etc. all with the easy touch of a button — much faster and easier than the guess and check of rewinding a cassette or the delicate finesse of moving a record player arm. At the turn of the millennium, a new form of media began to threaten the dominance of the CD. The MP3 provided similar improvements over its predecessor that the CD had compared to tapes and records only a decade before.⁸³²

Furthermore, while offering infinitely more convenience and flexibility, digital audio media created whole new possibilities for distribution, sharing, and acquisition. While record company executives were slow to realize the potential in MP3s, 17-year-old Shawn Fanning was not. Napster was created in 1999 as a peer-to-peer (P2P) music file-sharing network that turned the Internet into an almost unlimited cyber-library of free music. At its peak, Napster had 70 million users but was only allowed to exist as a free service for less than two years before it was forced to shut down due to prosecution from many of the largest entertainment and technology companies. In the midst of the music industry's war on Napster, album sales began to decline. Album sales have decreased every year since 2000 and the decline was greatest in 2007.

IV. Overview of the Declining Physical Sales of Music Albums:

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

⁸³¹ Peter J. Alexander, Peer-to-Peer File Sharing: The Case of Music Recording Industry, Review of Industrial Organisation, 2002, Vol. 20, pp. 151-161 at p. 152.

⁸³² Doug Walters, Causes and Solutions for the Recent Decline in Recorded Music Sales.

2001 for the first time since its introduction in 1983.⁸³³ This downturn coincides with the proliferation of online music file sharing.

IV. I. Declining Physical Music Album Sales - Global Overview:

The major setback in physical music album sales started to take a grave form in 2005, when IFPI found that more than one in three of all music discs purchased around the world is thought to be an illegal copy. It is estimated that some 37% of all CDs purchased (legally or otherwise) in 2005 were pirate – 1.2 billion pirate CDs in total. Pirate CD sales outnumbered legitimate sales in 2005 in a total of 30 markets. The majority of pirate discs sold are CD-Rs copied on highly efficient burner machines in small commercial labs. DVD music video piracy also started expanding, affecting the format's growth in many markets. 1 in every 3 CDs sold was an illegal copy (IFPI 2007).⁸³⁴

Global overcapacity in the optical disc industry remains a major contributor to music piracy. Global disc capacity totaled 60 billion units in 2005, compared to a legitimate demand of only 20 billion units, according to research firm Undertaking and Solutions. Taiwan remains the largest supplier of blank CD-Rs, accounting for just over a third of global supply. Back in 2005 IFPI estimated that the global traffic of pirate product was worth US\$4.5 billion based on pirate prices.⁸³⁵

In the United States of America, physical sales suffered a decline by -17% in 2012. In Europe music sales fell by 4.1% to US\$ 5.2 billion (€4.1 billion) in 2012. Physical formats continued to drag down the region's performance, falling by 14% while still accounting for 60% of all revenues. Music sales in France fell by 2.9% in 2012, reflecting a less negative result compared to 2011. The physical decline (-11%) continued to impact overall sales. In Italy, music sales fell by 1.8% in 2012 driven by a speed drop in physical sales. The market in Germany saw acceleration in the rate of decline in 2012, falling by 4.6%. Impacting the results was an 8% decline. In China there was a fall of 17% in physical sales.⁸³⁶

Sector	2011	2012	%change
Physical	9,893	9,403	-5.0%
Digital	5,371	5,798	+8.0%
Performance Rights	862	943	+9.4%

⁸³³ Alejandro Zentner, Measuring the Effect of File Sharing on Music Purchases, Journal of Law and Economics, vol. XLIX, April 2006, p. 63.

⁸³⁴ Matthias Duenner, The Impact of Legal and Illegal Downloading of Music on the Financial Performance of the Recording Companies

⁸³⁵ IFPI Recording Industry Piracy Report 2006: Protecting Creativity in Music.

⁸³⁶ RIN 2013

Synchronization	330	337	+2.1%
Total market	16,456	16,481	+0.2%

Figure 1: Global Recorded Music Trade Revenues (US\$ Millions); Source: IFPI, 2013.

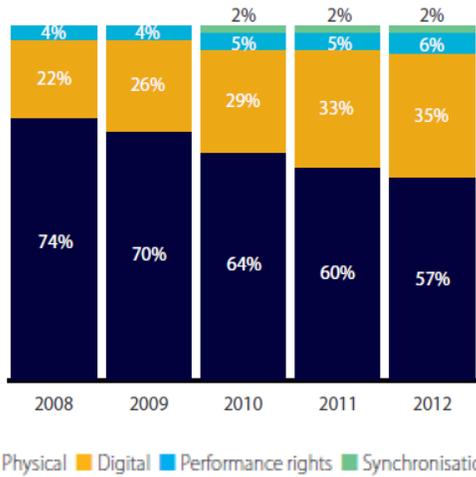


Figure 2: Global Recorded Music Sales by Sector (Value) reflecting gradual decline in physical music sales. Source: Recording Industry in Numbers, 2013, IFPI.

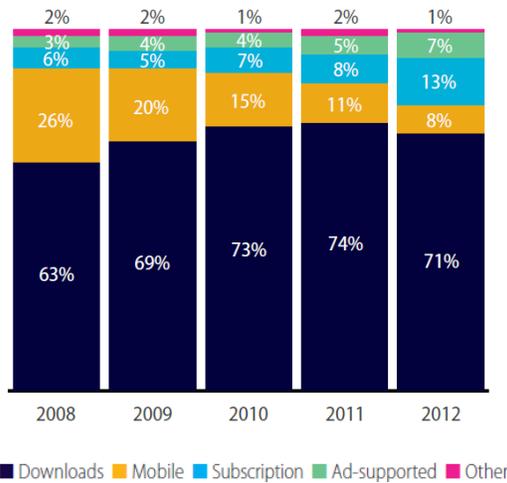


Figure 3: Global Digital Music Sales by Sector (Value) reflecting gradual increase in digital music sales. Source: Recording Industry in Numbers, 2013, IFPI.

IV.II. Diminishing Physical Music Sales – Indian Scenario:

Currently 95% of the Indian physical market is made up of Bollywood soundtracks, regional language soundtracks and local music, with 5% of sales coming from international repertoire. The physical market in India took off in the late 90s with cassettes sold at around US\$1 or less. The traditional CD format took nearly three years to become popular in major urban cities given its higher price (US\$2-10). Before the CD could reach its potential, a unique format of MP3 tracks on CDs stormed the market. Local estimates indicate that 200-250 million MP3 CDs and VCDs were being sold illegally annually. Legitimate MP3 CDs peaked at around 40 million units. As physical sales began to fall, India experienced a mobile revolution that saw the acquisition of more than 600 million mobile subscribers between 2006 and 2010.

Music industry revenues from digital platforms have grown from 4.5 billion INR in 2010 to 7 billion INR in 2011 registering a whopping growth of 60 & year-on-year. The overall Indian music industry has grown to 12 billion INR in 2011 from 10 billion INR in 2010 with physical sales of music being stagnant at 3 billion INR.⁸³⁷

In India, digital sales are overtaking physical sales. Physical sales of audio cassettes and CDs have been on a downward path. Physical sales were estimated to be INR 3.3 billion in 2010 as compared to INR 4.0 billion in 2009 showing a decline of 17.5%. While in previous years, piracy in cassettes and CDs was a major issue for physical sales, the challenge now has been easy availability of music online, be it legal or illegal. This provides users with the convenience of selection. Moreover, the next generation also believes in sharing music content among the peer group and this again results in consumers preferring music in the digital formats.⁸³⁸ Consumers are preferring music in the digital formats.⁸³⁹

Segment (INR bn)	2008	2009	2010	2011	2102	2013p	2014p	2015p	2016p	2017p	CAGR (2012-17)
Digital	1.9	2.6	4.2	5.2	6.0	7.0	8.3	10.1	12.6	16.1	+21.7%
Physical	4.9	4.5	3.2	2.6	2.3	2.0	1.7	1.5	1.4	1.3	-10.5%
Radio & TV	0.4	0.5	0.7	0.6	1.4	1.6	1.8	2.0	2.3	2.7	+13.7%
Public performance	0.2	0.2	0.5	0.6	0.9	1.1	1.3	1.6	2.0	2.4	+22.0%
Total	7.4	7.8	8.6	9.0	10.6	11.6	13.1	15.3	18.3	22.5	+16.2%

⁸³⁷ India Entertainment and Media Outlook 2012, PWC Report.

⁸³⁸ India Entertainment and Media Outlook 2011, PWC Report.

⁸³⁹ India Entertainment and Media Outlook 2011, PWC Report.

Figure 4: Sector Revenue Contribution in 2012 – Indian Scenario;
Source: FICCI-KPMG Annual Report 2013

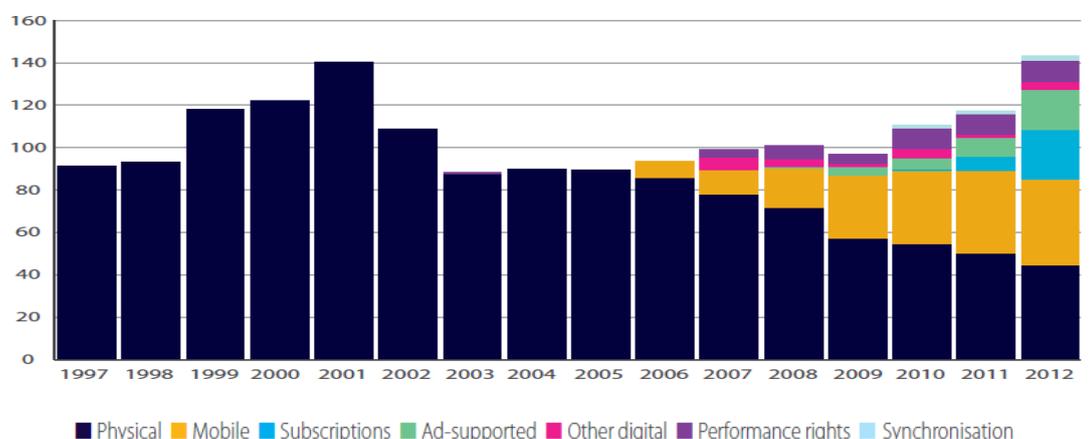


Figure 6: Indian Recorded Music Market (US\$); Source: IFPI 2013.

India is replicating world music industry trends. Music delivery and consumption are fast evolving on digital platforms as revenues from physical sales are fading.⁸⁴⁰ The online delivery of purchased music in digital format – as opposed to sales of physical CDs online – became available in 2001.⁸⁴¹ Globally, there are over 100 companies selling digital music. Among the biggest companies are iTunes, Spotify, Napster, Rhapsody and Musicmatch. In India, online music stores, such as Flipkart, Music Today, Infibeam and legal music streaming services, such as, Gaana, Dhingana, Saavn and other download stores have begun their operation. Sales of digital singles are outselling physical singles by three to one in the second half of 2003 (IFPI, 2004).

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

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

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

⁸⁴⁰ FICCI-KPMG-Report-13

⁸⁴¹ Alejandro Zentner, Online Sales, Music Downloads and the Decline of Retail Music Specialty Stores, Centre for the Analysis of Property Rights and Innovation Publication 06-06.

V. Factors Affecting Music Sales:

Sales of audio CDs are in their steady decline. With sleek iPods rapidly becoming the hi-fi system of choice, satellite radio offering hundreds of specialty stations and the internet overflowing with all kinds of free and cheap illegal digital music, suddenly the thought of owning awkward polycarbonate compact discs (CDs) that hold only an hour of tunes by just one artist seems positively prehistoric. There are several factors influencing and affecting music sales and current trends beyond music sharing through P2P. They are follows:

V.I. Digital Technologies and Decreasing Costs:

Prior to digital technology, music was produced and distributed using magnetically encoded tape. Compact disks, introduced to consumers in the 1980s, were the first element in the industry's shift to digital technology. Compact digital disc, or CD, was developed in 1979 and reached Asia market in 1982. Technology improvement reducing price of CD player and the convenience in consumption make CD more popular and replace cassette tape. The development of recordable CD (CD-R) and CD burner make it easy to duplicate music.⁸⁴² As a result many consumers were able to use computers to play compact disks for storage and replay on their computers.

Development of MP3 file format⁸⁴³ dramatically changed the storage and bandwidth requirements. MP3 is an audio compression format that generates near compact disk quality sound at approximately 1/10 to 1/20 the size. To give a practical example of the compression savings achieved by MP3, consider that Brian Adam's "Please Forgive Me" on compact disk requires 24 megabytes of hard disk space, but when converted to MP3 the storage requirement falls to 2 megabytes.

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

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

⁸⁴² Siwat Auampradit, The Effect of Music Piracy on CDs Purchases,

⁸⁴³ MP3 is created by engineers at the German company Fraunhofer Gesellschaft is short-hand for Motion Picture Experst Group- Layer 3.

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

V.II. Illegal downloading:

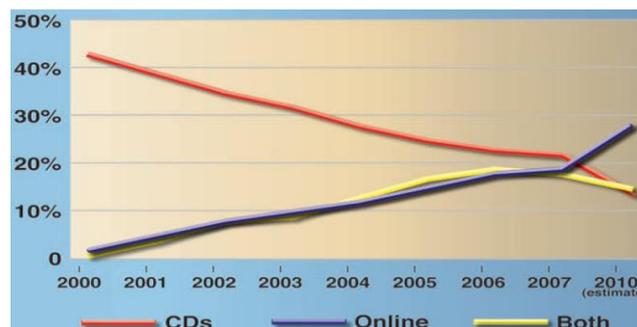
Online music piracy is directly affecting the music industry. If consumers stop buying music, the sales of the music companies will decline. Due to the relatively small size of music files and the growing availability of broadband internet connections, acquiring a pirated song over the internet has become faster and easier than ever. The illegal and unauthorized downloading of music that otherwise would have been purchased is lost revenue to the music companies. However, one needs to distinguish between two different types of lost sales. One is the actual loss from music that was downloaded illegally and would otherwise have been purchased. These consumers were able but willing to pay for music or were able and willing to pay but did not download legally. The other group includes consumers that are willing or unwilling but unable to pay for downloaded music. Since these consumers do not have the money to buy music there would be no revenue to be made from these consumers. Illegal downloading causes decline in sales revenue and income of record companies.⁸⁴⁴

V. III. Album Prices and Consumer Income:

Some have made the argument that the music industry is hurting because CD prices are too high. This argument is based on looking at nominal instead of real prices. Adjusting for inflation, record shipping prices have remained nearly constant during the last 20 years.

V.IV. Population Age:

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



Trends in Music Media Purchases (Taken from Bridge Ratings: 'Music Consumption Study', June 20, 2007).

VI. The Outcomes of Declining Music Sales:

⁸⁴⁴ Matthias Duenner, The Impact of Legal and Illegal Downloading of Music on the Financial Performance of the Recording Companies.

The copyright-based industries form important and well-recognized contributory components of the economic and cultural development of any country. They add considerably to national wealth, and therefore declining music sales have a corresponding negative effect on national wealth. The negative effects of counterfeiting on the economy of any developing country are in purely economic terms. Many jobs and investment are lost. It is important to understand the harmful effects of decline in music sales.

VI.I. Specific Effects on Developing Countries:

Allowing duplicate or pirated musical products to be sold freely in local markets effectively eliminates all opportunities for a national recording industry to develop. This is because pirates are only interested in dealing in a small range of the most popular recording artists, sure-fire in demand entertainment products that are highly sought after and can be easily sold. They have no interest in making works of local artists, or works less widely known, available. And those independent producers who might in other circumstances have been willing to invest in local recording artists find themselves unable to compete with illicit product.

Pirates pay no advances to performers, no royalties on sales, no licensing fees to composers, songwriters, and music publishers, no fees to graphic artists and photographers, and no tax revenues on their sales. They take no risks and ride along on the promotional and marketing spend of legitimate producers of the musical albums that they illicitly reproduce. A legitimate enterprise, which does incur all of those necessary costs of production, cannot possibly compete with pirate CD's. Recorded music represents the musical life of a society in a particular time. If the best of a nation's performers are not being commercially recorded, then their works are not being preserved and the losses to local culture are incalculable. A key element of the historical memory of the nation is lost.

VI.II. Negative Effects on Creative Industries and Local Economies:

Wherever piracy flourishes, it is virtually impossible for local music industries to compete, to grow, or, in emerging economies, to develop at all. All of these industries require significant investment and, even in the absence of piracy, involve considerable risk to investors given the highly competitive markets for these works and the difficulty of predicting consumer tastes and desires. Where any considerable degree of piracy exists in a particular market, making the risk of success even slighter still, it is not surprising to see investors staying away, with the consequence that new films are not produced or CD's recorded, and all of the employment and trade opportunities that might have derived from such investment are lost.

VI.III. Negative Effects on Sustainable Development:

Investment in the cultural sector of any country can be significant and sustained over many years, if investors find in place both an adequate legal system for the protection of the rights in intellectual property and effective enforcement of those rights. If either element of this formula is lacking, a nation's ability to attract such investment and to develop its own cultural industries - together with all of the additional benefits of increased employment opportunities, wealth creation, and tax revenues will be lost.

Due to fall in sales of music CDs/DVDs, not only the music retailing stores, but also the recording studios are getting affected. Lots of recording contracts are being cancelled. The artists are backing off from recording new songs and cancelling recordings. Consequently, from music stores to the owners of music recording studios and all persons connected with these recording studios, fellow artists, musicians – future of all of them are at stake. Their livelihood is in front of a big question. The music stores are saying that they have not anticipated such decline in sales. Previously 250-300 CDs are sold per day, but now-a-days only 50-60 CDs are sold. Not only Bengali music, but also sale of Hindi music is also severely hampered. The owners of recording studios fear that they have no idea how many recording contracts are going to be cancelled in future days.

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

VII. Recent Closure of Music World Flagship Store at Park Street, Kolkata:

VII.I. Formation of “Music World”:

Music World is a group company of the diversified Indian business house of the Rama Prasad Goenka (RPG) Group. The formation of the RPG group of companies dates back to the 1820s, when an entrepreneur, Ram Dutt Goenka came to Kolkata from Rajasthan. He began doing business with the British East India Company. Many RPG brands were a part of almost every Indian's life. Ranging from Ceat Tyres to Sprint cellular telephony and from the HMV music label to FoodWorld outlets, the RPG group touched the lives of a large number of Indians. The group assumed its present form after Hari Ram's grandson Rama Prasad Goenka (Goenka) came into the picture. Goenka was responsible for the formation of the RPG Group of companies

In this juncture it would be pertinent to trace the history of music major Saregama, which dates back to 1901, when the Gramophone Company Ltd., England (GCE) entered India. This British company set up a factory in Kolkata in 1907 to manufacture records and gramophones. In 1931, GCE was merged with the Columbia Gramophone Company to form a new company Electric and Musical Industries (EMI). GCIL marketed its label through His Masters Voice (HMV) and Columbia. HMV lost its monopoly and in 1990 RPG bought EMI stake in GCIL. In 1991 Spencer's store was redesigned and modernized and the store was divided into three formats – ‘Food World’, ‘Health and Glow’ and ‘Music World’. In June 2001, 61 stores of Food World, 13 Music World outlets and 18 Health and Glow Shops were established and their average earning was Rs. 350 million per month. In October 2001, “Music World” emerged as distinct identity.

In the absence of any major countrywide organized sector players, music companies had to shell out a huge amount as margins at various levels in the distribution channel. Issues such as piracy of cassettes and CDs were a major problem, which prevented the industry from reaching its full growth potential. Given these circumstances, the establishment of MusicWorld seemed to have come as a welcome development in the industry. The sales of the outlet soared high, establishing MusicWorld very firmly as the one-stop shop for the city's music lovers. MusicWorld had reportedly become a major factor that changed the way music was sold in India.

VII.II. Declining Sales and Closure of “Music World”:

Music World was one of the first entrants into the specialty retail space opening its first store in 1997 and then taking the franchise route in 2003. It started its business through retailing audio CDs, DVDs, gaming consoles and software, besides other music accessories and home videos of leading brands. The company, which had some 40 shops across the country, has been scaling down its operations since the beginning of April 2012. (fn 27) Unfortunately, India's premier music retail franchisee, Music World's biggest outlet at Park Street will be the last to down its shutters on July 1, 2013. Pirated sales of music products such as DVDs and CDs on streets and pavements is felt to be the main cause for this sudden collapse.

This popular music hub, owned by RP-Sanjiv Goenka Group, had been hit hard by “the onset of digitization of music and shift in consumer preferences towards music and video downloads and is quitting the music retail business forever.” according to Sanjay Gupta, the group's corporate head marketing.⁸⁴⁵ He added, “Sales were hurtling down and there was no stopping the slide. Sales have been halved in a year and a half. While people were listening to music more than ever, they were obviously not willing to buy it.” In the same line the franchisee attributed the group's decision to exit the music retailing business to the constantly falling margins and sales of pre-recorded stored music due to a variety of factors including piracy, digitization in the industry and increasing option of being able to download music straight from the internet. The combination has sounded the death knell for CD shops and made the whole business model itself unviable.⁸⁴⁶ Information trickling in suggests that the group felt the impact more strongly over the last six months to a year, with sales dropping over 50 per cent. In the financial year, 2011-2012, the economic loss extended up to Rs 258 crore and in 2012-2013, the loss reached Rs. 300 crore.⁸⁴⁷

A string of music shops have downed shutters in recent years, including Planet M that recognized the ominous signs early and exited the business. The latest to down the shutters was

⁸⁴⁵ Bengal music industry to protest Music World closure, Jun 14, 2013, <http://www.firstpost.com/bollywood/bengal-music-industry-to-protest-music-world-closure-872709.html>

⁸⁴⁶ Music World to shut all stores due to falling margins, **ET Bureau** Jun 13, 2013, 04.33AM IST, http://articles.economictimes.indiatimes.com/2013-06-13/news/39952181_1_music-world-music-retailing-business-business-model

⁸⁴⁷ “Surer Jale Chondopoton Music Worlder”, Ekdin, Siliguri Edition, June 13, 2013, p. 1.

CC Saha on Lenin Sarani, Kolkata that has been retailing music for more than half a century. The store now retails premium luggage. Videocon Group-owned Planet M's share of music in its revenue has fallen from 40 per cent a few years ago to 25 per cent. The chain expects this to fall to 10 per cent by next year, said chief executive Sanjay Karwa. "Music retailing is seeing a lot of challenges from piracy, free download, etc. Today, nobody wants to listen to music released two to three months ago," he said.⁸⁴⁸ Chief Manager of Saregama, S F Karim observed, "Almost 70% sales of Saregama have reduced. As a result, we remain fretful about the sales before releasing new music CDs. We have switched to release digital music."⁸⁴⁹ Online retailer, Flipkart shut its music download service, owing to piracy issues.⁸⁵⁰

VII.III. Notorious Pirated Markets:

The pre-dominant form of retail piracy in India consists of burned optical discs with content including music companies in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), and motion pictures on VCDs, DVDs and CD-Rs. The music industry alone reports losses due to hard goods piracy of Rs. 300 crore (US\$55.8 million).⁸⁵¹ Some imported discs and factory-produced discs from India have reportedly still been detected in recent years. Pirated hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkata, and Ahmadabad. Pirated discs are commonly called 'maal' in India – a colloquial term meaning 'goods' but usually used in reference to illegitimate or pirated goods. There are two kinds of maal in circulation: blue and silver. The average blue maal is a low quality VCD – generally a locally produced copy of a Bollywood film. These cost anywhere between Rs. 40 and Rs. 50 in Mumbai. Imports are generally higher-quality silver maal – discs copied from DVD masters. Silver maal are available for both Bollywood and international films and can command a premium price of up to Rs. 100, especially when they replicate the cover treatments of licensed discs.⁸⁵²

According to the Report of the FICCI-National Initiative against Piracy and Counterfeiting (FICCI-NIAPC), the share of fake music CDs/DVDs at 40%, 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

⁸⁴⁸ Subhro Niyogi & Rohit Khanna Smart killer of good ol' music business, TNN Jun 16, 2013, 02.25AM IST, http://articles.timesofindia.indiatimes.com/2013-06-16/kolkata/40005997_1_music-rights-music-retail-industry-music-world

⁸⁴⁹ "Interneter phanse hansphans CD-DVD", Anadabazar Patrika, Siliguri Edition, June 14, 2013, p. 4.

⁸⁵⁰ Lifestyle chains no longer hear rhythm in retail music, http://www.business-standard.com/article/companies/lifestyle-chains-no-longer-hear-rhythm-in-retail-music-113061301254_1.html

⁸⁵¹ IIPA Special Report on Copyright Protection and Enforce

⁸⁵² Media Piracy in Emerging Economies, Social Science Research Council

counterfeiting (and piracy). Both USTR and International Intellectual Property Alliance members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.⁸⁵³

The United States Trade Representative report has named the places where counterfeit (and pirated goods) abound in India, viz. Nehru Place and Palika Bazaar in New Delhi, Richie Street and Burma Bazaar in Chennai, Manish Market, Heera Panna, Lamington Road and Fort District in Mumbai, and Chandni Chowk in Kolkata. These locations are particularly well-known for the high volume of pirated DVDs, and CDs offered for sale. These places surely need to be kept under vigil for their high-volume trade. USTR expressed serious concern over "India's inadequate legal framework and ineffective enforcement".

- **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, 2008.⁸⁵⁴

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).⁸⁵⁵

⁸⁵³ International Intellectual Property Alliance Submission for the Record Hearing on U.S. – India Trade Relations: Opportunities and Challenges, March 13, 2013.

⁸⁵⁴ April 2008 State wise raid reports published by Indian Music Industry in its official website of Indian Music Industry, see <http://www.indianmi.org/newsletter/Apr108/StatewideReports.html#WestBengal>

⁸⁵⁵ April 2007 State wise raid reports published by Indian Music Industry.

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, 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.⁸⁵⁶

- **Major Pirated Rackets in Delhi:**

The United States has named New Delhi's popular Nehru Place as among the world's notorious markets for pirated and counterfeited products. '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 said.

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. 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.⁸⁵⁷

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 whooping 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

⁸⁵⁶ April 2006 State wise raid reports published by Indian Music Industry.

⁸⁵⁷ Ravi Sundaram, *Pirate Modernity*, (1st Edition, Reprint 2010), Routledge Publication, p. 97.

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.

VIII. Conclusion:

The future of music industry is looking miserable with the advent of 3G and 4G technology. The mushrooming of illegal websites has been a dominant trend and is likely continue to dominate the music download business because there are no proper measures to check operations. Retrenchment has set into the music business triggering unemployment. The handfuls of audio companies who are still around are there more out of love and passion than out of pure business interest. But even they are finding it difficult to survive in the current market scenario. Eastern India Music and Home Video Producers' Association presented Seven-point agenda to the West Bengal Government. Some of the steps are introduction of the Goonda Act in West Bengal that is already at work in Karnataka, Kerala, Andhra Pradesh, Punjab, Rajasthan, Uttar Pradesh and Tamil Nadu that include music piracy as a major offence under this Act; Punishment for cyber crime offences must be more stringent; All FM stations should increase the revenue-sharing model with audio companies as it was till August, 2010; Implementation of a law to make it mandatory for FM channels to take permission from licensing authorities and share reasonable revenue to help the music industry producer new albums; Reduction of taxes to cut down on additional burden on the music companies; Permitting downloading from legal websites only alongside blocking of copyright infringing websites with immediate effect; Bringing mobile companies within the ambit of the law and make it mandatory for them to establish a revenue-sharing model with music companies.

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

However, because of the benefits of recent technological advancements in digital music format the transition from physical to digital music format is inevitable. It is the high-time this inevitability is accepted by the music industry. Undoubtedly selling pirated versions of CDs or uploading Illegal MP3 music files over internet are violating the provisions of law, but time has come to bring the desired changes in the music industry to keep in pace with the

requirement of time. The reports are showing that globally music is going digital and this format is fetching increased revenues. The recording companies as well as the artists are having an outlook of look down upon music sales in digital format. At the same time they are complaining about music piracy, about the sales of pirated CDs, etc. But, owing to the inevitability of digital format, music sales via online medium is the future. In order to fight against piracy, this inevitable transitional change has to be acknowledged. Sale of counterfeited CDs as well as online music piracy can be controlled, if not eliminated, if the online music sales are regulated, monitored and legalized. In other way, the so-called 'piracy' has to be legally controlled and regulated. The concerned industry has to realize that digital music sales is the prospect since it is getting hold of more revenue, as evident from the global music sales reports.

Governmental copyright policies have to appreciate the scale of the challenge of trying to monetize content in an environment where around 95 per cent of all music is downloaded without payment to artists or producers. (IFPI 2010). The Copyright Act of India is recently amended by the Amendment Act of 2012. However, none of the recent changes appeared to be inadequate to address this issue. The provisions have failed to give the impression that the laws are at par with the recent transitional changes in the scenario of physical music sales. Apparently the laws appear to be inadequate to offer adequate protection to online music sales. High-time has come to decide where will the music buyers akin to place the future of Indian music industry – will it be in the legal music retailing stores, like “Music World” or will it be allowed to destroy in the rackets of illegal pirated music markets, like “Palika Bazaar”?

