

# 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. 21<sup>st</sup> 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, 3<sup>rd</sup> 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, 3<sup>rd</sup> 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, 3<sup>rd</sup> 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, 4<sup>th</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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, 2<sup>nd</sup> Edition, 2005, Oxford University Press;*
- ii. *William Cornish and David Llewelyn, Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights, 5<sup>th</sup> Edition, 2003, Thomas Sweet and Maxwell;*
- iii. *Paul Torremans, Holyoak and Torremans Intellectual Property Law, 5<sup>th</sup> edition, 2008, published by Oxford University Press;*
- iv. *Lionel Bently and Brad Sherman, Intellectual Property Law, 2<sup>nd</sup> Edition, 2001, Oxford University Press.*
- v. *Jeremy Philips and Alison Firth, Introduction to Intellectual Property Law, 1<sup>st</sup> 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, 5<sup>th</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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, 1<sup>st</sup> 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 4<sup>th</sup> 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*, 1<sup>st</sup> 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*<sup>1</sup>, 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

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<sup>1</sup> (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*,<sup>2</sup> 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.*<sup>3</sup> 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*<sup>4</sup>, 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

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<sup>2</sup> AIR 2000 Mad 454

<sup>3</sup> 239 F. 3d 1004 (2001)

<sup>4</sup> (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*<sup>5</sup>, 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*,<sup>6</sup> 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*<sup>7</sup>, 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*<sup>8</sup> the right of copyright owners in cinematographic films and sound recordings were infringed by free-to-air private FM radio. In this

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<sup>5</sup> 2007 CriLJ 2025 (AP)

<sup>6</sup> 2007 (3) KLT 363

<sup>7</sup> 2007 (35) PTC 780 (Ker.)

<sup>8</sup> 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*<sup>9</sup>, 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*<sup>10</sup>, 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

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<sup>9</sup> 2009 (41) PTC 1 (Del)

<sup>10</sup> (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.<sup>11</sup>

### **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.<sup>12</sup>

### **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

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

<sup>12</sup> See [http://en.wikipedia.org/wiki/Compact\\_Disc](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**