

ONLINE COPYRIGHT ENFORCEMENT THROUGH GRADUATED RESPONSE SCHEMES: AN ANALYTICAL STUDY OF THE LEGAL FRAMEWORK IN INDIA

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I. Introduction

The law of copyright has always been instrumental for the growth of creative industries all over the world. Copyright grants an exclusive right to the commercial use of the reproductions of an artistic, literary and other creative works. Copyright protection promotes creativity, social and cultural exchange and interaction. According to Landes and Posner, “copyright protection trades off the cost of limiting access to a work against the benefits of providing incentives to create the work in the first place.”² For content owners, one of the most important goals of any copyright enforcement system is to maximise revenue streams by discouraging unauthorised uses of their copyrighted works. In the physical economy, copyright enforcement is based on legal deterrence targeting the commercial infringers. However, as soon as exchange technology became more advanced, the consumer became an active counterfeiter while enduring almost no costs at all.³

Over the past few decades, advancement in technology, especially the Internet has disrupted the ability of copyright holders to monetise their creations by restricting their exercise of exclusive control over the reproductions and distribution of their works.⁴ Accordingly this increase in the scope of copyright infringement has increased enforcement costs. This led the content owners to seek effective mechanisms to deter infringement and restore lost profits in their copyrighted works.⁵ The war against online copyright infringement has been fought on a number of different fronts – via litigation against the peer-to-peer (P2P) software providers who enabled it, the end users who engaged in it and most recently against the Internet

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² Landes, W.M. and Posner, R.A., 1989. An economic analysis of copyright law. *The Journal of Legal Studies*, 18(2), pp.325-363.

³ Bomsel, O. and Ranaivoson, H., 2009. Decreasing copyright enforcement costs: the scope of a graduated response, Vol. 6 (2), pp. 13-29.

⁴ Owen, J.M., 2012. Graduated Response Systems and the Market for Copyrighted Works. *Berkeley Tech. LJ*, 27, p.559.

⁵ Ibid.

Service Providers who provide the infrastructure that permit the data to flow.⁶

The general public opinion is hostile towards improved copyright protection. The copyright law has consistently failed to protect the rights of artists and authors on the internet and the law-makers are alleged to have been ineffectual in passing better enforcement legislation. Forsaken by law, frustrated copyright owners are taking matters into their own hands⁷. Content owners hope that a new copyright enforcement model, “graduated response systems”, will help stern infringement of copyrighted works and encourage consumers to return to legal markets⁸. Graduated Response Systems are an ‘alternative’ approach to copyright enforcement that prescribes a series of escalating consequences for an individual accused of infringing copyrighted works. The consequences for infringement can include automatic redirection to a different homepage and reduction in internet download speeds.

India has emerged as one of the biggest hubs of online piracy with Delhi, Bangalore and Mumbai accounting for the major share of the illegal downloads. India along with twelve other countries found itself in the highest priority watch list of 2012, which is a part of U.S. Trade Representative’s annual list of countries on America’s official piracy radar. Although, attempts have been made to curb online copyright infringement by imposing stronger sanctions against the Internet Service Providers (ISPs), the laws in India has failed to keep an effective check on infringement of copyrighted materials over the internet. At present, the graduated response system to contain copyright infringement does not exist in India, but in August 2010, a committee set up by the Ministry of Information and Broadcasting has recommended “action against errant subscribers” by ISPs adopting a “three strike model”.

II. Status Report of Online Copyright Infringement in India

II.I. 2015 Special Report of International Intellectual Property Alliance

The 2015 Special 301 Report of International Intellectual Property Alliance (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

⁶ Giblin, R., 2013. Evaluating graduated response. *Colum. JL & Arts*, 37, p.147.

⁷ Storch, R., 2012. Copyright Vigilantism. *Stan. Tech. L. Rev.*, 16, p.453.

⁸ Owen, J.M., 2012. Graduated Response Systems and the Market for Copyrighted Works. *Berkeley Tech. LJ*, 27, p.559.

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.⁹ In 2008, the Indian film industry lost \$959 million (Rs. 4,411 crore) in revenue and around 5,71,896 jobs. The U.S. Trade Representative's Special 301 Priority Watch List has mentioned India primarily for a long time.¹⁰ 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)¹¹.

II.II. Envisional & Motion Pictures Association, India: Internet Piracy Landscape Audit (2009)

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. The study also mentions that "Envisional believe that there are around two million regular users of such sites worldwide" and Indians are one of the largest users of cyberlockers. Moreover, Indian users constitute 8.2% of the visitors to the top ten cyberlockers in the world.¹²

The MPA study also provided estimates regarding the illegal downloading of some movies during the four weeks from which a pirated copy was available. According to their report one of the movies in their analysis, Kaminey, was downloaded more than 3,50,000 times on BitTorrent and two-thirds of the download could be traced to locations within India.¹³ The study claims that the illegal downloading of Bollywood movies are mostly from Delhi, Bangalore and Mumbai.¹⁴

⁹ Report published by US India Business Council and Ernst & Young

¹⁰ Tripathi, S., Tayal, R. and Arora, P., 2016. Impact of Piracy on Bollywood: Issues and Challenges Ahead. *Adhyayan*, p.43.

¹¹ Ernst & Young, The Effects of Counterfeiting and Piracy on India's Entertainment Industry (Piracy Estimation Study) (2008).

¹² Envisional & Motion Pictures Association, India: Internet Piracy Landscape Audit (2009)

¹³ India among top 10 in online piracy: television, film industry take a hit, The Financial Express, see <http://www.financialexpress.com/archive/india-among-top-10-in-online-piracy-television-film-industry-take-a-hit/554531/>

¹⁴ Online Piracy a Genuine Threat to the Indian Film & Television Industry, Motion Pictures Association Asia Pacific – Pacific Press Release, as cited in Scaria, A.G., 2013. Online piracy of Indian movies: Is the film industry firing at the wrong target. *Mich. St. U. Coll. L. Int'l L. Rev.*, 21, p.647.

II.III. 2013 India Digital Future in Focus: comScore's Analysis

As per 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.¹⁵ 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 tamilrockers.com (616th).

III. Competing Interests of Content Owners, ISPs and Users – Piracy and Failure of Copyright law

III.I. Content owners

Content owners believe that the growth of the Internet and file-sharing technologies have given rise to an unprecedented level of piracy that has cut into their revenue streams and weakened their ability to exclusively control the use of the work.¹⁶ Although estimates of the economic loss caused by online infringement vary depending on the methodologies and underlying assumptions used in calculations, the losses are substantial.¹⁷

III.II. Internet Service Providers (ISPs)

From the point of view of the Internet Service Providers, a copyright enforcement regime should provide clear and practicable guidelines about which uses of copyright content on their networks and websites are acceptable and which uses might subject an ISP to secondary liability for infringement.¹⁸ Therefore ISPs favour an enforcement regime that limits their liability for the actions of their users. ISPs seek enforcement mechanism that are cheap to implement and maintain. Therefore for ISPs, automated filtering and takedown systems are preferable on mechanisms for detecting and resolving infringement incidents that rely on costly individualised human review.

¹⁵ 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>.

¹⁶ Levine, R., 2011. *Free ride: how the Internet is destroying the culture business and how the culture business can fight back*. Random House.

¹⁷ U.S Government Accountability Office, Intellectual Property: Observations to Quantify the Economic Effects of Counterfeit and Pirated Goods (April 2010).

¹⁸ Peter K. Yu, The Graduated Response, Florida Law Review, 2010, Vol. 62, p. 1374.

III.III. Users

An ideal copyright enforcement regime for users allows for wide access to copyrighted works at the lowest price possible. Users favour an enforcement regime that allows for a broad and permissive interpretation of fair uses.¹⁹ An ideal copyright enforcement regime must seek to balance the various interests of content owners, ISPs and users.

III.IV. Failure of Copyright law

The long and relentless breakdown of public copyright enforcement mechanism has paved the way for private enforcement of copyright. Procedural hurdles to direct infringement actions have made it nearly impossible to hold individual Internet users liable for copyright violations. Moreover, more desperate attempts by the content industry to enable enforcement of their rights have resulted in negative press and public outrage.

IV. Snapshot of the Existing Graduated Response Schemes

IV.I. Three Strikes Rule

Graduated response schemes are planned to deal with the occurrences of repeat infringement over digital networks.²⁰ Generally, it involves a series of warnings that lead to the imposition of sanctions in order to prohibit future infringements.²¹ The most prevailing form of such graduated response is “three strikes and you are out” model. The graduated response legislative system involves three notices being sent to the alleged infringing subscriber as a warning to stop the infringement before taking a strict action. The three strikes law owes its name from the game of baseball wherein a batter who misses three pitches is said to be struck out. In this model a user’s Internet access is suspended by his or her ISPs following the receipt of three successive notices of copyright infringement over a set period of time.²² The crux of such response system is the shared enforcement between right owners and ISPs.²³

The graduated response system can be administered by both a private entity and government. The origin of such graduated response

¹⁹ Principles for User Generated Content Services, see <http://www.ugeprinciples.com>, last visited on 22nd September, 2017.

²⁰ Brady, A., 2012. Graduated Response American Style: Six Strikes Measured Against Five Norms. *Fordham Intell. Prop. Media & Ent. LJ*, 23, p.1.

²¹ International Federation of Phonographic Industry, Digital Music Report 2011: Music at the Touch of a Button (2011)

²² Peter K. Yu, The Graduated Response, Florida Law Review, 2010, Vol. 62, p. 1374.

²³ Brady, A., 2012. Graduated Response American Style: Six Strikes Measured Against Five Norms. *Fordham Intell. Prop. Media & Ent. LJ*, 23, p.1.

schemes is believed to be in the U.S. Digital Millennium Copyright Act. Countries like France, New Zealand, Taiwan, South Korea and England have publicly operated graduated response laws. Whereas, Ireland and United States of America have private arrangements between various rights holders and ISPs. The efficacy of such law is dependent on the co-operation of ISPs, since internet users are identified by their IP addresses which are allocated by the ISPs.

IV.II. France

The French graduated response law is known as HADOPI, an acronym for “Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d'auteur sur Internet”. The same refers to both the law and the agency tasked with its administration. Under HADOPI-1, an administrative body would issue warnings to alleged infringers and have the power to suspend their internet access up to twelve months if their behaviour continued. The Constitutional Council overturned this law and held that only a judge has the authority to terminate or suspend internet access, an administrative authority cannot do so.

Later, under HADOPI-2, the power was allocated to a judicial authority. Under this law, accredited copyright owner representatives provided Hadopi with allegations of infringement. On July 8, 2013, the French Government passed HADOPI-3. This decree abolished suspension as a possible penalty for a subscriber's failure to secure its connections, but retained the maximum fine of 1500 Euros. After HADOPI-3, suspension was not considered as an appropriate remedy and the government switched its enforcement focus to commercial piracy. However, in 2013, the Constitutional Council of France has ruled that internet access is a basic human right and the HADOPI law breached the privacy rights of citizens. The HADOPI law has been replaced by a system of fines, where the value of fine increases with each copyright infringement by the same user.

IV.III. United Kingdom

The framework for the U.K.'s graduated response is contained in the Digital Economy Act 2010. It amended the Communications Act, 2003. The UK scheme envisages a two-tiered response to allegations of repeat infringement. It draws a distinction between 'initial obligations' and 'technical obligations'. This 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. This scheme is convenient for the rights holders to identify repeat infringers and also places obligations on ISPs to assist in the policing of their users. However, because of the lack of proper implementation mechanism, the law never came into operation and the government decided to replace the law with a 'six-strike' system, starting in 2015. This is known as the 'Voluntary Copyright Alert Program' (VCAP). The scheme would warn internet users four times that

they are infringing copyright and the users would be sent educational material relating to copyright infringement with no action taken thereafter.

IV.IV. United States of America

In 2013, USA adopted a six strikes approach, wherein ISPs would send copyright alerts to errant P2P site users after which punitive measures against the habitual defaulters would be adopted. It is also known as 'Copyright Alert System' (CAS). Unlike graduated response schemes in other countries, Copyright Alert is an entirely private and contractual scheme and not an administrative program instituted through legislation. The program was created through a memorandum of understanding among representatives of the RIAA, MPAA, several media corporations and all of the major ISPs.²⁴ The CAS is administered through the Centre for Copyright Information (CCI), a collaborative effort between the MPAA, RIAA and the five ISPs in USA.

Every Copyright Alert System will consist 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 the "Acknowledgement Step". They entail only warnings to the subscriber. Finally, after five notices relating to the same account, the ISP will move to the "Mitigation Measures Step." At this point, the ISP will take disciplinary action against the subscriber, including throttling Internet speeds, stepping down the subscriber's service tier, or restricting Internet access. In the sixth step, the "Post Mitigation Measures Step," the notice sent to the subscriber will warn them of the possibility of legal action under the Digital Millennium Copyright Act.

Other than the above mentioned countries, New Zealand, Ireland, South Korea, Taiwan also have similar online copyright enforcement system through graduated response schemes.

²⁴ Content owner parties to the agreements are Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, 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.

V. Monitoring Online Copyright Infringement – Legislative Mechanisms in India

Indian legislators and courts are struggling to trace an effective mechanism to contain copyright infringement in terms of legal, cultural and infrastructural challenges. This segment examines the measures taken in India to curb online copyright infringement while referring to similar mechanism in USA and Canada.

V.I. Notice and Takedown system under DMCA, USA

In USA, Section 512 of the Digital Millennium Copyright Act provides for the provision of Notice and Take Down (NTD) of an illegal content online. The copyright owner sends takedown notice regarding infringement to the service provider. The notice shall contain the signature (Electronic or Physical) of the person whose copyrighted work has been claimed to be infringed, along with his personal contact details. The service providers after analysing the takedown notice must act expeditiously to remove or prevent access to the allegedly infringing material by immediately taking down the online content.

V.II. Canada's Notice and Notice (NAN) System

The NAN legislative system in the Copyright Modernization Act came into force on January 2, 2015.²⁵ Under the NAN system, copyright owners are entitled to send infringement notices to Internet providers who are legally required to forward the notifications to their subscribers. The Internet providers must also inform the copyright owner once the notice has been sent or the reason for not forwarding the notice. Internet providers shall not disclose the subscribers' personal information as part of the notice-and-notice process. The Act makes it mandatory for intermediaries to forward copyright infringement notices to their customers and users.

V.III. Takedown Provision under Indian Copyright Act, 1957

The 'takedown' system in Indian copyright law was introduced through the Copyright (Amendment) Act, 2012 under sections 52(1) (b) and (c) of the Copyright Act, 1957. According to the newly inserted provisions, if any person storing a work of others receives a written complaint from the copyright owner of that work, then such person shall not distribute or facilitate the work to others. However it would not apply in those cases where the person responsible was aware or had reasonable grounds for believing that such storage was of an infringing copy.²⁶ After sending a

²⁵ Bradley J. Freedman & Kalie McCrystal "Canada's New Notice and Notice Regime For Internet Copyright Infringement" (2014) Borden Ladner Gervais.

²⁶ Nandita Saikia, "ISP/OSP Safe Harbours and Takedown Laws: Copyright and Information Technology "online: (2012), see <http://copyright.lawmatters.in/2012/06/safe-harbour-for-osp-and-isps-in-2012.html>, last visited on 24th Septemer 2017.

notice, the copyright owner has a window period of twenty-one days within which he should ideally obtain a court order for continued takedown and within which he should provide a copy of the order to the intermediary. The procedure further states if no such order is received by the intermediary or service provider before the expiry of the twenty-one day period, then the service provider may continue to provide the facility of access to the relevant content.

V.IV. Copyright Rules, 2013 and NTD regime

Rule 75 of the Copyright Rules, 2013 is in furtherance of section 52(1) (c) of the Copyright Act, 1957. Rule 75(2) provides that the copyright holder must send a written complaint to the intermediary containing all details of the infringement and the infringers, if known. The complainant shall establish that he or she is the owner of the copyright in work. The complainant after providing all the details as required in rule 75 shall give an undertaking that he would file a suit for copyright infringement within a period of twenty one days from the date of receipt of the notice. If not, the intermediary is permitted to restore the content after 21 days if no court order is received to endorse its removal. The primary job of the intermediary is to disable the access to such content within 36 hours of receiving the notice. There has to be a valid reason given by intermediary before taking down the content.

V.V. NTD under Information Technology Act, 2000

In addition to the Copyright Act, the procedure of takedown has also been provided in the IT Act. The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 deals with the issue of websites blocking. This Rule authorises the Department of Information and Technology to block websites. NTD was first introduced in the Indian legal system by way of the amendment of IT Act in 2008. Section 79(2) along with section 87(2) (zg) of the Act prescribe a privately administered NTD regime for limiting intermediary liability in India. In the IT (Amendment) Act, 2008 the government acted to limit intermediary liability and standardise NTD procedures under section 79 of the IT Act.²⁷

VI. Challenges for Online Copyright Enforcement in India

In respect of the takedown regime as laid down in the Indian copyright law, concerns have been raised by both content providers and online service providers. Music production houses like Saregama RPG Enterprises and other Indian music companies were of an opinion that such a model can be easily misused and abused by the intermediaries and service

²⁷ Ramakrishnan, A., 2016. Towards an effective regime against online copyright infringement in India, Dalhousie University, 2016.

providers. The specific concern was that illegal downloaders and suppliers of copyrighted content would rely on this provision to plead that their storage was incidentally made, in the process of transmission and thereby making it more difficult for the content providers to provide otherwise.²⁸

Service providers, like Yahoo and Google were very critical of the new provisions. They have contended that the loose language provided therein could result in problems while carrying on different operations, like search, hosting, information retrieval and caching. India's takedown procedure has led to over-compliance, with content being arbitrarily removed to the detriment of online expression. There are more general concerns about user rights to creativity, but there are additional legal and regulatory challenges peculiar to India as well.

The NTD process set out both under IT Act and the Copyright Act has raised controversy mainly in respect of the disturbing impact they have on freedom of speech. Article 19 of the Constitution of India provides that "All citizens shall have the right to freedom of speech and expression". It is contended that the new copyright and allied laws and provisions questionably infringe the rights to free speech and expression online. There is an added pressure on the service providers to comply with the order given by the government to block the websites. This has resulted in over compliance since it gives an impetus for the internet intermediaries to take down content whenever they receive notice thus indirectly violating Art. 19(1) (a) of the Indian Constitution. Beyond freedom of expression and over-compliance, privacy rights are also at stake too.²⁹

VII. Conclusion

Graduated response accounts for the fact that a disproportionate amount of infringers are younger users deserving a more constructive legal response than adversarial nature of litigation. However, graduated response in containing copyright infringement has attracted criticism from different ends. Critics have argued that the approach is costly, contrary to notions of due process. Graduated response has also raised concerns among piracy advocates, who are not comfortable with a framework that suggests monitoring of web users. This system raises the concern of whether private actors are competent to enforce copyright because it is contended that they cannot adequately address sophisticated equitable concerns. Therefore, it is argued that the graduated response system is antithetical to net-neutrality

²⁸ Padmanabhan, A., 2013. Give Me My Space and Take down His. *Indian JL & Tech.*, 9, p.28.

²⁹ Prakash, P., 2013. How Surveillance Works in India. *India Ink-NYTimes. com*. (10 July 2013), see http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/?_r=0, last visited on 28th September, 2017.

and chokes freedom of speech online, by effectively cutting off internet access.

It would be difficult to enforce one model for the Indian copyright system. Cultural and legal norms also pose a special challenge to policing online infringement and enforcement of copyright in India. Spreading awareness among the internet users in the country and offering a fairer and more effective balance between the rights of copyright holders and internet users are important consideration.

ISPs are required to have a valid licence and need to understand the importance of their role in bringing a fairer balance between the rights of copyright holders and Internet users. ISPs should be required to alert authors and provide them a means of appeal when their content is flagged for takedown, a process that can often take longer than 36 hours as prescribed in India's IT Act, 2000.

It is important to revise the current takedown procedure, so that demands for online content to be removed do not apply to legitimate expression of opinions or content in the public interest. Lack of transparency in regard to the decisions to take down content, leading to a lack of accountability of private intermediaries for over-broad blocking is also a problem. Law alone may also not be effective in combating online piracy. Being hostile to technology or stopping it from growing will be futile. Therefore it is better for the copyright holders to provide better alternatives to their consumers.