

## Piracy in the Internet Age

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*Received 17 December 2012, revised 12 August 2013*

The Internet has created boundary-less territories and has helped in evolving a unique method to share and transfer information, growth of e-commerce and in creating a global platform for all nations and its citizens. Online piracy is a major flipside to this development. Rampant intellectual property (IP) infringements by way of unlawful reproduction and unmonitored downloads is a matter of concern. It is significant to take note of the laws that various countries have enacted and enforced in order to curb or at least regulate online piracy and related activities. Further, though the Copyright Act, 1957 and Information Technology Act, 2000 in India deal with certain facets of piracy, they do not conclusively deal with this menace. It is the need of the hour for India to draft and enforce laws which will address the current problem and also take into consideration the technological advancements that are likely to give rise to more of such complex issues. Formulating such a law in the near future will be a welcome change and will definitely give India the IP advantage.

**Keywords:** Online piracy, copyright infringement, jurisdictional barriers, Internet laws, intellectual property

The Internet has become the first port of call for anyone in search of information, ideas or simple contact with like-minded people. Unparalleled opportunities also exist through social network sites, blogs, wikis and other interactive facilities for individuals to make information public about themselves, exchange opinions and share knowledge on every question under the sun.<sup>1</sup>

Infringement of copyright on the Internet has become a common phenomenon. Infringement either can take place wilfully or through ignorance. In a tangible form, it is easy to determine whether there has been infringement of the author's rights or whether a 'copy' of the protected work has been. However, in a digital environment this becomes a highly debatable issue.

There is a close nexus between intellectual property (IP) and the Internet and their convergence in the digital era is inevitable. Gieschen Consultancy's Report states that around 14% of counterfeit and piracy investigations that involve transactions are carried over the Internet.<sup>2</sup>

Internet is home to various copyrighted content such as music files, videos, software, video games, etc. A user of such content requires no prior permission from the author and is not obligated to pay

for any of the services availed; this is what makes the Internet quintessential.

The article begins with a brief introduction to the interface between intellectual property and the Internet followed by an analysis of the laws in the United States of America and the European Union. Jurisdiction issues arising out of disputes pertaining to cross-border infringements have been highlighted. In conclusion, an overview of the laws in India and recommendations that will serve as a tool in redesigning the existing laws and drafting laws that cater to the needs of the digital era has been given.

### IP and the Internet

The IP - Internet nexus can be looked at from three perspectives – the author, the user and the service provider. An author creates a piece of work and registers it under the existing IP laws to enjoy certain benefits, but the digital world hinders the complete enjoyment of these rights. Copyright owners perceive Internet as threat to their exclusive rights due to the following reasons: (i) wide distribution is relatively simpler and quicker on the Internet; (ii) anyone can distribute it to a mass audience; (iii) the quality of copies is virtually indistinguishable from the original; (iv) distribution is almost costless; and (v) users can easily and cheaply obtain copyright material on the Internet.<sup>3</sup> The Internet is boundary-less and to trace a

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person's Internet service provider (ISP) or any content that was accessed on the computer, many a times presents a bleak probability. The end user can be a teenager or a technologically challenged person who simply does not understand the implications of the use and may even think it is right. It can also be an adult who is well aware of the consequences of his wrong doings. In the background of the high probability of events happening without the knowledge of the user, should the legislature imperatively look into the intent and circumstances surrounding the same?

The concept of ISPs that started off with the purpose of connecting internal networks and college campuses has today become the only source to access the Internet. The nature of work performed by these service providers vary from one another. One of the most common features is that they are all into peering, which is the interconnection of peering points or Internet exchange points through which data is transferred to different networks. The catch here is that such data transfer is not easily traceable. For instance, if a person creates a website and uploads copyrightable content that is punishable, the only way to trace that person is through the IP address and if he has managed to fake it, then the possibility of even the ISP coming to rescue is minimal.

It is therefore critical to empower the legal system to respond to the new technological developments in an effective and appropriate way, and to do so quickly and continuously, because technologies and markets evolve at an incredible pace. This will ensure furtherance of the fundamental guiding principles of copyright and related rights, which remain constant whatever may be the technology of the day.

### **International Perspective**

Before discussing the existing laws, initiative and nature of infringements in India, it is necessary to analyse the laws that other countries have proposed and adopted at a national level, while simultaneously evaluating their effectiveness and applicability in reference to the Indian context.

#### **United States of America**

The United States of America has extended its copyright law and enacted the Digital Millennium Copyright Act (DMCA) which came into force in 1998. The Act contains six exceptions to infringement including educational research, encryption research, protection of minors, reverse engineering, privacy of

individuals and security testing. The DCMA added Section 512 specifically to the Copyright Act which brought forth the limitation of liability on the service providers in case of online copyright infringement and assigned rules in case of non-profit educational institutions.<sup>4</sup> It is based on the concept of safe harbour which protects the rights of ISPs, *inter alia*, cases of third party violation. A few sections under the Act have faced criticism for their failure to deal with relevant issues that are meant to curb online piracy. With the rapid growth of technology, it is imperative that laws keep pace with changing needs.

Recently, to safeguard the interests of copyright holders, a bill, namely, the Stop Online Piracy Act (SOPA) was brought to the table. It aims at eliminating all such foreign websites which encourage illegal downloading and infringement of copyrighted material. It also gives a Judge the power to rule on matters pertaining to legitimacy of a website and issue a court order to block the same if required.<sup>5</sup> Representative Lamar Smith, who had introduced the SOPA Bill claims that the intent behind this legislation is to prevent people indulging in piracy from generating profits and harnessing the interest of an industry that contributes to almost 60% of US exports, rather than curbing the use of Internet as a form of communication.<sup>6</sup>

The opponents of the Act have pointed out certain flaws that might be detrimental. SOPA targets only the website and not web users. In case of any illegitimacy, a website can be struck down by a court order, with no opportunity being provided to the website, like in the case of gradual response. Furthermore, the ISPs are required to create a system in which one can easily identify any such activity that occurs and what is to be noted is that this system will differ for all networks.<sup>7</sup> Lastly, it can be contended that in the course of identifying activity that is unusual there might be deep packet inspection which might conflict with users' right to privacy.

Also, the USA was a party to the ACTA, an international trade agreement initiated by Japan and USA in 2006 to protect intellectual property by conferring certain rights and corresponding duties on the countries that ratify it. It has been in the pipeline for a long span of time and undergone metamorphosis with different countries giving it their perspective. By 2010 it was brought to public attention and a conference was held in the USA constituting law professors and organisations who expressed their

concern with regard to this agreement and requested President Obama to put on hold any further discussions on it.<sup>8</sup>

#### **European Union**

The European Commission opined that the proliferation of IPR infringements posed an ever-increasing threat to the sustainable development of the world economy. It is a problem with serious economic and social consequences. In furtherance of this, the European Union brought forth a directive before the Parliament and voiced the need for tougher laws and after exhaustive debates it was recently withdrawn because a large number of the members of the Parliament were not in support of ACTA.

ACTA garnered more criticism than positive support and has been retracted by a large number of nations, inspite of being an instrument that could have tackled the prevailing IP issues at an international level with tact. It is challenging for law makers to be able to put on the table a law that can facilitate nations to achieve consensus and formulate a law that can be put to practice.

#### **United Kingdom**

The Digital Economy Act of 2011 came into force in June 2012 and covered subjects that deal with digital encroachment of intellectual property, namely, copyright infringement, television services, radio services, regulation of the same, etc. The Act with respect to copyright involves two major parties – the ISPs and copyright holders. Generally, the holders are companies which own copyrights or deal with protected works of individuals. They work in sync to devise a mechanism in which people downloading material illegally can be brought under the scanner of law. It also extends the powers to take necessary steps required in case of infringement.<sup>9</sup> Initially the Act also granted authority to the Government to censor websites but it was later scrapped.

It is pertinent to note that the Act has covered not only the core area of copyright infringement but also the neighbouring rights that are being affected. India should take note of these laws because such provisions may be necessary at a later stage when the probability of encountering these issues cannot be ruled out.

#### **Spain**

The exigent need for a law in place does not seem like a surprise as statistics show that the creative economy is being doomed by illegal downloads.

Numbers suggest that 97.8% of all music downloads and 77% of movie downloads were illegal in the first half of 2010 (ref. 10). The newly enacted *Sinde Law* aims to eliminate such illegal activity. Like in United Kingdom, the governmental body shall have the discretion to bring down any website that permits such transactions and also gives the right holders the power to sue for loss incurred by them.

The target is to complete the process within a span of 10 days in order to ensure that there is decline in the rate of online piracy. There was a lot of opposition by the owners of websites and other companies that were against it, but it has stood the test of time. It is commendable that they have one of the toughest laws in place especially after having been on top of the countries listed for Internet piracy.

#### **France**

The French system of the ‘graduated response’ was an innovative way of tackling this issue. The law was revised within few days of coming into force, bringing in some changes with relation to the functioning of the administrative authority.<sup>11</sup> The scheme was that of a three-strike one, wherein the law gives the offender the opportunity to rectify the error. This mechanism also requires the cooperation of the ISPs because they are in a position to provide information pertaining to the warning given to the offenders. The law ensures that sworn surveyors of collecting societies and other legal bodies have the power to make referrals in case of any infringement that arises with respect to the members of their associations respectively. These referrals were made to HADOPI, the administrative body responsible for the proper functioning of the system.

Although it is a very favourable law to the copyright holders, there have been protests from Internet users and net activists from the very beginning. It was felt that the law restricted the access of Internet to individuals who benefitted from it and also that it curtailed freedom of speech and expression also arises. Inter alia, the French Constitutional Bench<sup>12</sup> also questioned the authority of the administrative body to suspend Internet access when the courts were well within their ambit to do so and also when dealing with the point of infringement, it would be difficult to identify the offender as there could be a conflict between the subscriber of the Internet connection and the actual user. This goes against the French constitutional principle of presumption of innocence.<sup>13</sup>

### Jurisdiction Issues

Since copyright is a bundle of right, various rights of the owner such as right of reproduction and communication, etc., may be infringed. It becomes very difficult to ascertain the jurisdiction – should it be determined with reference to where the material originated, or where it went along the way or where it ended up being displayed, stored or printed.

Moreover, even in cases where the infringement can be traced, it becomes very difficult to hold a person liable for infringement because of lack of cross border laws or because it is not financially viable. As a result, the infringer gets off and this is one of the reasons why such offences are constantly on the rise. In order to harmonize at least some of these issues, and create greater predictability and reliability in the field of intellectual property, the 65 Member States of the Hague Conference on Private International Law adopted on 30 June 2005, a new treaty, the Hague Convention on Choice of Court Agreements. However, the Convention has not yet entered into force.

The Convention aims to ensure three basic rules, each of those subject to certain exceptions: (i) the chosen court must in principle hear the case, essentially excluding judicial discretion under the *forum non conveniens*<sup>14</sup> doctrine; (ii) any court that is not chosen must decline to hear the case; and (iii) judgement rendered by the designated court (in any Contracting State) must be recognized and enforced without a review of the merits of the case. Disputes involving intellectual property are subject to specific rules under the Convention: Article 2(2) (n) and (o) of the Convention, to be read in conjunction with Article 2(3) of the Convention, excludes certain validity and infringement proceedings from the Convention's scope of application; moreover, recognition and enforcement of judgements based on certain validity determinations are addressed in Article 10(3) of the Convention.<sup>15</sup>

The digitally networked environment is increasingly making multi-territorial communication of works of authorship, trade symbols, and other intellectual property a common phenomenon, and large-scale piracy is becoming ever easier to accomplish. In this environment, the practical importance of adjudicating multi-territorial claims in a single court should be readily apparent. Without a mechanism for consolidating global claims and recognizing foreign judgements, effective

enforcement of IPRs, and by the same token, effective defences to those claims, may be illusory for all but the most wealthy litigants.<sup>16</sup>

### The Indian Perspective

The basic right protected by copyright, that of preventing others from making copies, remains important in the digital context with regard to unauthorized downloading; but this has been distorted by the addition of the notion of a 'transient' copy as infringement. Despite the steady growth of licensed file-sharing sites, numerous court decisions around the world finding unlicensed providers and their individual users liable for infringement of copyright,<sup>17</sup> and more energetic measures by the ISPs encouraged by the governments; unlicensed activity continues virtually unabated.

The Motion Picture Distributors Association (India) (MPDA) in December 2009 commissioned researches on P2P infringements in India by DtecNet and Envisional. The research found that India was amongst the top ten countries in the world with the largest number of illegal P2P activities and BitTorrent was the most popularly used portals by Indian downloaders. It was revealed by the report that India has an increasing number of broadband users which is estimated to grow exponentially and that it has reached a phase where it is imperative to implement measures to curtail online copyright infringements.

An Ernst & Young Report in 2008 estimated the value of the Indian media and industry at US\$ 16.3 billion in the year 2010 and these numbers were projected to grow at a compound annual growth of 12% and reach US\$ 28 billion over a span of the following four years. This industry is such that it provides opportunities for global corporation and the economic liberalization has resulted in the entry of various corporations. Further, the report also found that 40% of the active Internet users consume online TV content, thus indicating that the industry is not in a position to fully monetize its earnings and have now begun to adopt cost-effective technologies to curb piracy.<sup>18</sup>

The Special 301 Report released by the United States of America for the year 2013 shows India's continued presence on the priority watch list. The report tracks the progress that India has made in the last one year with specific reference to protection and enforcement of IPRs and suggests mechanisms that can be adopted. India's enactment of copyright

amendments and publication of draft rules for comments and implementation of the Madrid Protocol and a draft National Intellectual Property Strategy has been appreciated, however the need to have an effective enforcement mechanism has been stressed upon. Further, it has been suggested that India make additional legislative changes in order to ensure that content-based industries can effectively combat physical and online piracy and develop new models for the delivery of content and as part of this reform, India should enact anti-camcording legislation and provide further protection against online copyright piracy, signal theft, and circumvention of technological protection measures.<sup>19</sup>

India has acted in furtherance of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) by incorporating provisions on Obligations concerning Technological Measures (Article 11 of the WCT and Article 18 of the WPPT) and Rights Management Information (Article 12 of the WCT and Article 19 of the WPPT) in the Copyright Act (Amendment), 2012. The intention of the legislature is to curb the rampant piracy practices prevalent in the country and also provide copyright owners with technological measures that are an effective means of enforcing their rights in the digital age.

Section 51 of the Copyright Act deals with infringement of copyright and provides that there is deemed to be infringement when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights uses the work in a way that is prohibited in the Act. It does not specifically mention the liability of service providers or refer to the online infringement or online piracy *per se*. But the provisions can be interpreted in such a way as to fix their liabilities.<sup>20</sup>

The issue of fixing liability on ISPs has been addressed by Section 79 of the Information Technology Act, 2000. This exempts the service provider from liability in a few cases and states that the network provider cannot be held liable for transmission of any kind of information or data by any third party.

The latest Copyright Amendment Act, 2012 under Sections 52(1)(a), 52(1)(b) and 52(1)(c) discusses the liability of a person where there is transient or incidental storage of a work or performance which is purely technical in nature and also when such work is not expressly prohibited by the right holder but the

person has reasonable ground to believe that there is copyright infringement in the instant case. The proviso to 52(1) (c) states that when a person gets a written notice from the holder of rights that there has been infringement, he shall refrain from facilitating access for 21 days and within this period, the owner is required to obtain a judicial order, failing which the person may continue to provide access of such material. Further, it does not provide time period within which the ISP has to act. Though not specifically mentioned, it appears that the safe harbour concept has been incorporated in these provisions of law.

It is interesting to note that with respect to jurisdiction, the laws are broader in connotation. Though the Civil Procedure Code suggests that the suit is to be instituted in a district court having jurisdiction, Section 62 of the Copyright Act makes available an additional forum of jurisdiction to the aggrieved party. This is to ensure that the statutory rights of the copyright holder are protected. Thus, the plaintiff can institute a suit where he actually and voluntarily resides or carries out business or personally works for gain and as a result the wrong doer is required to submit to the choice of court of the plaintiff.

### **Initiatives in India**

The statistical data and the object of the initiatives in India indicate that the nature of the infringements is wide-ranging. Statistics indicate that the entertainment industry in India is losing revenue of about 80% owing to physical and online piracy. India is among the top ten countries which account for P2P and BitTorrent activities. Although piracy in India is still dominated by street side vendors and small shops selling pirated products, the rising number of broadband connections in India is an alarming indication that implies a rise in digital piracy, in addition to what is currently prevalent. Another factor to be taken into consideration is the loss incurred by other countries because of physical and digital piracy in India.

The Kerala Anti-piracy Cell is a commendable initiative by the State Government where the Cell functions under the state's CBCID ( Crime Branch Crime Investigation Department) as a central unit to coordinate collection of intelligence, creation of data bank, coordination of investigation and direct investigation of crucial crimes to trace out their origin and also web distribution. The object was to curb the

menace of piracy in the Malayalam film industry which was incurring heavy losses owing to tax evasion and royalties. The Cell has been successful in detecting 77 cases throughout the state as on date. They have laid down certain warnings in public interest for the public at large, Internet subscribers, cable TV operators, mobile shop owners and CD/DVD distributors across the state of Kerala.<sup>21</sup>

Adobe Systems Inc also launched one of its largest initiatives to battle software piracy in India. They are working in collaboration with local law enforcement and government authorities across India. The object is to avert rampant piracy of software which results in a worldwide loss of US\$ 47 billion every year. Having enforced over 25 civil actions in major cities, Adobe is setting a trend for the big corporations who look at India as a potential market but fear the growing cases of piracy.<sup>22</sup>

Likewise, the United States Business Council launched the 'Bollywood-Hollywood Initiative' (the world's largest film industries in terms of volume and revenue respectively) with the Federation of Indian Chambers of Commerce and Industry (FICCI). Their initiative, in the form of a ground-breaking survey, determined the true cost of piracy and counterfeiting to the Indian Entertainment Industry; a push to ensure India's adoption of Optical Disc Legislation to combat piracy; a campaign to raise public awareness of the detrimental effects of piracy on India; and a drive to US-India governmental cooperation in combating international, cross-border piracy - particularly of Indian films in the US and other countries as well as US films in India.<sup>23</sup>

The Government approved a scheme to implement an anti-piracy initiative in the audio-visual sector under 12<sup>th</sup> Five Year Plan and the Ministry of Information and Broadcasting has an outlay of ₹2 crores for the Plan period 2012-17. Though the FICCI-KPMG shows that the figures of piracy have declined in comparison to 2011, the piracy markets still account for 600-700 million unit sales of DVDs each year and one of major factors is the increased competition within the sector. Some of the activities planned by the Government under the Plan are as follows:

- (a) Campaign against piracy through audio-visual, Internet and print media and a dedicated web portal;
- (b) Training programmes and workshops to sensitize police, judicial, administrative officials,

multiplex and cinema hall owners about the Copyright Act;

- (c) Research on effects of piracy and develop public-private strategies to combat it; and
- (d) Inclusion of anti-piracy awareness material in the curriculum of the schools and colleges, road shows/street plays/documentaries for creating awareness.<sup>24</sup>

### Recommendations

In the words of Justice Kirby, 'The genius of the common law derives from its capacity to adapt to principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the Internet, a great sense of legal imagination may be required than is ordinarily called for'.<sup>25</sup>

There are diverse opinions voiced by a number of communities in the context of regulation on the Internet ranging from fair/personal use, ignorance of infringement, the extent of liability of ISPs and other trivial matters that are likely to be encountered in the near future keeping in mind the rapid developments in the field of technology. Having analysed laws at the international level and being aware of the present Indian scenario, the following are a few recommendations put forth by the author.

### Implementation of WCT and WPPT

One of the first and foremost steps is to act in furtherance of the Internet Treaties that are already in force. Once other nations adopt the code set down and incorporate it in their national legislations, there will be considerable control in the rate of infringement. This will have a dual effect – protection of intellectual property and development of e-commerce. WIPO like it did in the past, should to offer support to countries that wish to embrace the provisions of the said treaties.

The WIPO Internet Treaties (WIPO Copyright Treaty, WCT and WIPO Performances and Phonograms Treaty, WPPT) are designed to update and supplement the existing international treaties on copyright and related rights, namely, the Berne Convention and the Rome Convention. They respond to the challenges posed by the digital technologies and, in particular, the dissemination of protected material over the global networks that make up the Internet. The contents of the Internet Treaties can be

divided into three parts: (1) incorporation of certain provisions of the TRIPS Agreement not previously included explicitly in WIPO treaties (2) updates not specific to digital technologies; and (3) provisions that specifically address the impact of digital technologies.

#### Role of ISPs

The current situation will only change if the access providers themselves become more active in policing their clients. This would be the case if the ISPs are themselves more directly benefited from value or content added services. Many of the laws that exist in the countries mentioned impose responsibility on the ISPs to keep a tab on such infringements. It might seem impossible for the service provider to filter information but the only way out is to devise a system in which violation of specific standards laid down will be brought to the attention of the provider who will in turn take necessary action.

Uniform Dispute Resolution Policy (UDRP) set up by ICANN is an international dispute resolution body to resolve issues pertaining to domain name registrations. Since it is in the form of web contracts, it cannot be duplicated and only one body can adjudicate matters relevant to this. Similarly, the service providers can play a pivotal role between Internet users and an enforcement body.<sup>26</sup>

#### Online Licensing

For legal protection to remain meaningful, right holders must be able to detect and stop the dissemination of unauthorised digital copies. And for e-commerce to develop to its full potential, workable systems of online licensing must evolve which inspire confidence in consumers. The answer to these challenges to a great extent will lie in the technology itself.<sup>27</sup> As much as this seems farfetched, the practical usage of this might be a solution to the on-going piracy rage. What is to be noted is that licensing does not necessarily imply a 'pay to use' policy and is required to be interpreted more broadly.

#### Internationalisation of Rights

At the level of the judiciary, the courts are required to strike a balance between the interests of right holders and users while considering the governance structure bias. The courts can do so by interpreting copyright law in favour of the weaker and disadvantaged party in the policy making process. The reasoning behind this would be that such changes will result in internationalisation of individual

copyright norms without the need to impose severe legal sanctions. This will in turn ensure higher efficiency than many national copyright laws have at present. There will be jurisdictional barriers, but that also can be set aside if the courts of law choose to rule in a certain pattern that enables precedence and sets a standard that can be followed.

#### Conclusion

It can be inferred from the limited scope of the copyright law in India that there is no conclusive mechanism that has been adopted to curb online infringement of content except for a few noteworthy initiatives and amendments to limited provisions under the Copyright Act. The law is inclined towards the growth of e-commerce rather than the protection of works created by individuals. This is a telling fact that reflects the need to address this growing menace by analysing the legislative enactments of other countries, and the lacunae persisting in those laws and thereby successfully devising an appropriate policy framework. This framework should take into consideration the ever-increasing broadband network connections and also the nature of infringements. Redesigning laws in tune with present day technology and assessing compatibility among nations in this regard is one of the best ways to deal with the on-going copyright crisis. Diversity of approach may make the process of law stagnant and increase the frequency of infringements but it is an accepted fact that this course of action needs to be a gradual yet stringent one.

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