Onset of Mobile Chip Piracy in the Domain of Copyright Infringement

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This research article is about how people are using their mobiles for their own benefit but are unknowingly infringing the copyright by downloading songs, movies and games. Using mobile is a need, but recently in order to increase the marketability, different companies are accessorizing their products with new features whose usage results in the infringement of copyright. Due to this, music and other related industries are suffering a lot of losses. So, we should try a conscious effort to curb this crime and hence, benefit the Indian economy. Though, there is a growing awareness amongst the population of India as well as the music companies, yet nothing conclusive has been done. In this paper, the authors have tried to analyse some of the initiatives taken for curbing such piracy.

Keywords: Copyright infringement, mobile chip piracy, Internet downloads

The last decade of 20th century had witnessed information technology emerge as the most prominent technology which has a revolutionary effect on the lives of the people across the world. The evolution of Internet can be said to be one of the best technological advancements of mankind. The amazing capability of the Internet to promote exchange of knowledge, information and ideas on a universal scale has changed the way people are now interacting. The greatest advantage of this medium is its ability to enable people around the world to obtain great amount of information in just a matter of few seconds.

However, this easy access of Internet also comes with many drawbacks. With the growth of Internet, Intellectual Property Rights (IPR), abuses have grown a lot.

‘In addition to various forms of violations of intellectual property in real world, now the intellectual property owners risk their IPR being violated in the virtual world as well. Despite existence of gamut of legal regimes to protect IPR, more often than not these laws are either limited to territorial boundaries or biased towards protection of traditional intellectual property and do not cover intellectual property in digital sense. Thus, these laws are inadequate to deal with the intellectual property infringements that take place on the Internet which knows no territorial boundaries.’¹

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The intellectual property owners complain that they are losing millions of dollars because of online copying that Internet facilitates.² Furthermore, they fear that evolution of Internet would aggravate this problem. Digital technology has opened up new ways of doing business and given right owners and consumers access to new on-line markets via digital networks. Text, music and images are reduced to digital data which can be transmitted in digital form at high speed throughout the world to everybody with a connection to the Internet. Unfortunately, the digital era also has a serious downside for content producers. It has made it easier than ever for consumers to get access to content without paying for it. There is no doubt that digital copying and transmission of intellectual property is poised to do major damage to the content industries. Mass copying is much too costly for customers and so copyright enforcement at the level of customers was not necessary. But, the advent of Internet and P2P networks³ changed this situation dramatically. As digital technology develops further, music fans may sample or download tunes from a historic catalogues or cinema fans will access movie at any hour with the convenient downloading system.

Music firms have been battling piracy ever since fans started uploading their collections into web servers for free downloads. As more and more music became easily available online, the recording companies as well as lyricist and music composers are suffering. Earlier, it was online sharing of files which was creating trouble, now it is high end mobiles.
The courts in many countries including India have adopted a two prong test to determine the copyright infringement. Firstly, whether a valid copyright exists and if this is answered in the affirmative, then it is further examined to see if there has been copying of the constituent elements of the original work.1

**Evolution of Music Piracy in the form of Mobile Phones**

With the technological advancement, the piracy is also gaining impetus. Earlier, we used to have CD players, which had very minimal storage capacity, but with the advent of MP3 players, the scenario has changed. The music industry was more apprehensive when Apple introduced iPod. Though, it was done with all good intentions, people used it for illegal download of songs. Apple tried to check piracy by having some security settings in the iPod, but then there are always people present, who find out the way of overriding such security measures.

This time however, the menace is even more threatening. A major problem plaguing the mobile music industry is that of illegitimate downloads. Illegitimate downloads refer to the free transfer of music from one handset to another and according to the music industry, pirated downloads have reached a volume which is three times the legal music. In order to increase the sales, the mobile companies are including music and video in all their latest models of mobiles. More threatening is the way the files are transferred from one mobile to another. One can easily copy digital music to mobile phone with built-in chips or memory cards from storage devices like computer hard disc, mobile phones with already stored music etc. These chips can also be inserted into some other cell phones. Illegal transfer of music into cell phones is done with the help of Bluetooth, memory card, data cable, Wi-Fi, IRDA etc.

Earlier iPod and music player needed a computer interface, but now the mobiles have inbuilt Bluetooth technology which helps in easier transfer. After that the songs can be downloaded to a memory stick and finally in a computer. Bluetooth wireless technology has been a boon for mobile users and disaster for music industry. Unlike conventional computer to computer or mobile to mobile file transfers, it is impossible to pin down the Bluetooth file transfers. This is because the phones themselves act as tiny file transmitters and receivers without any external network travel.

‘Piracy with the help of removable memory cards, used in cell phones, digital cameras and PDAs, is the latest woe for an industry plagued by intellectual property rights violations.’4

With the popularity of music in the telecom industry through ring tones, music downloads, etc. it has now started taking roots in this industry as well. A ring tone, which is downloaded by a mobile subscriber on his cell phone and is transferred to his friends, even that amounts to piracy. More and more mobile subscribers who transfer downloaded music using technologies like Infrared, Bluetooth, Wi-Fi, etc. are indulging in piracy. A major problem plaguing the mobile music industry is that of illegitimate downloads. This refers to the free transfer of music from one handset to another. Music piracy can be defined as any illegal manner in which music may be produced by a person. This may include download of music illegally from websites, duplication of audio CDs, conversion of music into MP3 or other formats not offered by the music company and circulated in the markets, for personal or commercial use can be categorized under music piracy.

The contents can be transferred onto a mobile device through various genres such as SMS, WAP, hard coded/embedded content, WEB, IVR. Content can also be forwarded to handsets using Wi-Fi, Bluetooth, Infrared and data cable among others. A greater trouble is that the memory stick or chip or card is available very cheaply and is generally expandable. This allows keeping and sharing a lot of songs. The persons who can indulge in mobile piracy are mobile phone dealers, mobile phone repair shops, computer accessories dealers, shops selling video games, games parlours etc.

**Combating Mobile Chip Piracy**

The digital age poses many unique problems for law. One such problem is adapting intellectual property to meet the challenges of global computer networks. Internet is global. This makes it multi-jurisdictional. It has become very easy to take a copyrighted product and reproduce it in digital form. The online distribution of digital content is far more vulnerable to unauthorized use than analogue distribution of physical content. The analogue distribution of material is done by fulfilling the contractual obligation by paying the purchase price to the seller of the product. The user’s position is further dealt with by applicable copyright law. Digital
distribution of content, however, enables copyright owners to individualize the terms of their exploitation contracts and to open separate markets for the same content. This vulnerability follows from the fact that the modern digital technologies permit reproduction and dissemination of digital content within seconds and without any loss of quality. Copies can be made as many times as desired without loss of quality. They can be digitally altered and manipulated. Copying is also extremely cheap for infringer. It is also unlikely that an individual user will be caught for his actions. With millions of users requesting data over the Internet, it is very difficult to track the persons infringing the copyright. The Internet user, for the most part of time is anonymous.

Once, the data have been downloaded from Internet, and then it is very easy to share from one mobile to another due to advancements in technology. This is precisely the reason as to why the mobile downloads are rampant.

Many people think it is easier to combat digital piracy than piracy on streets. Two measures can be taken to keep piracy at a low and manageable level:

(a) Piracy can be checked by increasing inconvenience during finding and downloading pirated content and also by increasing the risk of getting caught and punishment for doing so.

(b) Legalizing acquisition by a consumer by stipulating a payment for the content that they download.

There is another generation of society who records television broadcasts and music for private purposes. It is impossible to prohibit private copying. In a bid to curb piracy, music companies are planning to launch Copy Control CDs (CCDs). The music CDs presently available in the market can be easily replicated but the introduction of CCDs will make copying or digitizing impossible. Such CDs could be played only on instruments designed to play them but they can not be used on different formats. CCDs are a response to sharp increase in the level of piracy, multiple copying and illegal Internet distribution of recorded music. The CDs can be differentiated by seeing a logo which the company attaches with every CD. The consumer would not get affected by this step as there will be no price difference between regular CDs & CCDs. However, they are certain to interfere with the fair use expectations of the consumer. In the present case, it will disappoint the music lovers because creating a compilation of songs from CDs and transferring them to mobiles does not itself constitute infringement. Infringement occurs when you facilitate the distribution of those files. Permission is always required unless there is a criterion of fair use.

Fair use doctrine allows potential user to take the needed portion of the work and make use of it without seeking a license, thus enabling user that otherwise will be frustrated. Fair use preserves proprietary rights in creative works while accommodating public interest in dialogue and advance of knowledge. The terms ‘fair use’ and ‘fair dealing’ have not been defined anywhere. The only thing mentioned in the Indian Copyright Act, 1957 under Section 52(1)(a)(i) is ‘private use’. The line of distinction between legitimate and illegitimate misuse of technology, as under the ‘fair use’ proposition, and for infringement actions, may become misty in view of the broad exception catered under Section 52 of the Copyright Act.

Article 9(2) of Berne Convention provides for the fair use exceptions. However, it became recognized that copying of digital content made possible by modern technology cannot be considered as a special case under this article. Moreover, it does not represent a normal exploitation of the work and does unreasonably prejudice the interests of the author because their economic interests get hampered. As a result, copyright laws slowly began to adapt to the new realities by introducing legislations to provide for exception to the reproduction right permitting private copying for the personal use of the copier as a corollary to remuneration being paid to right owners with respect to these new uses of their works. These exceptions were introduced in the context of analogue technology and were a response to the impossibility of controlling private copying at the time.

One of the major arguments by the people who download songs onto their mobile is that it helps them listen to songs anytime and anywhere they want to. To work out this, the Indian music companies have tried to offer Bollywood soundtracks on pen drives and memory chips. The most recent example is the movie BLUE. It was sold in pen drives and Micro SD chips. However, pricing is hindering the new initiative. While the SD memory cards are costing few hundreds, CDs stuffed with 15-20 MP3 files together are available in just Rs 50. More tech savvy people go online and start downloading the songs which are available as soon as it is released. Still, the music companies are defending the high price by giving the
reason that it is not only the songs they are providing but also video clips, ring tones, wallpapers, etc. The music companies came up with this idea because there is already a set market for such preloaded memory chips. By doing this, they will legitimize the whole thing and in turn will gain a part of the profits of the retail shops who are generally involved in such activities. Not only music but also movies are being sold in Micro SD card.

Finally, the most recent initiative taken by Indian Music Industry to curb piracy is Music Mobile Exchange (MMX) which is a division of the Indian Music Industry. It has launched the first of its kind in Andhra Pradesh. This has been launched to cash on the growing demand for music content on mobile chips. Getting a MMX license will help in legitimizing the selling of music by mobile stores without violating the Copyright Act. Currently, it has seven members i.e. Saregama, Aditya music, Tips, Venus, EMI, Sony and Universal. The license could be taken for a period of one to three years at a cost ranging from Rs 1500 to 5000 per month or per computer depending upon the kind of the shop or the location of the shop. The MMX license offers legitimate partnership opportunity with shopkeepers.12

India, in the event of non-adoptions of the international treaties has called for the Copyright Act itself to be amended. The proposal to amend the Act was made in order to make room for a Digital Rights Management (DRM) scheme to be incorporated.9 DRM technology13 has helped curb piracy on mobiles. DRM entails operation of a control system that can monitor, regulate and price each subsequent use of a digital file that contains media content or software.14 This technology platform is based on OMA (open mobile alliance), that offers interoperability and prevents mobile piracy.15 DRM is put on the content, and not on the handset. It is a code wherein the content that has been downloaded cannot be forwarded, in simpler terms; there is forwarding disabled on the same. With DRM-enabled content coming in the market, service developers and operators can look forward to providing DRM-protected content to their customers. It will help check mobile music piracy. Most of the handsets today are ‘forward locked’ by the manufacturers themselves, for basic commodity product like mono tones and polyphonic ring tones. So, mobile piracy happens on the retail front where some grey market stores, burn songs/videos on the handset or SIM card at the point of purchase, probably to add value15.

DRMs may also in the process of their function restrict non-copyrightable or copyright expired works in the public domain hampering the very purpose of it being so. In spite of tribulations associating themselves with DRMs being foreseen, the need to introduce DRMs outweighs the potential risks.5

Conclusion

One of the leading questions which crops up over here is why ordinary law abiding citizens engage in the online use of music that according to national and international law is unauthorized. The simplest answer to this question is that they do not consider this use as unauthorized. There are some reasons behind such thinking. Ordinarily people in their role of consumers tend to regard digital content as something that is out there in order to be shared by all. This is particularly so with popular music which is not perceived as the product of a creative music industry which has to invest vast sums in its promotion and distribution, but rather as a freely circulating part of culture. And this is more so since the same music industry markets its products so as to induce people to believe that in order to be part of the network culture, they have to listen to that particular music.16

‘Law is always seven steps behind the technology. This is so because we have a tendency to make laws when the problem reaches its zenith.’17 We do not appreciate the gravity of the problem till it takes precarious dimensions. At that stage, it is generally difficult to deal with the problem. This is more so in the case of offences and violations involving the information technology.

The problem of digital piracy is having varied facets and dimensions. Its solution requires rigorous application of energy and resources. The owners of intellectual property receive royalty for the reproduction or commercial use of their work. This royalty is not meant only for the phonogram industry but also for the lyricist and composer. Both the lyricist and composer have a right to get royalty on sale of each of their music. But, in the present situation, as the music is available free of cost, no sale happens which will bring royalty to them. There are ways and means through which the royalty payment can be ensured. The right of copyright owners to equitable remuneration should always be balanced with the interests of society at large.16
As India is not a party to the WCT and WPPT, it is not bound to incorporate anti-circumvention provisions into its copyright law. However, the Indian Government does recognize the WIPO treaties as part of the international copyright regime. The ground realities in India clearly point to a need for anti-circumvention laws. Mobile entertainment in India is gaining popularity through value added services provided by service providers. At the same time, Indian pirates have not been oblivious to these developments. Unauthorized copying of audio CDs, movie DVDs and software has plagued the owners of digital works in India for several years now. Despite the growing problems of unauthorized access and use of copyrighted works, Indian copyright owners have also recognized the importance of incorporating technological measures to protect their digital works. However, no security measure can be 100 per cent secure. Technological measures will be truly effective in protecting copyrighted works only if they are complemented by legal protections. Policymakers must take steps to ensure that the individuals and companies that create and distribute content have their property protected from theft. At the same time, public policy must encourage the other myriad benefits of the digital era-technological innovation in content and devices, disintermediation of middlemen that serve only to increase costs, and so on. Copyright law aims to balance the competing interests of both, the artists and general public by protecting the artists’ works and encouraging their creativity on the one hand and on the other by allowing public access to information. By balancing these competing interests and creating an environment where content providers can take full advantage of digital technology, the digital era holds the promise of new vistas of creativity.

References
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3 P2P network means Peer to Peer Network. One of the most popular options for file sharing on Internet is peer-to-peer networks. Users can use software that connects to a peer-to-peer search for shared files on the computer of other users connected to the network. files of interest can then be downloaded directly from other users on the network.
10 It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
11 Gillian D, Copyright and the Public Interest (Sweet and Maxwell, London), 2002.
13 This is a term that refers to access control technologies used by hardware manufacturers, publishers and copyright holders to limit usage of digital media or devices. Whereas copy protection only attempts to prohibit unauthorized copies of media or files, digital rights management allows the issuer of the media or file to control in detail what can and cannot be done. India is not a signatory to WIPO Copyright Treaty, but with the new amendment of 2002 in the Copyright Act, it has tried to include the nuances of DRM.
18 It refers to the laws which prohibit the circumvention of technological barriers for using a digital good in certain ways which the right holders do not wish to allow. The requirement for anti-circumvention laws was globalized in 1996 with the creation of WIPO Copyright Treaty.