

A Critical Study on Copyright Violations in the Indian Entertainment Industry in the Internet Age

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Abstract

Innovation and seed are the twin watchwords of a knowledge-based economy. The most astonishing feature of the emergence of new technologies is the enabling dissemination of knowledge in a hitherto unprecedented manner. Internet definitely allows copyright holders to disseminate and communicate their works to the public in a much faster manner but the same Internet has also facilitated others to unauthorizedly create multiple copies of a work and their faster and much wider dissemination, all unauthorizedly. In this situation, copyright law plays a major role in protecting the works. However, the approach to tackle such problem has been the same. This means that the traditional notions of copyright infringement have been applied to infringement through Internet. In this backdrop, this article examines the technological advancements and their impact on the copyright law of a developing nation like India, the role of judiciary and recommends reforms necessary to tackle the hurdles in effective copyright in technological age.

Keywords: Copyright, Infringement, Internet, Intermediary, Piracy

1. Introduction

Today, the Internet has become a necessity rather than a luxury. Especially, with the current COVID-19 pandemic, the world has stayed connected and every work has been made possible with the Internet. From education to healthcare, from meetings to entertainment, everything is possible due to Internet.

The Indian Entertainment Industry has been in existence since more than 100 years. Traditionally, the Entertainment industry functioned focussing more on the sales and ticket prices of the released movies. Whether a music album is a hit with the masses or not was determined on the basis of number of copies sold of the Cassettes or Compact Disks (CDs). A film's success was determined with reference to the collections it made at the box office. But the emergence of piracy has caused a hurdle for the entertainment industry. The same has been replaced with the number of likes on YouTube and Facebook. Such has been the impact of the social media that today a film's success is determined on the first day itself, as the people who have watched a movie or music post their reviews on Facebook, Instagram or Twitter. All this has been made possible with Internet.

In the 1990s, when the Internet was still emerging as a technology nobody had thought that it would become so essential within a span of just 20 years. From 1990-97, the estimated number of Internet users across the world grew from 1 million to approximately 70 million. With greater access and cheaper availability, Internet today has extended its operations on our smartphones. The fastest growth of Internet users is expected in Asia and Latin America (New York Times).

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In 2016, Mukesh Ambani owned Reliance Jio introduced the Indian population to the 4G network speeds. With such disruptive speeds and aggressive pricing, the Indians welcomed the new technology with open arms. However, it further aggravated the complications for the IP owners (more particularly copyright-holders). The major issue was now piracy of the copyrighted materials was much faster and easily accessible to millions of Indians, who could further share it among their known ones.

2. Literature Review

Various books and articles have been published on the topic of piracy in the entertainment industry. Some have studied piracy from psychological viewpoint while some have studied the economic implications of piracy. Also, some studies deal with the consumer behaviour analysis of piracy.

Hsing Kenneth Cheng, Juan Feng, Gary J. Koehler and Sean Marston (2010) highlighted various tools adopted by Governments to restrict the access to pirated content of foreign entertainment programs. It was mentioned that with Internet people have gained access to their favourite foreign shows without any hindrance from governments by way of tariffs, quotas and subsidies. Hence, the authors call for a re-examination of the traditional governmental mechanisms to combat piracy. The authors show that the effectiveness of the traditional governmental tools such as tariffs, quotas and subsidies depend to a large extent on the difference in quality and content available on both traditional and Internet channels. Also, the authors concluded that even when people did not download copyrighted foreign content from Internet, there was an increase in tariffs.

Ernst & Young (2008) studied the problem of piracy with regard to four industries i.e. film industry, music industry, television industry and gaming industry. The study shows that piracy results in 572,000 job losses and revenue loss of \$959 million each year. Moreover, the study classifies piracy into four types: optical disc piracy, internet piracy, cable piracy and loss due to under-declaration. The study then goes on to estimate the loss suffered due to each type of piracy:

- i. Optical Piracy - \$171 million
- ii. Internet piracy – Zero or Negligible
- iii. Cable Piracy - \$ 326 million
- iv. Under-declaration - \$462 million

The study also mentioned about the different initiatives taken by the Indian film industry to prevent piracy which have led to little success. The main causes of the failure were attributed to:

- i. Lack of common organised front to fight piracy
- ii. Lack of sustained activity to fight piracy
- iii. Insufficient allocation of funds from the industry to fight piracy.

Additionally, KPMG-FICCI (2016) studied various parts of the Media & Entertainment (M&E) Industry such as radio, television, films, digital contents, animation/VFX. With regard to films, the report highlighted that piracy was still a problem for the Indian Entertainment industry. Also, the report highlighted the problem of music piracy in India and concluded that with an increase in people's attitude to stream music through music apps consequently decrease music piracy. However, it also noted that the government should continue to take steps to create frameworks and policies around piracy for the sustainable growth of the music and entertainment industry. Moreover, the report highlighted the growth of OTT platforms such as Netflix, OZee, Amazon Prime, etc. which had then just arrived in India. The report mentioned that with the reducing costs of smartphones as well as affordability and improvement in mobile broadband infrastructure, OTT platforms would replace televisions in future.

Besides, FICCI (2017) studied the trends of the Indian Media & Entertainment Industry. It further studied each segment of the industry such as Music, Television, Films, Animation/VFX, etc. The report considered OTT platforms as a new-age threat which may disrupt India's Media & Entertainment Industry. The study highlighted the problems which cause piracy as well as the steps taken by the Government to prevent it. The report also highlighted on the role played by affordable broadband with increased speeds. The report observed that with the Digital India campaign, there has been a growth in the online payment facilities in the backdrop of demonetization. The overall effect of which has been increased across various segments. For example, the video consumption has increased to 64% from 2016 to 2017. Also, the report shows that 'video' and 'music' in the entertainment category has become a top favorite in online searches contributing 31% of all searches. The report further highlighted the piracy issues through OTT platforms and cited an example of live streaming of sports

matches. In the backdrop of the growth of OTT platforms in India, it was concluded that piracy was still a threat, which was to be taken down.

Furthermore, Jayanta Ghosh (2016), analyzed the area of digital media and copyright protection in relation to Copyright Act, 1957. It also discussed the *Aereo* case in light of the broadcasting organizations. Also, it discussed the Copyright (Amendment) Act of 2012 which brings DRM provisions as well as Rights Management Information (RMI). The author then discussed the protection available to Offline as well as Online modes of work. With regard to online access, it is observed that anybody can download and view a multimedia work on the Internet without the author's permission. The author also discussed the complications/issues arising out of the digital environment through third party intervention without permission. Finally, it was concluded that the materials in the digital environment needs effective legal protection.

Sanjeev P. Sahni, Garima Jain and Indranath Gupta (2017) critically review the literature existing on psychological, sociological and cultural factors affecting behaviour towards digital piracy. It also studied digital piracy through the social learning theory whereby people imitate their surrounding people even though they are surrounded by criminal background. The authors opined that to address the issue of digital piracy, there should be a modification of social attitudes, belief and behaviour towards intellectual property protection. Moreover, even though people know that piracy is illegal, they indulge in it and change their perceptions with change in social values. Moreover, the authors studied the self-control theory mentioning that people with low self-control project instant gratification and are more likely to indulge in piracy. The authors also mentioned about Kohlberg's level of moral development – Pre-conventional morality, Conventional morality, and Post-conventional morality. The authors finally study digital piracy with the help of theory of reasoned action and theory of planned behaviour.

3. Objectives

- To study the concept of Copyright as an Intellectual Property.
- To study the various challenges and problems emerging from Internet and faced by copyright-holders of the Indian Entertainment Industry.
- To study the various remedies provided by the Indian judiciary to curb the problem of copyright violations and to protect the rights of the copyright-holders.
- To provide suggestions so as to reform the existing framework.

4. Methodology

The present articles use the primary and secondary data. Under the primary data, it uses the data available in various researches done by Government authorities on Copyright Violations. Such data would be helpful as it is carried out by government agencies over a period of time, taking into consideration all relevant factors and hence, is reliable and verifiable. On the other hand, the secondary data covers the various principles of copyright law and the judgments pronounced by the Indian courts. These secondary data would help to study the legal position to tackle copyright violations. It would also help to study the effectiveness of the laws. Thus, the combination of primary and secondary data would help to understand the different challenges and problems posed by Internet, not only for the legislators but also for the copyright-holders. The legislators are finding it difficult to tackle the problem of copyright infringement, as the same is being done now with the help of Internet. Also, the copyright-owners are finding it difficult to monopolize their works and commercially exploit them to its fullest. Though the Indian Copyright Act, 1957 recognizes the offence of infringement of copyright and provides appropriate remedies, but with the increasing cases of copyrights violations in the Indian entertainment industry, the framework is not efficient. To supplement the law, the Indian courts have also taken some innovative measures to curb copyright infringement.

5. Conceptual Framework

5.1 Copyright Law in India

Copyright, in general, is a form of Intellectual Property which grants an exclusive monopoly. The Preamble of the Indian Copyright Act mentions that it amends and consolidates the law relating to Copyright. Copyright, also known as author's rights, is the rights that creators have over their literary or artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films to computer programmes, databases, advertisements, maps and technical drawings (WIPO, 1996).

As per Section 14 of the Indian Copyright Act, 1957 “copyright” means the exclusive right to do or authorize others to do certain acts in relation to literary, dramatic, artistic, musical works, cinematograph films and sound recordings.

When copyright infringements are in respect of the Entertainment industry, it is known as ‘piracy’. However, whether such piracy of films and music creates economic disadvantage or not, is still debatable. The rise of the digital medium for consuming content has added to industry growth but has also aided digital piracy. For instance, online streaming has emerged as the biggest contributor to music consumption. As of December 2018, the value of audio OTT market was estimated to be USD 250 million and music consumption per week stood at 21.5 hours versus a global average of 17.8 Hours (ESYA Centre, 2019).

5.2 Copyright in the Entertainment Industry

With respect to the Entertainment Industry, copyright exists in cinematograph films and music works. With respect to cinematograph films, the copyright exists in the producer of the film while in respect of musical work, copyright protection exists in the lyrics and music of the song.

As per Section 2 (p) of the Indian Copyright Act, 1957 “musical work” means a work consisting of music and *includes* any graphical notation of such work of such work but *does not include* any words or any action intended to be sung, spoken or performed with the music. The definition means that while the melody of a song would constitute a musical work, but the lyrics of the song would also be enabled for copyright protection as a literary work.

In *Indian Performing Rights Society v. Eastern Indian Motion Picture Association*, the Supreme Court of India held that a “musical work” under Section 2 (p) of the Indian Copyright Act, 1957 means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced. Similarly, in *Sawkins v. Hypersion Records* it was held that a musical work is a combination of melody and harmonies. Whilst the notes are essential, they are not the sole determinant of what is heard.

A musical work in order to enjoy copyright protection, must be original, to determine the originality, the degree of skill, labour and innovativeness is to be considered. On this point, a case decided by the Columbian Supreme Court is relevant. In *Darryl Nnudorf v. Network Productions Ltd.*, the Supreme Court of Columbia held that the tests for joint authorship to be applied to musical work are as follows:

- i. Did the Plaintiff contribute significant original expression to the songs?
- ii. If the answer to the above question is ‘yes’, did each of the Plaintiff intend that their contributions be merged into a unitary whole?
- iii. If the answer to the above question is also ‘yes’, then did each of the Plaintiff intend the other to be a joint author of the songs?

Another work in which copyright is granted in the Entertainment industry is ‘Cinematograph Film’. Under Section 2 (f) of the Indian Copyright Act, 1957 “cinematograph film” means any work of visual recording, on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and ‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films.

In *Restaurant Lee v. State of Madhya Pradesh*, it was held that the exhibition of movies by playing back pre-recorded cassettes in restaurants falls within the ambit of ‘Cinemas’ under the Madhya Pradesh Cinema (Regulations) Act 1952 that when a video cassette recorder is used for playing pre-recorded cassettes of movies on the television screen, it is certainly used as an apparatus for the representation of moving pictures or series of pictures and comes within the definition of cinematograph as defined by the said Act. Similarly, in *Balwinder Singh v. Delhi Administration*, it was held that video and television are both cinematograph and that both are jointly and severally apparatus for the representation of moving pictures or series of pictures and come within the scope of Section 2 (e) of the Cinematograph Act 1952.

A bare reading of the definition of ‘Cinematograph Film’ as provided under the Indian Copyright Act, 1957 it shows that the term includes a soundtrack associated with the film that is, the sound embodied in a soundtrack which is associated with the film.

Accordingly, in *P. Thulasidas v. K. Vasanthakumari*, it was held that the definition of ‘cinematograph film’ in Section 2 (f) includes soundtrack, if any work produced by any process analogous to cinematography. Video and Television are appliances capable of use for reception of signs, signals, writing, images and sounds and hence, would fall within the definition of telegraph. Both articles would be cinematograph jointly and severally.

Thus, soundtrack associated with a film is protected as part of cinematograph film, and not as sound recording. However, independent copyright may also subsist in those sound recordings which are made from films and tracks, for example, making records of songs from the soundtrack of a film.

5.3 Copyright Act 1957 – Issues and Challenges with respect to Entertainment Industry

When one studies the reasons for copyright infringement of films and music, the primary reason is to make commercial gains from the unauthorised copies of such work. But apart from this, there are also several other reasons associated with such unlawful dissemination, such as:

- Obtaining benefits as the item is free
- Doing it because it is convenient and quick
- Threat of being discovered is low or negligible
- Probability of being discovered and punished is low
- Illusion that the content available online is free
- Original products being unaffordable
- Affordable and easy access to Internet through smartphones

The above-mentioned factors of piracy are more applicable to online piracy which has gained momentum with greater penetration of Internet, particularly with introduction of high-speed internet in the form of 2G/3G/4G/5G.

Apart from identifying the factors for online piracy, it is equally important to identify the sources of such behaviour. Some of the sources of online piracy are as follows:

- P2P Networks
- Cyber Lockers
- Streaming Sites
- Linking sites
- Torrent sites
- Social Media (Apps like WhatsApp, Telegram, etc)

The problem of film and music piracy is being faced not only by a developing country like India, but even the developed countries like USA also face the problem. In a report studied in 2019 it was estimated that online piracy accounts for 26.6 billion views of U.S.-produced movies and 126.7 billion views of U.S.-produced TV episodes every year. The economic impact of digital video piracy extends far beyond the movie and television industries; in total, it is responsible for at least \$29.2 billion in lost domestic revenues, 230,000 in lost American jobs, and \$47.5 billion in reduced GDP (NERA & GIPC, 2019). The study also surveyed 34,000 Internet users from around the world, out of which 23 percent of respondents used illegal stream ripping sites, which created downloadable files of music “ripped” from online streaming sites. Illegal stream ripping is especially popular among young people: 34 percent of 16- to 24-year-olds admitted to doing it (ITIF, 2020).

5.4 Legislative measures for Copyright Infringement

In light of the rampant copyright infringements, the Indian courts have granted the following remedies:

- i. Civil Remedies
- ii. Criminal Remedies
- iii. Administrative Remedies

Chapter XII of the Indian Copyright Act 1957 provides for Civil Remedies available to the owner of copyright. Section 55 of the Indian Copyright Act, 1957 provides the following Civil Remedies in favour of the owner of copyright:

- a. **Injunction:** It restrains a person by way of injunction from doing the act of infringement
- b. **Damages:** It is a claim in the form of a monetary amount.

c. **Accounts of profit:** It is the profits which the infringer/defendant may have made by wrongly using the copyright of the owner/plaintiff.

d. **Damages for conversion:** When the infringer/defendant converts the copyrighted work into another form without the consent of the owner of copyright.

On the other hand, the criminal remedies available to the copyright-holder is the infringement of the infringer or imposition of fine, or both. The remedy for seizure of the infringing copies is also available. Chapter XIII (Sections 63-70) consists of the offences and penalties.

“Section 63: Offence of infringement of copyright or other rights conferred by this Act.—

Any person who knowingly infringes or abets the infringement of—

(a) the copyright in a work, or

(b) any other right conferred by this Act 1 [except the right conferred by section 53A],

[shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees]:

Provided that 1 [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.]

Explanation.— Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.”

From the analysis of the civil and criminal remedies, it is clear that both civil and criminal remedies are separate and distinct and therefore both can be adopted simultaneously by the plaintiff/complainant.

However, knowledge or *mens rea* is an essential ingredient to establish an offence in order to adopt the criminal remedy. All infringing copies of the work in which copyright subsists and all plates used for production of such copies are deemed to be the property of the owner of the copyright in the work. Also, a Police Officer of the rank of Sub-Inspector and above is granted the owner to seize the infringing copies without warrant and produce the same before a Magistrate (Gurnani, 2020).

Additionally, Section 70 of the Indian Copyright Act, 1957 clarifies that no Court inferior to a Metropolitan Magistrate or a Judicial Magistrate of First Class shall try any offence under the Act. Any person can make a complaint and the Metropolitan Magistrate shall take cognizance of the offence upon receiving the complaint of the facts which constitute such offence irrespective of the qualifications or eligibility of the complainant to file a complaint.

As far as the Administrative Remedies, it includes those which are available to the various authorities constituted under the Indian Copyright Act, 1957 viz. the Registrar of Copyright, the Copyright Board and the Copyright Societies. These authorities have certain powers relating to copyright and hence the owner of copyright can approach them in case of infringement.

The Parliament of India has made some amendments so as to tackle the menace of entertainment piracy. The most notable change being the recognition of the offence of illegal recording of films (also known as ‘camcording’). Section 6AA of the Cinematograph (Amendment) Bill, 2019 prohibits anyone from using any audio-visual recording device to reproduce or transmit a film or abet the making or transmission of a film without written authorisation from its producer. Further, individuals who make copies of a film without authorisation may be punished with imprisonment of up to three years or a fine of up to 10 lakh rupees or both. Another major development is the notification of the Copyright (Amendment) Rules, 2019. The major object for the adoption of the Rules is to ensure smooth and flawless compliance with the Indian Copyright Act, 1957 and to bring it in parity with other relevant legislations in light of the technological advancements in the digital era. The major changes made by the Rules is expanding the provisions of statutory licenses for the broadcast of literary and musical works and sound recordings to internet broadcasts as well; increased transparency requirements for copyright societies; and the introduction of digital payments of fees.

However, since the proposed Amendments are a recent development, their implementation should be effective so as to fully achieve their objectives.

5.5 Judicial Trends in India

Apart from the legislative measures as discussed above, the Indian courts have also granted certain remedies to protect the rights of copyright-holders. These remedies have specifically assumed importance in the light of technological advancements, which have in some way or the other facilitated Internet piracy.

One of the earliest and commonly-used remedies by the Indian courts is *John Does Orders* (also known as 'Ashok Kumar order'). This remedy is used when the identity of the infringers is not known or untraceable. It has been found that the Indian movies were most commonly pirated when the copies of the films were shipped to other countries (such as Dubai, Iraq and Iran) or when the film was submitted for certification to the Central Board of Film Certification ('CBFC') (*Bollywood Hungama, 2016*).

The Delhi High Court, which is the hub of John Does Orders, passed it for the first time in the case of *Taj Television Ltd. & Anr. V. Rajan Mandal & Ors.*, relying and adopting on the judicial systems of Canada, the United States, England and Australia. However, the problem with such remedy is that it is time-consuming and ineffective as it only orders against unknown persons. As the identity of the infringers is not known to the copyright-holder, he may again have to apply for such order, causing financial burden to him.

Another remedy provided by Indian Courts is the remedy of 'notice-and-Take Down'. This order is made against the online intermediaries to block and deny access to public to such links and sites which host infringing materials. However, the position regarding the liability of online intermediaries in cases of copyright infringement, is debatable in India as no clear position exists on the point. However, the courts have held and recognized that an online intermediary cannot be held liable unless they had proper information, and unless proper order is given by the requisite authority (Section 79, The Information Technology Act, 2000).

In 2021, the Indian Parliament has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Under the 2021 Rules, it is provided that "in case of emergencies, the authorised officers may examine digital media content and the Secretary, MIB may pass an interim direction for blocking of such content. The final order for blocking content will be passed only after the approval by the Inter-Departmental Committee. In case of non-approval from the Committee, the content must be unblocked" (Rule 16, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code 2021).

A recent addition to the list of remedies adopted by the Indian Courts against copyright infringement is 'Dynamic' Injunctions. Expanding the traditional notions of injunctions, the Delhi High Court for the first time, in 2019, granted dynamic injunction. In *UTV Software Communications Ltd. v. 1337x.to*, the Delhi High Court held that where an injunction has been granted against a website, the copyright-holder could approach the court's Joint Registrar to extend the injunction to other websites (with different domain names or IP addresses) providing access to a website which is the subject of the blocking order. Such injunctions were inaugurally granted by the Singapore Supreme Court, applying them to 'Flagrantly Infringing Online Locations' or FIOs, which "primarily or predominantly share infringing content"

Another unexplored remedy for limiting copyright infringement is 'Live Blocking'. Even though this remedy has been extensively granted in certain jurisdictions like U.K. but the Indian courts have not used it frequently. Unlike typical blocking orders for copyright violations that focus on websites, live blocking orders require Internet Service Providers (also known as 'Online Intermediaries') to block access to the servers hosting these events and streaming them live for the duration of the event. Such streaming is common in sporting events like Cricket, Football, Olympics, F1 Car Racing, etc. (ESYA Centre, 2019).

6. Conclusion & Suggestions

From the above discussion, it is clear that the problem of piracy has been sufficiently recognized by the Indian legislature and judiciary. Also the Indian courts have adopted some new remedies to tackle the menace of online piracy. But from the increasing cases of online piracy, the measures adopted have not been sufficient. Also, as compared to the developed countries, the Indian courts have not fully explored the grey areas which require attention so as to effectively eradicate the problem of piracy. As the Cinematograph (Amendment) Act 2019 has still not been adopted, it leaves a room for the violators to continue their illegal activities without any deterrence. Also the United States' Trade Representative's Special 301 Report 2021 has placed India in the Priority Watch-list and also mentions that 'India' does not effectively criminalize unauthorized camcording in theatres.

Thus, in light of the above, the researchers have made some suggestions so as to curb the menace of entertainment piracy:

- Use of Artificial Intelligence & Blockchain Technologies

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- Use of Digital Encryption
- Use of Digital Watermark Technology

Adopting a Public-Private Partnership (PPP) model to tackle piracy

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