

## NON-LEGISLATIVE MEASURES IN INDIA TO DEAL WITH THE DIGITAL PIRACY

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### ABSTRACT

Widespread piracy over the Internet seriously harms artists, the famous and struggling alike, who create content, as well as the technicians who produce it. It ultimately also hurts law-abiding consumers who must pay higher prices for content, enjoy less content, or pay higher prices for Internet access to compensate for the costs of piracy. Moreover, digital piracy not only results in the unauthorized distribution of content, it hurts the ability of content producers to create legitimate business models for selling digital content; as the saying goes, “It’s hard to compete with free.” While many companies have rallied to the challenge and created compelling businesses to sell content legally, on the whole, digital content is more profitable to distribute illegally than legally and always will be.

### KEY WORDS:

Digital/Online Piracy, Internet Source Etc.

### INTRODUCTION

There is no “silver bullet” that will solve the piracy problem no single technical or legislative proposal will completely solve such a complex issue but there are many “lead bullets” that can help reduce piracy. Just as preventing theft in the offline world requires a combination of industry-backed technical controls such as locks, closed-circuit TV, and anti-theft packaging as well as a government funded system of law enforcement, digital piracy requires a coordinated approach. Much of this effort will likely come from industry, but government has an important role to play in protecting the intellectual property. In addition, government should not preclude those impacted by digital piracy, including copyright holders and ISPs, from taking steps to limit digital piracy by technical ways. Users should be reminded that they do not perceive the personal benefit of antipiracy measures, namely that the long-term availability of software and entertainment in digital format depends on the financial health and well-being of the producers and the artists who create them. To the extent that anti-piracy systems meet this objective, they provide a rebate to those who are not directly involved in the financing of industries of software or entertainment. To achieve the goal of reducing piracy, industry and governments have used a variety of tactics, including changes in social behaviour, technical controls, and enforcement of the legal rights of rights holders.

### FACTORS AFFECTING ONLINE PIRACY

**a. Obtaining benefits as the item is free** - Most individuals who participate in online piracy do so to obtain the benefits of a particular item for free. The most dominating example of online piracy is found in the illegal download market for free media such as music and movies. Opponents of the online piracy market further point out that the use of such creative works without paying for them also affects the large support staffs (i.e. Publishers, designers, engineers, sound technicians etc.) who lends a hand in the creation of the work.

**b. Doing it because it is convenient and quick** - One of the major factors that could be linked to increase in the online piracy level is that as with the increase in technology it is very easy and convenient to engage in online piracy. Anyone sitting in the comforts of their own home can engage in online piracy with the help of a computer and good bandwidth connection or also merely by having a good smart phone. With the advancement of technology and the internet speed being fast online piracy can be done very quickly also. It is no more a time-consuming process. Hence it is easier to engage in such behaviour.

**c. Threat of being discovered is low or negligible** - Many times it happens that the nature of online copyright infringement is such that it is very difficult to trace the infringer. Moreover, the instances

where the infringer is traced and punished are rare. There is facelessness attached to the crime of online piracy and hence the infringer keeps on doing repeated infringement without any fear of being caught. Most people downloading a song on the internet think they will get away with it and are thus not deterred from piracy.

**d. Probability of being punished is low** - There is no deterrence in the area of copyright infringement. People are sure that they will not be caught or punished and hence they flout the law very easily and without any fear. Moreover, the judicial court system in India is such that people are losing faith in the judicial system. Also, in the area of copyright infringement cases it is difficult to locate the infringer as the boundaries of this crime are not just restricted to India. Hence the probability to catch and punish a criminal is extremely low and thus is a major factor which motivates such kind of behaviour without any fear.

**e. Illusion that the content available online is free** - Many a times people have that illusion that because they are paying for the internet connection they can download and copy anything and everything available on the internet. Sometimes they are unaware that the material on the internet is copyrighted and he/she could be punished for the same.

**f. Perception that Copyright owner is a wealthy corporation that the Industry makes a lot of money** - People have a perception that by their copying also the copyright owner will not be affected because he (i.e. Corporation or individual) is perceived to be a wealthy person. We time and again keep reading in the newspapers that this particular film made this much crores of profit and most of the times we hear the hefty payments that the celebrities receive or charge for doing certain projects. Hence in the minds of common individuals there is a very glamorous and luxurious picture that comes up when we talk about films. Considering this perception many people think that as the music Industry and the film industry makes a lot of money and as actors are highly paid by doing online piracy it is not hurting anybody or pinching their pockets. And as they make a lot of profit and the industry is blooming, their act they consider is very trivial and does not affect anyone<sup>1</sup>.

## **SOURCES OF ONLINE PIRACY**

**a. Peer to Peer P2P Services** - A P2P allows computers to connect with each other on the Internet. Once connected, a computer can access the hard drives of all other computers also on the network. P2P is also commonly known as a networking protocol and it is often intended for people who want to share the digital content.

**b. Cyber Lockers** - Cyber Lockers are also a means by which the audiovisual work can be stolen. They are essentially online storage sites where you can upload a file up to 200MB (movie-size) and let other people download copies whenever they want. One such site, rapidshare, makes money by charging downloaders for a quicker, enhanced downloading capability. According to V.i.Labs, a digital anti-piracy technology firm, rapidshare claimed last year to have 160 million files on tap. While cyber lockers can serve a legitimate purpose, like streaming sites they are typically offshore hosts serving as facilitators to access pirated content.

**c. Streaming site** - Illegal streaming allows you to view unauthorized copyrighted content on demand without downloading the illegal file. Websites may stream directly or provide links to content hosted on other websites. Both hosting unauthorized content and providing links to unauthorized content is illegal. These sites are often user friendly, with content divided into categories such as genre, year or language.

**d. Linking sites** - Linking websites collate thousands of links to pirated content often stored on external cyber lockers. These sites are prolific in copyright infringement as cyber lockers are not searchable.

**e. Torrent sites** - A torrent is a file sent via the Bit Torrent protocol. Bit Torrent is an illegal, digital file-sharing program that is operated from a centralized location, which grants access to its users that allows them to participate in the transfer, import, and export of intellectual property. Bit Torrent, which is classified as a Peer-to-Peer (p2p) digital file-sharing program is considered to be more efficient than

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<sup>1</sup> Paul Goldstein, International Copyright Principles, Law and Practice, p.5, section 1.1, Oxford University Press, 2001.

its predecessors, which include Napster, Kazaa, and Limewire. In contrast to traditional file-sharing programs in which full files are circulated through digital transmission, Bit Torrent sharing allows for the segmented transmission of digital media through its servers as a result, users are inundated with much smaller files, which allow for a more comprehensive and seamless transmission however, this design does not detract from the illegality innate in all file-sharing programs. Typically, a Bit Torrent website will contain a series of servers that houses the intellectual property through which is being circulated throughout the Bit Torrent website membership to Bit Torrent websites ranging from those offered without a charge to those that require membership fees are able to download and upload digital media belonging to the members of that particular Bit Torrent website<sup>2</sup>.

### **BLOCKING WEBSITE THAT OFFER PIRATED CONTENT PRETENDING TO BE LEGITIMATE CONTENT PROVIDERS**

In addition to P2P networks, a large amount of pirated digital content is available on websites for direct download or streaming. As with legitimate websites, these sites typically come in two formats: an advertising template and a paid content template. Currently, Internet users can easily connect and, in a few clicks, find complete Hollywood movies to watch for free. Live programming is also recorded and distributed online on websites such as Livestream.com and Justin.tv. This form of piracy is used to hack live sports events, such as NBA, NFL and MLB games, for internet users, including international users who would otherwise not have access to programming. This form of piracy is particularly strong in China, where millions of users watch U.S. Sports programming online. One of the reasons why hackers use websites to distribute copyrighted content is that bandwidth and storage are relatively inexpensive and that these costs can be supported by advertising. These advertised websites provide online copyrighted content, as well as profits for the sale of pirated advertising content.

### **BLOCKING INTERNET USERS FROM SEARCH ENGINE SERVICE PROVIDING ACCESS TO PIRACY WEBSITES**

Blocking access to piracy services by Internet search services, such as Google, is another compliance measure that does not depend on filtering. There is no compelling reason for these services to provide easy access to illegal content, as Google does with its ability to search for bittorrent files. Google offers the ability to create a custom search for torrent files that index piracy sites. There is no reason in principle for search engines to be immune from the responsibility of selling advertising on piracy sites. If these services know enough about the searches they do and the sites they index to match ads with searches, they'll probably know enough to block illegal sites from their search results. In fact, some time back, The Pirate Bay was 'accidentally' deleted from Google's search results, but Google manually reset the website.<sup>209</sup> For search engines to stop facilitating piracy, all that is required is a commitment not to support websites that commit illegal acts. A search engine that can place appropriate ads on a page with hacked content can also delete the content. However, for these sites to be able to do so, they need to know that they will not be attacked by the government or by those who oppose serious efforts to combat digital piracy<sup>3</sup>.

### **EXECUTING AGENCIES: NATIONAL AND INTERNATIONAL**

#### **(a) International Intellectual Property Alliance**

The International Intellectual Property Alliance (IIPA) is an international advocacy group for the US media industries with close ties to the US Trade Representative. It was formed in 1984 and is a private sector coalition of seven trade associations representing U.S. companies that produce copyright protected material, including computer software, films, television programmes, music, books and journals. It seeks to strengthen international copyright protection and enforcement. In their reports, they consistently expressed their dissatisfaction with India's efforts to combat piracy. IIPA works closely with other US lobby groups like the MPAA (Motion Picture Association of America) and the

<sup>2</sup> Rosemary J. Coombe, *Challenging Paternity: Histories of Copyright*, 6Yale J L & Human 397 (402).

<sup>3</sup> L. Patterson, *Copyright in Historical Perspective* 27 (1968) at 141-42; 14 HC JOUR 306.

BSA (Business Software Alliance). The IIPA reports, which place India in a 'danger zone', have a major influence on regional and international rhetoric about piracy. In recent years, local film, music and software industry associations in India have run very emotional and independent anti-piracy campaigns, reminiscent of the IIPA<sup>4</sup>.

#### **(b) Business Software Alliance**

The Business Software Alliance, headquartered in Washington DC, has a regional office in Delhi and has been instrumental in leading counter-piracy operations across the country. According to the BSA, India ranks 20th in the world in software piracy, with a rate of 73%, while the Asia-Pacific average is 53%. China ranks second at 92% while Pakistan ranks ninth with a piracy rate of 83%. They engaged the general public to provide them with information about pirated software as part of an anti-piracy initiative: the rewards program. Launched in 2005, a reward of up to Rs 50,000 will be awarded to information allowing result in legal action against companies that use unlicensed software. The rewards program was designed to encourage people to support the fight against piracy and to report software piracy to the NASSCOM anti-piracy hotline. In 2006, BSA and NASSCOM had the opportunity to win the largest settlement amount for a copyright deal in India, with Netlinx India Pvt. Ltd. December 2000, which led to the inspection and confiscation of 40 personal computers carrying illegal software without a license. The agreement includes \$ 30,000 in damages, full legalization of software used by them, removal of all unlicensed/ pirated software and submission to an unannounced audit of computer systems over the next 12 years.

### **INTERNATIONAL FRAMEWORK FOR DEALING WITH ONLINE PIRACY**

National copyright law does not exist in a vacuum. It is part of a multi-level system that includes international treaties and conventions, as well as treaties and regional legislation. This international and regional legislation tries to significantly harmonize the rules on copyright and its respect. The countries in this study are part of some or all of the major international copyright treaties that make up their national laws. For this reason, the researcher briefly describes the relevant treaties, their basic rules and their minimum standards.

#### **(a) International conventions**

In the international scenario, the most relevant international treaties and conventions in the field of copyright are the Berne Convention for the Protection of Literary and Artistic Works (BC or Berne) 1886, the Agreement on Trade Related Aspects of Intellectual Property Law (TRIPs) and, as regards use in digital networks, the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The status of members of all countries can be summarized as follows. Firstly, EU Member States are part of all international agreements. The EU as an organization is a member of the TRIPs Agreement and the WIPO Treaties, making them binding on their institutions and their member states. Second, all countries are parties to the WTO and the latest amended version of the TRIPs Agreement. Third, most countries are part of the WIPO treaties with few exceptions like Brazil and Thailand

#### **(b) Berne Convention**

The Berne Convention is the principal international treaty allowing for recognition of copyright across borders. The BC is the first major international treaty on copyright. Its main principles are national treatment, automatic protection (or prohibition of formalities), and independence of protection in the country of origin of the work. Berne sets out minimum standards regarding the protection of works, the rights of authors, and term of protection. Protected works include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression". Authors are granted a series of exclusive rights, such as translation, reproduction, public performance, broadcasting, public recitation, and adaptation. The BC allows uncompensated exceptions or limitations to exclusive rights, including for certain types of reproductions, for quotations, reporting of current events, and ephemeral recordings for broadcasting. BC applies to the reproduction right the first international version of the so-called three-step test: a set of three conditions that regulate the imposition and permissible scope of

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<sup>4</sup> Akhil Prasad and Aditi Aggarwala, Copyright Law Desk Book, 2009 at 132-133.

limitations to copyright. Finally, as a rule, the duration of copyright is set at 50 years after the death of the author. However, the Berne Convention does not include rules on enforcement procedures and subjects disputes between members concerning these obligations to WTO dispute settlement procedure<sup>5</sup>

### **(c) The Trips Agreement**

The TRIPS Agreement is an annex to the Agreement Establishing the World Trade Organization (WTO). The basic principles of the agreement are national treatment and most-favored-nation treatment. The Agreement sets minimum standards for the availability, scope and use of intellectual property rights, including copyright and related rights provisions. Minimum standards refer to the protected subject matter, the rights conferred, the exceptions or limitations allowed for these rights and the minimum periods of protection. As far as copyright is concerned, the TRIPS Agreement incorporates by reference the substantive provisions of the latest version of Berne Convention, with the exception of those relating to moral rights. As a result, they become obligations under the TRIPS Agreement to its members. Beyond this, the TRIPS Agreement includes obligations with respect to the object and rights not covered by the Convention, namely computer programs, databases and rental rights for at least computer programs and, Cinematographic works. In this respect, the TRIPS Agreement is a “Berne plus” agreement, with regard to limitations and exceptions. Article 13 includes the TRIPS version of the three-step test. It replaces the ‘authors’ by ‘the owner of the rights’, extending the scope of the provision to the holders of derived rights. It also extends the test to new rights under the TRIPS Agreement. For neighbouring rights, the agreement grants minimum rights to performers, producers of sound recordings and broadcasting organizations. The term of protection is at least 50 years for the first two categories of rights holders and 20 years for the last.

### **(d) The WIPO Treaties**

The WIPO Treaties include the WCT and the WPPT. The purpose of both treaties is to adapt copyright and related rights to the digital environment. The WCT is a special agreement within the meaning of Article 20 of BC. Like the TRIPS Agreement, it incorporates by reference the substantive provisions of the latest version of the BC and adds to the Berne Convention two additional categories of protected works: computer programs and databases. The WCT recognizes the rights granted to Berne but adds distribution rights, rental and a general right of communication to the public that apply to online use. For the online environment, reproduction and communication rights or making available to the public is particularly important. The WCT provides an exclusive reproduction right with wide application in the digital domain. It could be said that the law includes all forms of incidental, transient or technical copies. 236 Article 9 (1) of Berne Convention already granted authors the exclusive right to authorize the reproduction of works “in any form”.<sup>237</sup> Article 1(4) of WCT stipulates that “the Contracting Parties shall comply with Sections 1 to 21 and the Appendix to the Berne Convention” and that the corresponding agreed statement qualifies “the storage of a protected work in digital form on an electronic medium” as a reproduction within the meaning of Article 9 of BC. With regard to communication to the public, the recipient country had previously divided this notion into specific rights of execution, transmission and recitation. Article 8 of the WCT extends the scope of Berne to the right to make works available to the public “The public may access these works from a place and at a time individually chosen.” In doing so, it extends the application of copyright to interactive and on-demand acts of communication. In the field of related rights, the WPPT builds on the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (RC or Rome). The WPPT recognizes minimum standards of protection for performers and producers of phonograms. Performers are granted, first transmission rights, communication to the public and fixation with respect to their unfixed (live) performances. Secondly, with regard to their fixed performances in phonograms, performers are granted the rights of reproduction, distribution, rental and making available. Producers of phonograms have rights to reproduce, distribute, rent and make available their phonograms. Subject to reservation, performers and producers of phonograms are

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<sup>5</sup> The Role of the Berne Convention in the Promotion of Cultural Creativity and Development: Recent Copyright Legislation in Developing Countries, *Journal of the Indian Law Institute*, Vol. 28, 1986, p.423

also entitled to remuneration for the dissemination and communication to the public of phonograms published for commercial purposes<sup>6</sup>.

### **ANALYSIS OF INTERNATIONAL PIRACY NORMS**

The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The TRIPS Agreement is another important intellectual property law treaty that encourages more countries, especially developing countries such as China to adhere to the global regime for the protection of intellectual property. It contains provisions for computer programs and data compilation, which indicates a greater concern for the new technology. However, there is still a lack of specific rules on digital piracy. In 1996, WIPO submitted two treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), collectively referred to as the Internet Treaties of WIPO, to protect the rights of copyright holders in the information age. The preamble of the WCT and WPPT defines the objective of the two treaties, which is to introduce new international rules and to clarify the interpretation of certain existing rules to provide adequate solutions to the problems raised by new cultural and technological developments. Both treaties recognize the need to maintain a balance between author's rights and the public interest in general, especially education, research and access to information. The WCT specifically protects rights holders in literary and artistic works, including works of art, books, software, movies and music. The WPPT protects the interests of performers and producers of phonograms. The WIPO Internet Treaties require Member States to provide a basic right framework that allows creators to control how other users can use and compensate for their work on the Internet. In addition, contracting states are required to provide adequate legal protection and remedies against the circumvention of technological protection measures and the modification or elimination of rights management information. However, the treaties do not specify how they should be provided with regard to protection and resources and it is left up to the member states to determine it.<sup>7</sup>

### **CONCLUSION**

The lack of effective copyright and intellectual property enforcement authorities can also be attributed to high piracy rates in these areas. India with millions of internet users is one of the larger and fastest growing markets for digital customer next to china. Significant progress in further bringing down of piracy rate is seen from past years. but the common feature of holding a unlicensed software available with no risk is making the usage of illegal software among individuals. This is affecting not only foreign software leaders but also localised and small companies that write original software who are the Indian robust and leading IT industry globally. According to a report by the tech giant, over 90% of new personal computers used by Microsoft in India have a high level of pirated software. Piracy may seem to be natural and justified route for the bulk of Indian software consumers for whom prices of software are nowhere near what they can afford.

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<sup>6</sup> P. Narayanan, The law of copyright and Designs, 3rd edition 2002 pg.14.

<sup>7</sup> Ibid