Challenges of Online Copyright Enforcement in India

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Abstract

This paper deals with legal approaches for the protection of Indian online copyright, including a emphasis on the film industry. The paper starts with the identification of various restrictions to the online copyright legislation. The paper offers a broad overview of the scene of pirated Indian movies. The paper explores the proposed (and unimplemented) guideline for end-users in India It addresses recent trends in website blocking injunctions, a technique that has been widely adopted by the industry in recent years. Ultimately, it deals with the ad-supported financial model for pirate websites, referring to a study conducted in India.

Keywords

India · Copyright · Internet · Piracy · Film · Website blocking · Ad-supported piracy

1. Introduction



\*\*Special description of the title. (dispensable)

Legal concerns surrounding the violation of online copyright date back to the first half of the 1990s, when only Internet dial-up was on the rise. The first Clinton administration — at Vice President Al Gore's initiative — formed the Task Force on Information Infrastructure (IITF), to articulate the vision of the U.S. government for the so-Information Infrastructure (NII). As part of this initiative, in 1995, a working group submitted a report discussing the impact of the Internet on copyright law (then in its infancy). The report presciently observed:

**The NII has tremendous potential to improve and enhance our lives. It can increase access to a greater amount and variety of information and entertainment resources that can be delivered quickly and economically from and to virtually anywhere in the world in the blink of an eye. For instance, hundreds of channels of “television” programming, thousands of musical recordings, and literally millions of “magazines” and “books” can be made available to homes and businesses across the United States and around the world.[[1]](#footnote-1)**

The report recognized that Internet development could "disassemble the balance" between copyright owners and consumers but stated that the issue could be resolved by "no more than slight clarification and minimal change" to current copyright laws. The key recommendations of the report were that conventional distribution and performance rights should be expanded to include digital transmission. In the same year Jane Ginsberg advanced a similar view in one of the earliest law review articles on the subject.  
Today, nearly 25 years later, the online piracy climate has changed, kudos to faster and cheaper broadband link rates, in at least four big ways compared to the early dial-up Internet age. First, piracy issues in the Internet dial-up era centered mainly on exchanging MP3 format songs or PDF format books, where files were no larger than a few megabytes. The focus today has turned to the uploading of movies and television shows, mostly in high-resolution formats that run into a few gigabytes per file. Second, growing websites providing cheap (often free) online storage means large quantities of these files can be easily uploaded and exchanged. This compares with the dial-up era when the standard and realistic way to transmit massive video files on CDs and other physical storage devices was to copy them to. Third, from an era where users could only access low-quality streaming content using software like RealPlayer and Windows Media Player, the Internet has now progressed to a stage where high-resolution content is easily shared and accessed through YouTube, Dailymotion and Vimeo or local variants of such websites (such as Youku in China). Fourth, Internet access in developing countries and emerging economies has widened greatly, to upto the limit where China ranks first and India second in terms of numbers of Internet users. Other economies among top ten include Brazil, Russia and Indonesia.[[2]](#footnote-2) Despite the above, it's possible to argue that the views advocated by the IITF working party and Ginsberg still hold true today. Most copyright laws round the world go back to the dial-up period, essentially broadening the applicability of traditional rights in an electronic environment. Nonetheless, they'll be adequate address nearly any sort of major online infringement operation (although sometimes requiring ingenuity in their application). If there's frustration with the prevalence of internet piracy, it's going to have little to try to to with "law lag" (i.e. the thought that the law remains behind technology) than actually with problems outside the reach of the law. The hard truth is that the vast global scope of digital Internet use and file-sharing means piracy are often curbed in spurts at the best . Therefore, to quote the supreme court of eire , "The practice of downloading copyright content from the web has increased such a lot among younger folks that a presumption of privilege seems to possess emerged to possess what's not theirs freed from charge." There are grave limitations on what the legislation will neutralize this example . For India's movie industry , which this paper will specialise in , there are three factors that specifically curb the effectiveness of enforcing online copyright–the prevalence of physical piracy, the hosting of pirated content on servers outside India, and, above all, a general infrastructure deficiency within the civil and criminal justice system.

With reference to the first factor, within the late 1990s, when Internet penetration in India was still limited, a government study identified video parlours and cable operators because the major sources for the dissemination of pirated films. The study observed that “[a]ll parties involved within the legitimate transaction of films—from the producers to the theatre owners”—lost “heavily thanks to widespread video or cable piracy” which the govt also lost potential tax revenues.[[3]](#footnote-3) Nearly a decade later, the govt constituted a high-level committee on piracy (“Committee”) to look at the difficulty in additional detail. In contrast with the older study, the Committee noted the rise of Internet penetration in India and predicted that piracy was “set to explode” with the expansion of broadband Internet in India.[[4]](#footnote-4) Yet while the amount of Internet users in India has undeniably grown exponentially since the 1990s, when measured as a percentage, it still amounts to only 30% of the population of India. additionally connection speeds are often slow in India. Yes, one report reports India's 4 G download speeds are among the world's slowest. The Indian movie industry lacks the resources to enforce its copyright adequately worldwide. While the Indian government has approached foreign governments for assistance on behalf of the movie industry , little action seems to possess emerged.[[5]](#footnote-5)

With reference to the third factor, as Marc Galanter has observed, Indian laws are “notoriously incongruent” with “attitudes and concerns”[[6]](#footnote-6) which “[d]elays of Bleak House proportions are routine in many kinds of litigation”.[[7]](#footnote-7) Several million cases are pending before Indian courts, consistent with the Indian Government's own statistics, and there's a significant shortage of judges. within the case of regulation of criminal copyright, the matter falls under the jurisdiction of state governments, instead of national governments. As a result, enforcement of copyrights in less developed regions becomes poor, with instances of corruption and inefficiency. The complainants face more obstacles as court proceedings attend trial. One research found that "much of the time" criminal copyright prosecutions haven't yielded successful and dissuasive outcomes, with issues like easily bailing the accused, long delays, lack of evidence, low conviction rates and low fines when convictions are won. within the civil court sense, proceedings appear to progress gradually after the initial stage. because the Supreme Court of India has observed, “[I]n the matters of trademarks, copyrights and patents, litigation is particularly fought between the parties about the temporary injunction which matches on for years and years and therefore the result's that the suit is hardly decided finally”.[[8]](#footnote-8)

2. The Piracy Landscape In India

The Indian film industry is the world’s largest in terms of films produced and tickets sold,[[9]](#footnote-9)third largest in terms of box-office size[[10]](#footnote-10)and fastest-growing overall.[[11]](#footnote-11)Globally, Indian cinema enjoys popularity among the Indian diaspora, as well as among non-Indian populations in certain parts of Asia and Africa, and forms a component of India’s global “soft power”.However, the industry suffers from high levels of piracy. According to an industry study, piracy causes the Indian film industry annual financial losses of around US$1 billion, along with around 600,000 annual job losses.[[12]](#footnote-12) However if one may question how these statistics were determined, it is clear that a culture of piracy is widespread all over India. Pirated DVDs are openly sold in Indian cities markets while illegal file sharing and downloading is popular.

In India (as in many other countries) there are many ways in which pirated copies of films are made and distributed online. For these, there are four worthy of mention. Second, within the production and distribution chain, prints of films were leaked secretly by individuals. Second, pre-release film prints (known as "screeners") were leaked by film festivals, industry insiders and even the Indian film classification board. Third, film pirates have used camcorders inside theaters to copy films and then upload them online at the post-release level. Despite advances in the quality of cell phone cameras, hackers are gradually using mobile phones to film videos, making it hard to identify them. Third, films can also be downloaded from legal outlets at the post-release level, and shared online, whether from DVDs or streaming services such as Netflix and Amazon Prime.The reasons for the acts above can differ. There have been cases where people actually exchanged copyrighted material out of excitement and without any clear financial motive. But financial benefit motivates a large amount of piracy. The Committee has described piracy as a business with "big rewards."Some years ago, a single raid against a prominent pirate in India reportedly yielded pirated DVDs worth over US$ 1 million.[[13]](#footnote-13)Of late, online piracy yields significant revenues through advertising. In 2014, a report by a then British member of parliament, serving as intellectual property advisor to Prime Minister David Cameron, quoted estimates that 600 pirated websites generated over US$ 200 million through advertising revenues in 2013, with nearly a third of the advertisements being those of “household” brands.[[14]](#footnote-14) Many companies were unaware, according to the survey, of their ads appearing on these web pages. In India, a study conducted by the Federation of Indian Chambers of Commerce and Industry (FICCI) and Strategic IP Information (SIPI) monitored 1143 piracy websites offering Indian movies and found that advertisements funded 73 %. Less than half of these were found to be well-known brand advertisements.

A group of Indian scholars and activists have viewed film piracy as an altruistic practice. Lawrence Liang, for example, has proclaimed himself to be "a supporter of film piracy," while the Alternative Law Forum (an organization that advocates open access) has ignored the advocacy efforts of WIPO against piracy. The most common argument offered by piracy sympathizers is its promoting access to culture. This was also an argument once made in a copyright infringement lawsuit by the victims, accused of running an unlicensed DVD rental. The ad-supported financial model of pirate websites, however, will wonder how altruistic the pirate motives really are. For demonstrate, in 2014, two websites selling pirated copies of a popular Bollywood film were tracked down for Latvian-based pirates, allegedly with no cultural connection to India and entirely profit-driven. The largest number of server locations was in North America, then Europe and then Asia in the FICCI-SIPI report, of the websites monitored. In addition, unlike a decade ago, there are now several ways to access licensed content at nominal rates in India through streaming websites such as YouTube, Netflix and Hotstar (an India-focused website run by the Star TV network).

3. Website-Blocking Injunctions

As mentioned earlier, what most plaintiffs are realistically looking for in civil infringement cases in India is an temporary injunction. Here the Delhi High Court, through the so-called "John Doe" orders, was liberal in granting these injunctions promptly and ex parte. A John Doe order is a restraining order for anonymous infringers. In India it is sometimes referred to as an order called "Ashok Kumar." The Delhi High Court issued the first such order in India, in a lawsuit involving pirated live 2002 FIFA World Cup broadcasts by unlicensed cable operators. The plaintiffs had rights to broadcast the event and sub-licensed those rights in India to unique cable operators. Back then, broadband penetration was very small in India, and streaming technologies were underdeveloped worldwide. The plaintiffs thus concentrated on curbing news broadcasts. The plaintiffs listed a handful of cable operators who had already broadcast the matches as defendants without a license but added as remaining defendants unknown "Ashok Kumar" parties. The plaintiffs argued that the “enforcement of rights against cable operators is a virtual nightmare” and that “if they were to wait and identify specific parties and collect evidence of infringement by such specific parties, they would lose a great amount of time”.[[15]](#footnote-15) The plaintiffs, citing rulings from the United States, the United Kingdom, Canada and Australia, argued against the new, unnamed defendants in lieu of a John Doe warrant. The court agreed with the arguments from the plaintiffs and issued the warrant. Justice Bhandari (who will continue to be appointed to the Indian Supreme Court and to the International Court of Justice) explained:

**“The judicial systems of all these countries have basic similarity with our judicial system. Therefore, looking to the extra ordinary facts and circumstances of the case, in the interest of justice the courts in India would also be justified in passing ‘John Doe’ orders. …Undoubtedly the cable operators in India have a long history of violating copyrights. … The cable operators are encouraged owing to the unique nature of cable piracy and the unstructured nature of the cable industry, the speed with which any trace of infringement can be erased by the cable operators, enforcement of rights in conservative nature is unlikely to effectively redress the plaintiffs’ grievance.”[[16]](#footnote-16)**

In the sense of online piracy, a number of rights owners have received narrowly worded ex parte John Doe orders from the major high courts (particularly Delhi) to compel ISPs to preemptively block infringing websites— a pattern that will be noticeable from 2011 on. The Delhi High Court issued an injunction in what is believed to be the first of those cases in connection with a big-budget Bollywood movie, Singham. Applying the decision of Justice Bhandari in an online setting, the court declared:

**[D]efendants, and other unnamed and undisclosed persons, are restrained from communicating or making available or distributing, or duplicating, or displaying, or releasing, or showing, or uploading, or downloading, or exhibiting, or playing, and/or defraying the movie “Singham” in any manner without proper license from the plaintiff or in any other manner which would violate/infringe the plaintiff’s copyright in the said cinematograph film “Singham” through different mediums like CD, DVD, Blue-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner.[[17]](#footnote-17)**

Thus, the court passed a very specific order involving numerous participants in the online piracy chain, from those who indulged in camcording to uploaders and downloaders, as well as physical piracy matches. This order was followed by a large number of similar orders in the coming months and years, using similar language.[[18]](#footnote-18)

The wide ambit of such orders has met with considerable criticism. One of the earliest criticisms was that ISPs were blocking entire websites (such as Vimeo and Daily Motion) instead of specific pages within the website hosting infringing content.[[19]](#footnote-19) In 2013, the Madras High Court stated that only pages specifically hosting infringing content ought to be blocked, rather than entire websites.[[20]](#footnote-20) In 2016, the Delhi High Court passed a similar order.[[21]](#footnote-21) The same year, the Bombay High Court refused to grant a John Doe order, where the plaintiff requested for a block on 800 websites, finding the plaintiff’s suit to be “sketchy and formless”.[[22]](#footnote-22) The judge directed the plaintiff to instead produce “a list of individual links to downloads”, further stating that “a technically competent officer” of the plaintiff must check “if not all, at least a sufficient sampling of these links so as to warrant the grant of an injunction”.[[23]](#footnote-23)

However, the Delhi and Bombay High Courts both later backtracked. The Delhi High Court recalled its order and held that “rogue websites” indulging in “rank piracy” ought to be blocked outright, rather than specific pages within the website.[[24]](#footnote-24) The Bombay High Court, in a subsequent order by the same judge, blocked all websites submitted by the plaintiff in a list, numbering 110.[[25]](#footnote-25) Instead of individual pages, the list of websites contained complete websites, such as www.limetorrents.cc, www.thepiratebay.org and www.ugtorrents.com. Recently, in the midst of confusion about the actual legal situation, ISPs have blocked the famous website www.archive.org (which houses thousands of important historical materials in the public domain) in its entirety, following an order of the Madras High Court from John Doe. Apparently some users had uploaded to the website pirated copies of two films. Nonetheless, in the infringement suit the complainants called the website in its entirety and the court granted the complainants the relief they requested without any rider identifying the website in its entirety from the infringing pages found therein.

4. Ad-Supported Piracy

Recent reports have demonstrated the severity of the ad-supported piracy. This section goes into more depth on the study of FICCI-SIPI. The research is just among a few conducted worldwide on the subject and perhaps the only one conducted in India. As already mentioned, the study tracked 1143 pirate websites offering pirated copies of Indian movies. These fall approximately into five categories— torrent and other peer-to-peer file sharing websites, direct download websites, connect websites, and streaming websites. The study found 786 different entities advertising on 835 websites. Of this number, 46% concerned categories such as adult dating, pornography, unregulated products and gambling. The remaining 56% concerned mainstream products and services.[[26]](#footnote-26) The latter spanned industries like telecommunications, automobiles, entertainment and retail and included ads for well-known brands like Lufthansa, AirAsia, Nissan, Hyundai, Religare (an Indian financial services group) and Flipkart (a popular Indian online retail website).[[27]](#footnote-27)

The study blamed these advertising on the manner in which digital advertisers operate. The study estimated that up to 85–90 per cent of the brands ' digital advertising budget was spent on search engines, social media, and legal platforms for streaming live. However, the remaining amount was funnelled by ad agencies or marketing teams to “ad networks that provide cheap and efficiency driven media campaigns”, such as Google AdSense, DoubleClick (a subsidiary of Google), PopAds, Propeller Ads, BlueKai, AppNexus and Lotam.[[28]](#footnote-28) Usually these networks run on a cost-per-click basis and practice low control rates. This implies, for example, that an ad for Lufthansa put through these networks may appear on a pirate website offering a copy of the latest Avengers film, rather than a news website, if the former attracts 100,000 visitors a day, while the latter attracts 10,000 visitors a day.

In a report titled *How Google Fights* *Piracy*, Google has stated that it “takes the challenge of online piracy seriously” and is “a leader in rooting out and ejecting rogue sites” from ad networks.[[29]](#footnote-29) Google has claimed that it has terminated over 11,000 AdSense accounts for copyright violations.[[30]](#footnote-30) However, the FICCI-SIPI study found that Google and DoubleClick collectively provided ad network services to over half the sample websites in the study, with AdSense supplying nearly 20%.[[31]](#footnote-31) This may indicate that either Google has not paid much attention to Indian copyright owners ' concerns, or that the sheer scale of piracy means that copyright-violating AdSense accounts continue to proliferate rapidly. Either way, it clearly shows that Indian films produce income from the piracy. While this revenue, as the FICCI-SIPI study shows, draws only a small chunk of corporate digital advertising budget, it may be considered high in comparison to the limited investment made by pirate websites and the high number of viewers these websites may attract (thus maximizing the returns from a cost-per-click ad policy).

However, even though Google and reputable brands are more serious about resolving the problem and choking funding for pirate websites, it is necessary to note that, according to the FICCI-SIPI report, nearly half of the advertisements came from dodgy firms. Pornography is legally illegal in India for example, though gambling is prohibited in virtually every Indian state. It is uncertain that pornography or gambling website will be as aware as a conventional company would be of its brand image and prestige. Pirate websites can, in reality, be the best way to market their goods and services to young people for these companies. But seeking to counter piracy by throttling advertisement revenue can only be a marginally successful strategy.

Conclusion

The paper started by drawing attention to how the law would curtail online piracy, there are limits. India's compliance poses external obstacles. In this sense, website-blocking injunctions have been built out by rights owners as a convenient technique, which has definitely provided benefits. Still, this isn't an ideal remedy. In the absence of judicial jurisdiction, in particular a ruling of the Supreme Court, setting out the precise conditions for blocking websites in their entirety versus specific infringing pages, it is always open to judges to be careful and to rely only on blocking specific offending pages. In such a situation a pirate inside the same website will easily move to another unblocked domain. Furthermore, even if judges block websites in their entirety, this may still encourage the blocked website to move completely to a different website. Additionally, concerns about how legal websites, such as www.archive.org, were blocked could be posed. While many judges are unlikely to be experienced Internet users and prefer to give complainants the benefit of doubt, blocking legitimate websites can be a breach of consumer rights and even a breach of the right to freedom of expression.

In the midst of this dilemma, proprietors of rights can consider non-litigious strategies as a more efficient and less contentious measure. Online piracy, for example, is increasingly seen as a question of money laundering and tax evasion, where pirates profiting from ads may use payment gateways to remain anonymous. Throughout the UK, the government has set up the Police Intellectual Property Crime Unit (PIPCU). The PIPCU performs a range of anti-piracy functions, notable among which are efforts to disrupt the revenue stream of pirate websites.[[32]](#footnote-32) Recently, following reports of the widespread piracy of Telugu-language films, the state of Telangana in India established the Telangana Intellectual Property Crime Unit (TIPCU), modelled on the PIPCU.[[33]](#footnote-33) Following Telangana, the state of Maharashtra (which is home to Bollywood) announced the establishment of the Maharashtra IP Crime Unit (MIPCU).[[34]](#footnote-34) Through bypassing the courts and partnering with law enforcement officers likely to be more vigilant about cybercrime and technology, the industry would be more effective in combating piracy.

Another tactic for rights owners may be to approach India's Advertisement Standards Council (ASCI), a self-regulatory body that regulates misleading ads, and to alert well-known companies to the problem of their advertisements appearing on pirate websites. Legally, there is no provision for the means by which traders in India may advertise their goods, and the matter will not be strictly within the reach of the ASCI. This does not, however, prohibit rights owners from lobbying with the ASCI to promote discussion among advertising companies. In the United States, a collaborative initiative between the National Advertisers Association, the American Association of Advertising Agencies, and the Interactive Advertising Bureau has contributed to the creation of the Trustworthy Accountability Group. Yet another right-holders tactic could be to address what the room elephant — Google and its ad networks — is arguably. Google has recently introduced measures to censor websites with hate speech and to prohibit ads from appearing on such websites. This action was taken under pressure from companies displeased by the unintended presence of their ads on such websites. Copyright owners could collaborate with Google for similar technical initiatives regarding pirated content. There is no doubt, however, that copyright infringement is regarded even less seriously than hate speech. In comparison, unlike hate speech, there is a greater degree of tolerance and participation among young people in the consumption of pirated material.

In the end, it is possible to counter online piracy through a set of steps. Nevertheless, as this paper has pointed out, right-holders must be realistic about each measure's limits and can at best only hope to mitigate the extent of piracy.

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