

“Players in Internet Piracy: Gauging Liabilities under the Indian Law”

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Abstract

Internet piracy is the proliferation of infringing copies of works in which copyright subsists on the internet. With rapid changes in technology and an increasingly blasé perspective of the public that deems it okay to share and download music, films, software and books that were created through the painstaking efforts of others, it has become a global phenomenon. Following reports of India landing in the lists of major hubs of internet piracy owing to lax enforcement and archaic laws, the Government of India responded with some cutting-edge amendments to existing laws and some much-needed rules and guidelines framed there under that brought the country into compliance with the WIPO treaties, despite not being a signatory to them. However, with a paucity of judicial decisions on the infant laws, the law of the country on the subject still retains an immensity of ambiguities.

This paper attempts to prove that the laws dealing with accountability of the perpetrators and facilitators of internet piracy are adequate, by determining the extent of liabilities under Indian law of the parties the users who upload infringing content and the intermediaries.

I. Overview

Rapid revolutions in technology have thrown life around the globe into a tremendous upheaval, changing the way people think, act and communicate. On the one hand, it is a priceless tool, helping to unify the world, making modern life more efficient and brisk. On the other, though, it is a dangerous leviathan that can and does ruin lives and fortunes. Time and again, the people through their legislators have spoken out against practices that harm society as a whole, curbing and bringing them under control. However, sometimes, some actions become irrepressibly widespread, giving rise to the "Everyone Does It" attitude, in light of which it becomes difficult to determine whether a law really does reflect the General Will of the people, as envisioned by the great Rousseau, or if society will internalise - accept, understand and enforce - it amidst its members rather than view it as fetters upon their freedom.¹

One of the emerging grey areas is the infringement of copyright through the digital medium, specifically over the worldwide web. Known simply as *internet piracy*, it has wreaked havoc on the rights of authors, film-makers and musicians to receive remuneration for their work by allowing people to share their content for free with others, through peer to peer networks that gained popularity in the early 1990s with sites like Napster and Kazaa to the recent "file locker" sites like Rapidshare and Megaupload that allow multiple downloads for free, always augmented

¹ J.R. Lucas, *The Nature of Law*, THE UNIVERSITY OF OXFORD, (n.d.)<http://users.ox.ac.uk/~jrlucas/law/natlaw.html>.

by sites such as Youtube that allow the streaming of videos for free online. No longer is the choice of entertainment available to a person limited to how much money he or she possesses in the wallet; with a basic broadband connection, that person has the choice between thousands of electronic books, music and movies.

While countries like the US with their stringent laws, effective monitoring and overtly flooding citizens' homes with thousands of pre-litigation letters² forcing people to settle with a few thousand dollars in order to avoid going to Court,³ have managed to curb their piracy rates somewhat, the problem rages unchecked in developing countries, with States like China, India and Brazil regularly being named worst-offenders in the US Piracy Watchlist⁴⁵. India has continued to be a target of copyright owners over the globe, alleging massive amounts of copyright infringement through online piracy; for example, studies conducted by BSA/IDC in 2007 claimed that the software piracy rate in India was 69%,⁶ while an even more recent report released the US India Business Council and Ernst & Young claimed that the losses incurred by the Indian film industry amounted to about \$959 million in revenue and approximately 5,71,896 jobs in the year 2008 and estimated the total piracy rate to be about 60%.⁷ Even the Motion Pictures Distributors' Association chipped in with their chilling figures - going by the ratio of illegal downloads to the actual number of broadband subscribers, India in fact has the highest rates of piracy in the world.⁸

As one might expect, these figures have not been accepted unanimously, with a great many dissenters slamming the extraordinarily high rates of monetary losses allegedly sustained by the Motion Picture Association of America and Recording Industry Association of America on account of,⁹¹⁰¹¹ and others accepting that figures approximating damage in copyright claims may

²R.I.A.A. v. *The People: Five Years Later*, THE ELECTRONIC FRONTIER FOUNDATION, (2008) <https://www.eff.org/wp/riaa-v-people-five-years-later>.

³ This practice, being christened *neo ambulance chasing*, is done by "copyright trolls", who obtain data on people's internet usage, enter into agreements with copyright owners, and then proceed to send threatening letters to those people, asking them to settle for \$3000-4000 in order to avoid going to Court and risking having to pay anywhere between 150,000 to 300,000 dollars. The most recent and infamous case of this would be the case involving the movie *The Hurt Locker*. Sarah J. Purewal, *So, You're Being Sued for Piracy*, TECH HIVE, (last visited Sep. 20, 2014) http://www.techhive.com/article/230515/So_Youre_Being_Sued_for_Piracy.html.

⁴ The Deadline Team, *Familiar Names On U.S. Piracy Watchlist As Online Theft On Rise*, DEADLINE, (2012) <http://www.deadline.com/2012/04/familiar-names-on-u-s-piracy-watchlist-as-online-theft-on-rise/>.

⁵ *2013 Special 301 Report*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA), (2013) http://www.iipa.com/2013_SPEC301_TOC.htm.

⁶ *Fifth Annual BSA and IDC Global Software Piracy Study*, BUSINESS SOFTWARE ALLIANCE, (2007) http://globalstudy.bsa.org/2007/studies/2007_global_piracy_study.pdf.

⁷ F.E. Bureau, *Piracy, a Serious Threat to Indian Film Industry*, FINANCIAL EXPRESS, March 19, 2010.

⁸ Utpal Borpujari, *India Major Online Film Piracy Hub*, DECCAN HERALD, December 15, 2009.

⁹ *BSA's Canadian Piracy Numbers Based On Hunches, Not Actual Surveys*, TECHDIRT, (last visited Oct. 03, 2014) <http://www.techdirt.com/articles/20090527/1125035034.shtml>.

¹⁰ Robert Reid, *The Numbers Behind the Copyright Math*, TED BLOG, (March 20, 2012) <http://blog.ted.com/2012/03/20/the-numbers-behind-the-copyright-math/>.

¹¹ Felix E. Salmon, *Beware Copyright Statistics*, Upstart Business Journal, (Oct 04, 2007) <http://upstart.bizjournals.com/views/blogs/market-movers/2007/10/04/beware-copyright-statistics.html?page=all>.

be unsound and extravagant, including a notable recent case where a judge ruled that the RIAA's claim of damages amounting to \$75 trillion (more than the global GDP) was "absurd".¹²

Be that as it may, it cannot be denied that there is a kernel of truth to the protestations of the copyright owners, and if we as a people are unable to guarantee the intellectual rights of people, we may well be stifling all creative initiative in the years to come, propelling society into increasing depths of a cultural abyss.

Quintessentially, the battle against internet piracy is being fought in multitudinous regions on a global scale. The countries of the world need to present a united front with, if not identical, then at least uniform laws on the subject,¹³ so as to keep persons from circumventing local laws and regulations by using foreign websites whose servers are located in countries such as Iran (which now does not recognise the copyright in works created in the US, and vice versa). This is why it is essential for India, which is a signatory to the TRIPS agreement, to ensure that the copyright of the works created by not just its own people, but also those of the peoples of other countries, is protected.

Piracy over the internet implicates a great many people at multiple levels - not just the person who uploads infringing copies on the internet, but the website that allows users to upload such copies, the advertisements that link to such a website, the programme that lets users search other users' computers for copies (application service provider), and even the search engine that helps users get illegal downloads. Some of these parties' liabilities are uncomplicated, an *open and shut* case as far as copyright infringement goes, but the liabilities of others are far more nuanced and subtle, open to interpretation and debate under the law. Their liabilities will be dealt with in a systematic manner in an attempt to see if the present law in India manages to encapsulate all the parties under the broad ambit of copyright infringement or technological offences.

Liability of Users who Upload or make Available Infringing Copies on the Internet

Piracy of films, music and books abounded in India even before the advent of internet. At the time, it manifested itself in the form of electronic piracy, when counterfeit copies of music, movies and software were peddled in shops for dirt cheap prices and even bundled with computers for free. The peddlers of these counterfeit copies had been envisioned by the Copyright Act in the middle of the century itself, and they were accordingly held liable under both civil and criminal law. The Indian Copyright Act of 1957 left sufficient scope for Courts to interpret these acts as infringement of copyright in these works.

¹² Jaikumar Vijayan, *Judge Rules Punitive Damages Against LimeWire 'Absurd'*, Tech World, (March 20, 2011) <http://news.techworld.com/sme/3267255/judge-rules-punitive-damages-against-limewire-absurd/>.

¹³ Matthey R. Just, *Internet File-Sharing and the Liability of Intermediaries for Copyright Infringement: A Need for International Consensus*, 1 Journal of Information Law and Technology(2003).

The first wave of confusion began with the increasing practice of cable network operators to show movies to their subscribers without an appropriate license, a practice starting in the 1980s. An example of that would be the relatively old case, *Garware Plastic and Polyester Ltd v. Telelink*,¹⁴ where the Hon'ble High Court of Bombay held that transmitting movies over a cable network so as to make them accessible for viewing by their subscribers amounted to broadcasting of the work, in effect communicating it to the public.

It is essential to note that under the Indian law, copyright infringement is dealt with in §51. Sub-clause (i) of clause (a) of the section is perhaps the widest in terms of defining what constitutes infringement of a copyright, when read with the acts given under §14 that only the copyright holder or someone authorised by him can do in respect of the copyrighted work. Thanks to §14, any work, whether it be a literary, dramatic or musical work, a computer programme, a sound recording, a cinematograph film, or an artistic work, the acts of *storing the work in any medium by electronic means* and *communicating* it to the public are both exclusive rights of the copyright owner, and, by extension, anyone authorised by him.

The implications of this are twofold: the offender in question becomes liable, firstly, at the stage when he *rips* the copyrighted data from its disc and stores it on a computer resource, and then again when he communicates the work to the public. Both these provisions are extremely crucial in ensuring that a person is unable to hide behind loopholes and vague wording when it comes to the question of infringement. In terms of mere electronic storage on the uploader's computer, however, he will probably not be liable under this Act, especially owing to the wide latitude given by the Courts to cases of mere possession if there is a chance that they might attract the fair dealing exception.¹⁵

Once an infringement has been proven, there is enough fodder in the Act to proceed against an uploader both criminally and civilly. The important provisions include §63 punishes the infringement, or knowing abetment thereof, of a copyrighted work with imprisonment of six months to three years, and with fine of Rs 50,000 to Rs 2 lakhs. §63A provides for enhancement of punishment in case of repeated offence. §63B punishes the knowing use of an infringing copy of a computer programme with imprisonment for seven days to three years and fine of Rs 50,000 to Rs 2 lakhs. §64 allows the police to seize infringing copies upon reasonable belief that a person's copyright in a work has been infringed or is *about to be infringed*. §65A and 65B punish the circumventing of technological measures used to protect copyright, and the altering of Rights Management Information (and/or distribution of copies where the RMI has been altered) with imprisonment of up to two years and with fine.

¹⁴Garware Plastic and Polyester Ltd v. Telelink, AIR 1989 Bom 331.

¹⁵Ayush Sharma, *Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?* 14 Journal of Intellectual Property Rights 523 (2009).

On the local front, too, State Governments are enacting their own legislations and rules to deal with internet pirates more effectively, particularly the ones in the south. The States of Tamil Nadu¹⁶ and Karnataka¹⁷ have extended the scope of their respective Goondas Acts (which generally were meant to control the activities of extortion and bootlegging) now include video piracy, punishing offences severely with fines of up to Rs 1 lakh and imprisonment of up to two years.¹⁸ Perhaps the most active State of all of these in recent years has been Kerala, which enacted the Kerala Anti-social Activities (Prevention) Act in 2007, conferring the powers of search and seizure¹⁹ of suspected vehicles, vessels or even animals that may be used to commit the crime of copyright piracy (one of the antisocial activities touted in the act²⁰) and of preventive detention without trial of copyright pirates. Following a *John Doe* order in October of 2012 restraining people from uploading, downloading or streaming a popular film, the police used a computer programme to track down pirates selling and uploading illegal copies of Malayalam films and arrested about 30 individuals, before proceeding to file complaints against over a thousand members of the public who had downloaded the infringing copies.²¹ A 2013 report by the International Intellectual Property Alliance claims that more raids are occurring in India, alluding to a massive-scale raid conducted at the urging of the "joint efforts between the MPA's representative office in India, the Motion Picture Distributors Association (India) Pvt. Ltd., and the Andhra Pradesh Film Chamber of Commerce (APFCC), [resulting] in arrests of four members of two major syndicates in southern India specializing in illegal camcording as well as online and hard goods piracy."²² Apparently, in "another case during the fall of 2012, the arrests of three individuals distributing illegal copies of films online led to the takedown of *team-cc.com*, *rockerzone.com*, *southreels.com*, *southdownloads.com*, and *southcreations.com*. This latter operation was primarily initiated by the APFCC." It is evident from the few cases that have hitherto been initiated by the Government against internet pirates who upload infringing copies on the internet that India may experience an oncoming surge of stricter enforcement of copyrights.

¹⁶ Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest-offenders, Goondas, Immoral Traffic Offenders, Slum-grabbers and Video Pirates Act of 1982.

¹⁷ Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act of 1985.

¹⁸ Laurence Liang & Ravi Sundaram, *India*, in *MEDIA PIRACY IN EMERGING ECONOMIES* 339-398 (Joe Karaganis ed. 2011).

¹⁹ Kerala Anti-social Activities (Prevention) Act of 2007 §17.

²⁰ *Id.* at §2(h).

²¹ Sai Vinod, *Kerala Loses its Sense of Proportionality, Takes Extreme Steps to Fight Online Piracy*, SPICYIP, (Nov. 02, 2012) <http://spicyip.com/2012/11/kerala-loses-its-sense-of.html> (viewed on 24-10-2013).

²² *India: 2013 Special 301 Report on Copyright Protection and Enforcement*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, (last visited on Nov. 10, 2014) <http://www.iipa.com/rbc/2013/2013spec301india.pdf>.

A. Communication of the Work

Communication to the public has been defined under the act as "making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available."²³ This provision makes a few deviations from the original definition, inasmuch as it has qualified the issuing of copies as being issuing of physical copies only and in adding that the work may be communicated to the public simultaneously or at chosen times and places.

It is strongly evident that the legislators wish to provide for electronic piracy, including piracy over the internet, specifically in the Act; this can be gleaned from the clear segregation between issuing *physical copies* and other forms of communication (all though the latter does not exclusively include only electronic communication, but must also contain other forms of broadcast, such as on screens or over speakers.) The second half of the section, which says that the act of making the performance available for viewing or listening will be considered as communication to the public *regardless of whether a member of the public actually enjoys the work in any manner* means that it will be no defence to state that no person read, watched or heard the copyrighted book, movie or song. This deviates from all normal rules of communication, which necessitate the presence of at least two parties - one who sends the information and one who receives it. The presence of this qualifying phrase results in underlining the previous postulate that only the act of *making something available for download* can be held to be an infringement under the Act, and there is no real need to prove any actual loss incurred by the copyright owner. This is a strong provision, and provides vast protection to copyright owners' rights to seek remedies in the event that their books are made available for downloads, without having to wait until a certain number of people gain access to it.

B. Implications of the Doctrine of First Sale

While the act of uploading pirated copies of copyrighted works fits into the straitjacket formula of infringement, the issue becomes complicated when the whole process of acquiring the copy in the first place is legitimate. With an increasing number of sites such as Amazon and iTunes, which allow the *legal download* of music and e-books onto computers of customers, people can now obtain copies absolutely lawfully and then choose to upload them somewhere else. They may even choose to obtain a small sum by means of remuneration in exchange for providing this file to other users. If a transaction like this were to involve a physical sale involving the actual handing over of the disc or book, it would have attracted the safety of the *First Sale* doctrine. The doctrine, which extinguishes all right of the copyright owner of transferring the copyrighted work, allowing owners of goods to re-sell them to someone else freely and legally, was first

²³ Indian Copyright Act of 1957 §2(ff).

talked about by the US Supreme Court in 1908²⁴ and is now an established part of the copyright laws of most countries. It can be argued that, in theory, if the person who uploads a song or a book on the internet deletes his own copy, he has allowed to transfer what he lawfully bought.²⁵ Indeed, this concept was utilised by the popular programme *ReDigi*, which sought to equate digital files with real ones and allow users to transfer their songs to each other at low prices, taking care to delete the song from their hard disks. However, the website recently fell afoul of the law when music production company, Capitol, filed a case against it in a US district court. The district court agreed with the music company on a technical ground, that the transferring of files would be impossible without copying them. This is the absolute truth; the way the World Wide Web works means that any time a person uploads a file, it is not the file itself that is stored on the website's server, but a copy. The original file remains on the person's hard disk. When another person then downloads this file onto his or her computer, the new file is also a copy of the file uploaded on the server. In fact, a cached copy of that file may exist on other servers and mirror sites and ease the process of downloading. *ReDigi* argued (unsuccessfully) that as there was no more than one digital file at a place in any given time, in theory, the process was the same as handing over a physical disc or selling it in a used market.²⁶

The case now lies in appeal, and there is a chance that it might be decided in the appellants' favour, based on other judgments of the US courts, most notably the one by the Supreme Court in *Kitsaeng*,²⁷ where the Court held that the doctrine of first sale removed all geographical barriers to sales and gifts, allowing transfer of ownership so long as the copy was lawfully made somewhere. The case itself did not pertain to digital transfers or online piracy, but instead to parallel imports (another hotbed of bitter contention). What was remarkable about it, however, was that it favoured the freedom of people to deal with their property as they wished, and that it was delivered in a nation renowned for aggressively protecting the intellectual property rights of people to the detriment of all else, including competition laws and privacy. The fact that the doctrine of first sale depended on a lawful origin and everything else became extraneous created a tumultuous wave of debate on whether the doctrine might be extended to digital sales or not.

However, the sale of digital content has always been at odds with this doctrine. Whereas in 1908, the Supreme Court of the USA had specifically held in *Bobb's Merrill Co.*,²⁸ that the placing of terms on the inside flap of a book restricting buyers from transferring that book had no effect because the buyer had not entered into a contract with (and thus agreed to the terms of) the copyright owner, this logic was never extended to the sale of software in any country. By now, it is commonly understood that buyers of software are not considered owners but in fact licensees;

²⁴*Bobb's Merrill Co. v. Strauss*, 210 U.S. 339 (1908).

²⁵S. Frankel and L. Harvey, *Will the Digital Era Sound the Death Knell for the First Sale Doctrine in US Copyright Law?*, *Intellectual Property Magazine* 40, 40-42 (2011).

²⁶Wendy N. Davis, *Record industry tussles over whether a resale market for online music violates the Copyright Act*, *American Bar Association Journal* (2013).

²⁷*Kitsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

²⁸*Bobb's Merrill Co. v. Strauss*, 210 U.S. 339 (1908).

the numerous *shrinkwrap and clickwrap agreements* they are subjected to ensure that they may never install copies of the software in the computer of another person in the form of multiple pages of end-user license agreements.

Professor Clark D. Asay of Penn. State Law has argued that for all intents and purposes, regardless of what the end-user agreements might say, the users' right in software, films and music is more of ownership than license. They are not expected to return their copies, or pay periodic sums in exchange for enjoying the use of the software, or even renew the "license" to use the same. The laws in the US and Europe are still rather confused over whether to depend on semantics or the "realities of possession", as he terms it.²⁹

The laws in Europe have been construed along the same lines as this argument, tilting in favour of the rights of the owners/licensees of computer programmes. The European Court of Justice gave a landmark ruling in 2012 that the *resale of software licenses is certainly permissible even if the digital good has been downloaded directly from the Internet*. The Court further clarified that the first sale doctrine tended to apply whenever software *was sold to a customer for an unlimited amount of time*, as such a transaction was tantamount a *transfer of ownership*. The right of copyright owners to meddle with the resale of legitimate owners of copies of software was limited. The Court further agreed that there could be practical difficulties in ensuring that the original owner be no longer able to access or use the licensed computer programme; however, that alone could not justify blanket bans on resale as the provision of first sale doctrine is also present in cases where software can be installed from physical supports.³⁰

This welcome ruling breathed fresh oxygen into the flames of war, and between it and the *Kirtsaeng* judgment, there may well be enough persuasive material to entice the Indian courts in the future to redefine the liability of users uploading content on the internet.

If the First Sale doctrine is not allowed to be applied in the digital sphere, the freedom of men and women to do unto their property as they wish shall be curbed greatly only to placate the paranoia of a few. This will especially bode ill for developing countries, where people simply do not have the money to spare on multiple copies of something that ought to have been lawfully handed down. In the case of books, for example, a teenager might donate the physical copies he bought as a child to a library, allowing other younger children to benefit from his purchase; yet, he will have to keep the digital e-book on his computer forever, unable to share it with anyone else because he is not *licensed* to do so, regardless of the fact that he lawfully acquired his copy and will never read the children's book again.

²⁹Clark D. Asay, *Kirtsaeng and the First-Sale Doctrine's Digital Problem*, 66 Stan. L. Rev. Online 17.

³⁰UsedSoft GmbHv. Oracle International Corp., C-128/11.

If this principle is extended to educational so computer programmes, cinematographic films and audiobooks (digital audio recordings of books), the resources available to one generation may never be passed down to others. Simple acts of lending and gifting will be construed as evil acts of copyright infringement, defying all logic and equity in a country poised on the edge of a technological revolution, forcing stagnation as people who wish to retain their rights and freedom begin to shun online alternatives except when absolutely necessary. When Consumers International prepared a list of educational books' prices in 11 countries along with those countries average purchasing power, and coupled it with an examination of international treaties that discuss copyright and the flexibilities therein, they claimed that India ought to amend its laws to clearly legalise and widen the scope of first sale and exhaustion of copyrights.³¹

The whole argument between the doctrine of exhaustion on the one hand and the right to free trade on the other has been encapsulated excellently by Justice Ravindra Bhatt of the Delhi High Court in the following words:

“The doctrine of exhaustion of copyright enables free trade in material objects on which copies of protected works have been fixed and put into circulation with the right holder’s consent. The “exhaustion” principle in a sense arbitrates the conflict between the right to own a copy of a work and the author’s right to control the distribution of copies. *Exhaustion is decisive with respect to the priority of ownership and the freedom to trade in material carriers on the condition that a copy has been legally brought into trading.* Transfer of ownership of a carrier with a copy of a work fixed on it makes it impossible for the owner to derive further benefits from the exploitation of a copy that was traded with his consent.”³²

There is no lasting international consensus on the topic of first sale and exhaustion of intellectual rights in general in treaties and conventions on a worldwide scale. The Agreement on Trade-Related Aspects on Intellectual Property Rights (also called the TRIPS agreement), which India is a signatory to, has not touched upon the subject at all except for Article 6, which says:

"For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 *nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights*".

Clause (a) of Article 28 of the same agreement, which prevents third parties from "making, using, *offering for sale, selling,* or importing" the products in which copyright subsists without the consent of the copyright owner, further says that its provisions are subject to Article 6.

It is clear from this missive that every country is free to frame its own laws on this issue; perhaps the reason for so much discord and chaos abounding in this sphere.

³¹CONSUMERS INTERNATIONAL, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS,ix-51 (2006).

³²Warner Brothers Entertainment Inc. v. Santosh V.G., CS (OS) No. 1682/2006.

In India, the doctrine has a very limited scope in the digital realm. While the provisions on parallel importation were purposefully left out by the Parliament in the 2012 Amendment following a petition signed by several authors at the Jaipur film festival,³³ the *first sale* doctrine still remains in the statute, albeit in a vague, limited sort of way.

§14 of the Copyright Act of 1957 has, while listing the exclusive rights that can be exercised by copyright owners and their assignees, included the phrase "to issue copies of the work to the public *not being copies already in circulation*" when talking of rights in literary, dramatic and musical works,³⁴ computer programmes,³⁵ and artistic works.³⁶ The Section has further placed a condition on the *commercial rental or sale* of computer programmes,³⁷ cinematograph films, and sound recordings. These clauses do not talk about copies already in circulation, which means that *the doctrine of first sale does not apply to resale or commercial rental of movies, software and sound recordings*. However, both sale and commercial rental involve a monetary aspect; both require remuneration as a consideration. The act of *gifting* has not been mentioned anywhere in the act, and as the age-old principle of *Rule of Law* and the fundamental right enshrined in *Article 20* of the Constitution of India clearly state, a person can only be tried or held guilty for an offence under a *law which was in existence at the time of commission* of the alleged offence. It would perhaps be a little ridiculous to state that a person could not buy a DVD of a film and then gift it to someone else, absolutely free of cost. Since most piracy on the internet is conducted on a similarly Samaritan basis, with no charge being levied against downloaders, the closest analogy that can be drawn between the digital realm and the physical one is that of gifting alone.

Perhaps to ensure that the doctrine of exhaustion after the first sale does not clash with the ban on internet piracy, the Copyright Act *clearly demarcates the two*. The provisions of *issuing copies not already in circulation* are contained in separate clauses to the others that could implicate a person if he or she were to *store the copyrighted work on an electronic medium or communicate it to the public*. The way these clauses are worded is an unambiguous indication that they are meant to be construed separately and as stand-alone clauses, and are not meant to be read together.

However, past trends have confirmed that India is keen to follow foreign developments in the sphere of copyright and information technology, and perhaps a favourable decision on first sale over the internet by a court in the US or Europe might at least allow users in India as well to

³³Pranesh Prakash, *Exhaustion: Imports, Exports, and the Doctrine of First Sale in Indian Copyright Law*, 3 NUJS Law Review 637 (2012).

³⁴ Indian Copyright Act of 1957 §14(a)(ii).

³⁵ Id. at §14(b)(i).

³⁶ Id. at §14(c)(iii).

³⁷ Id. at §14(b)(i).

retain ownership rights over their lawful copies instead of relegating them to the helpless status of licensees bound by the whims of the copyright owner.

A valid compromise could conceivably be found in the restructuring of the first sale doctrine in order to take into account the risks of piracy and the permanent nature (on account of not being prone to ordinary wear and tear) of digital media. Until then, a pirate obtaining an infringing copy of a movie and allowing millions of users to download it will be considered as guilty as a teenager who lets her best friend copy the contents of her audio CD onto another computer under the Indian law on copyright.³⁸

Liability of Intermediaries

The forgotten child of information technology and intellectual property law, internet piracy presents a labyrinth of connections between parties; the same rules that unify the world enmesh its people in the web of liabilities, chief among them internet intermediaries. There are very few uploaders who use their own servers and websites to relay illegal information to the public, and by their acts of sharing pirated works, they incriminate everyone from their internet service provider, to the website that hosts this work and the search engine that indexes or unknowingly advertises to this content. The simple acts of web-surfing, linking and caching no longer retain their innocence when so much data is sullied by its very nature, and in an ever-shrinking, increasingly-monitored world, the intermediaries between common people and pirates draw the most flak, forced to take shelter under a vague and slowly narrowing concept of *safe harbour* provisions.

A. The Range of Intermediaries Concerned in Online Piracy

Before the 2012 Amendment to copyright laws,³⁹ allusions to intermediaries had been unspecific about the existence and, if so, extent of the liability of intermediaries. Indeed, the very nature of intermediaries had been unclear under the law before 2009, thanks to a definition that did not include any actual examples,⁴⁰ leaving room for rancorous contention between parties. A later amendment in 2009 served to extend the scope of the definition, and intermediaries are now defined as,

"with respect to any particular electronic records, ... any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record *and includes* telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes".⁴¹

³⁸ All though, of course, with the inclusion of a Provisio to §63 of the Act, if "the infringement has not been made *for gain* in the course of trade or business", then the Courts have a discretion to impose a lesser sentence of up to Rs 50,000 in fine and up to six months' imprisonment.

³⁹ Copyright (Amendment) Act of 2012.

⁴⁰ Information Technology Act of 2000 §2(1)(w) (as it stood prior to the amendment).

⁴¹ *Id.*, as amended by the Information Technology (Amendment) Act of 2008.

Essentially, this means that anyone, who may have had any sort of contact with the data on its transmission route from the computer of the uploading pirate to that of the downloader of the infringing content, is now *fair game* for implacable copyright owners. While the new definition incorporates a large section of intermediaries, the ones who steal the spotlight of copyright infringement cases most often are web-hosting service providers, search engines and application service providers.

Web-hosting Service Providers

With the proliferation of sites, such as Youtube and Rapidshare, that allow users to upload and download or view (by streaming, which involves downloading in the form of a temporary cache that is later deleted) content from all over the world without running checks on whether the work being uploaded had a copyright subsisting in it and whether the uploader had the right to communicate the work to the public. Most of these sites, however, are based in foreign countries and have extensive terms and conditions that allow for the takedown or blocking of infringing content if they receive notice of the same. Their liability is more direct than other intermediaries', since they are expected to be able to deal directly with the contents of what is being hosted by users on their sites. Most countries contain elaborate procedures on the timeline which must be adhered to following the receipt of an infringement notice by the copyright owner by any of these sites; if they do not comply with these procedures, they can become liable in a Court of law.

India seems to have gone one step further and is making sites liable for all content hosted on their websites, whether they be aware of such hosting or not. In a startling judgment delivered by the Delhi High Court the preceding year,⁴² it was held that “there is no reason to axiomatically make each and every work available to the public solely because user has supplied them unless the defendants are so sure that it is not infringement.”⁴³ The Court differentiated between the Indian law and the laws of the US (the DMCA) and said that a reading of §51 with §55 would mean that the Indian focus is on "preventing infringement at the threshold" unlike in the US, where the laws focus on post-infringement action.⁴⁴ Not only did it put an injunction on the popular social networking site MySpace to remove all infringing material from its site, the Court also allowed a future ban on all infringing material, saying that the automated process of converting the format of music files to one that is viewable on MySpace should include the process of screening for infringements.

This is a worrying development, to say the least. Not only did it specifically ignore the rules framed by the Central Government on takedown procedures,⁴⁵ it also placed a massive burden on

⁴²Super Cassettes Industries Ltd. v. MySpace Inc. and Another, Delhi High Court, 29 July, 2011.

⁴³ Id.

⁴⁴Ujwala Uppaluri, *Delhi HC judgement – Super Cassettes v. MySpace*, KRACKTIVIST, (Nov. 07, 2012) <http://kractivist.wordpress.com/2012/11/07/delhi-hc-judgement-super-cassettes-v-myspace-copyright/>.

⁴⁵ Information Technology (Intermediaries Guidelines) Rules of 2011.

websites to ensure that no content placed on them infringes a copyright, a task so unimaginable that even the most vociferously anti-piracy country, the USA, does not have any analogous provisions or court decisions. While the validity of this judgment has not been challenged so far in a Court of Appeal, it is expected that if the matter comes up again before an Indian court, the decision will swing the other way, especially since internet giants like Google will have vested interests in not losing out a consumer base in a country as populous as India because of erroneous interpretations of the law. The fact that MySpace additionally utilised the process of formatting the music uploaded on it signifies a greater involvement by it than by other websites, so perhaps this judgment shall remain a lone wolf in this regard.

Application Service Providers

An Application Service Provider, abbreviated as *ASP*, is "a third-party entity that manages and distributes software-based services and solutions to customers across a wide area network from a central data center".⁴⁶ It is "an entity that manages and distributes software-based services on the Internet to customers across a wide area network from a central data centre."⁴⁷

Examples of ASPs include the infamous Napster and other peer to peer programmes such as Limewire and Utorrent. The main feature of these programmes is that they allow users to search and download files from the computers of other users, making the infringement of copyright child's play. Modern day peer to peer applications have hitherto escaped the ire of the law and copyright owners both in India and internationally (with the notable exception of Napster) as, essentially, they are meant to aid the process of file transfers between users, especially if the size or confidentiality of those files necessitates the avoiding of sending them through regular email services. It has become a boon in the promulgation of *open source software* (which is not copyright-protected and whose creators encourage free distribution among as many users as possible) and is even being used by some commercial news to reach an increasingly net-savvy audience.⁴⁸ However, they are being misused by modern day pirates to share infringing copies of works easily in bits and pieces using the information already stored on individual users' computers, thus eliminating the need for expensive and resource-heavy servers dedicated to facilitating downloads. Without the need to pay for maintenance of websites or an internet plan that allows extensive uploads and downloads, even amateurs can enter the peer to peer arena and start sharing their files for free.

So far, there have been no cases on peer to peer programmes and other ASPs in India, so their exact liability under law remains a matter of pure speculation.

⁴⁶*Application Service Provider*, WEBOPEDIA, (last visited Nov. 21, 2014) http://www.webopedia.com/TERM/A/application_service_provider.html.

⁴⁷Rodney D. Ryder, *Napster and Beyond*, TATA GROUP NET EFFECTS, (Jun. 2011) <http://www.tata.in/article.aspx?artid=O8M+v1gQnj8=>.

⁴⁸*Things You Should Know About P2P*, EDUCAUSE, (Mar. 2009) <http://net.educause.edu/ir/library/pdf/est0901.pdf>.

Search Engines

Many sites have a primary function of indexing information and making it available in the form of hypertext links (specific URLs) to users who employ a search function. These sites neither host infringing material on their servers nor provide services to enable the same; they are merely conducting a thorough search and presenting the results of the internet to people. This does not prevent aggrieved people from filing complaints against them, but the suits have been few and far between, and have always been responded to quickly by Google and its competitors with a prompt removal of offending material.⁴⁹

Internet Service Providers

The multiple internet service providers such as MTNL, Airtel, BSNL and Reliance, to name a few, are responsible for providing high-speed broadband connections to users all over the country. They have the capability of monitoring people's internet activity and also limiting it by choking download speeds and also blocking hypertext links that contain infringing materials. In foreign countries, they are the pawns in an elaborate rule of a certain number of strikes, which involves them sending letters to desist from illegal downloading to their customers and even stopping all service to the customers if the downloading does not stop.

In India, they have been used and abused in the past to block websites that contain download links to infringing copies of copyrighted works by way of *Ashok Kumar* or John Doe orders. In a recent case,⁵⁰ an Ashok Kumar application was filed to restrain a great number of named and unnamed network service providers from facilitating downloads by their users of a cinematographic film. The Court granted a temporary injunction asking ISPs to block the sites that hosted infringing materials on their servers. The ISPs were caught in a storm between the Devil and the deep sea as their enraged customers took them to Consumer Courts for interrupted services, and ISPs like Airtel were fined heavily for complying with the High Court's orders,⁵¹ especially as the block became effective all over India and not just in the State of Tamil Nadu, to which the Madras High Court's jurisdiction extends. This led the ISPs to file another petition in the High Court, which then modified the ex-parte order to clarify that the blocking would be of specific URLs that hosted infringing copies, and not the entire site.⁵²

It appears that Internet Service Providers are easy targets for copyright owners as they have the power of affecting users all of the country, unlike actual websites, which seem to resemble a modern day hydra - when one shuts down following a court settlement, two more rise to take its place.

⁴⁹Maulana Mahmood Asad Madani v. Union Of India And Ors, Delhi High Court Judgment, 24 January, 2013.

⁵⁰M/S. R.K. Productions Private Ltd. v. Bharat Sanchar Nigam Ltd. and Others, Madras High Court Order, 29 March 2012.

⁵¹ Prashant Reddy, *Airtel Pays Penalty for Indiscriminate Blocking – ISPs Stuck between a Rock and a Hard Place?*, SPICYIP, (Aug. 10, 2012) <http://spicyipindia.blogspot.com/2012/08/guest-post-airtel-pays-penalty-for.html>.

⁵²Prashant Reddy, *Madras High Court Rules Against 'Safe-Harbour' for ISPs – A Victory for Copyright Owners*, SPICYIP, (Nov. 24, 2012) <http://spicyip.com/2012/11/madras-high-court-rules-against-safe.html>.

B. Legal Provisions on Liability of Intermediaries

Even before the amendments, rules and guidelines, intermediaries could be held liable for *abetting the infringement of the copyright in a work or any other right* conferred under the Copyright Act, provided they did so *knowingly*.⁵³ Being a criminal offence, the degree of knowledge on part of the intermediary would need to be, if not actual, then at least constructive. The latter has been defined by Professor KD Gaur as existing "when a person deliberately refrains from making inquiries, the result of which he might not care to have, and it is actual knowledge in the eye of the law."⁵⁴

Thus, if the intermediary had received complaints regarding infringing copies of copyrighted works being uploaded on his website and if he had chosen to ignore those complaints, he could perhaps be liable under Common law for abetment of infringement; the same would extend to search engines and advertisements linking to such sites and cyber cafes allowing the use of their computers for illicit uploading. This liability would not extend to criminal law, as the definition of abetment clearly states that, aside from actual instigation or engaging in conspiracies, a person can be held to abet the doing of a thing if he "intentionally aids, *by any act or illegal omission*, the doing of that thing."⁵⁵ Not carrying out inquiries into alleged piracy, not removing infringing materials from websites, not stopping the linking or advertising to pirated content were all omissions, but *they were hardly illegal omissions*, as no law had been specifically put in place regarding takedowns. On the civil front, however, there would perhaps have been scope for remedy as the level of *mens rea* required would be relatively low and because there were common law judgments on the "incitement of others to infringe copyright", which would perhaps have found "ready acceptance by Indian courts."⁵⁶

With the recent amendments, however, the compass of liability of intermediaries has been significantly transformed. At present, the laws governing them are split into different Acts and the rules and guidelines that have been framed by the Central Government under them, related yet distinct. Working in conjunction, the Information Technology Act and the Copyright Act, along with the guidelines and rules framed thereunder, have worked to establish the limits of liability of intermediaries, and what actions may be taken against them.

While the bulk of legislation on internet piracy and intermediaries' liability is contained under the Copyright Act, there are a few pertinent provisions in the Information Technology Act which necessitate an analysis. Strangely, though the Copyright Act was amended in 2012, no corresponding changes were made to the Information Technology Act, to the extent that the

⁵³ Indian Copyright Act of 1957 §63.

⁵⁴ K.D. GAUR, TEXTBOOK ON THE INDIAN PENAL CODE 80 (4th ed. 2010).

⁵⁵ Indian Penal Code of 1860 §107.

⁵⁶ RODNEY D. RYDER, INTELLECTUAL PROPERTY AND THE INTERNET 427 (1st ed. 2002).

offence of online piracy is not included as an offence under any of the provisions of the Information Technology Act, or even included within the definition of cyber security.⁵⁷ The implications of this may be far-reaching, since it means that no guidelines or rules can be framed under the Information Technology Act to collect data legitimately on users' activity. The present rules allow only for the collection of data as might relate to tracking certain specific incidents and any matter relating to cyber security, and since cyber security does not include cyber offences in its ambit, the provision cannot apply to copyright offences.⁵⁸

Indeed, whatever raids against pirates have been conducted by the police so far have been the result of complaints and tip-offs. The registering of criminal complaints against 30 individuals for uploading pirated content and against 1010 people for downloading the pirated content in Kerala was brought about by the tracking of IP addresses through the use of a computer programme called *Agent Jadoo*, developed by a firm based in Kochi, called jadooTech Solutions Ltd.⁵⁹ This was, in essence, a spying software used to infringe the laws of privacy of the citizens of the country under the pretext of protection of copyright. This, however, is not an unheard-of tactic. It is employed regularly by other countries, giving rise to massive debates on privacy and the viability of using an IP address to determine the identity of a criminal.

Nonetheless, intermediaries are, by law, required to preserve certain information, retaining it with them in the form of records for a specified period of time, as directed by the Central government.⁶⁰ Contravening this law can make them liable to punishment of up to three years' imprisonment and also fine.⁶¹ This has allowed the Central Government to frame rules for the maintenance of log registers containing details of customers at cyber cafes, history of websites and lists of proxy servers.⁶²

The Information Technology Act limits the liability of intermediaries under §79 which exempts the intermediary from liability for any "*third party information, data, or communication link made available or hosted by him.*" This provision applies if the intermediary's only job is providing a communication portal through or in which the information is transmitted or temporarily stored. However, the intermediary is supposed to observe "*due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*" As might be expected, the section excludes acts of aiding, abetting etcetera, and further goes on to create an exception if:

⁵⁷Information Technology Act of 2000 §2(nb).

⁵⁸The Information Technology (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules of 2009 Rule 3.

⁵⁹ Sai Vinod, *Kerala Loses its Sense of Proportionality, Takes Extreme Steps to Fight Online Piracy*, SPICYIP, (Nov. 02, 2012) <http://spicyip.com/2012/11/kerala-loses-its-sense-of.html>.

⁶⁰ Information Technology Act of 2000 §67C.

⁶¹ Id.

⁶² Information Technology (Guidelines for Cyber Café) Rules of 2011 Rule 5.

"upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner."

This very important Section provides an interesting safe harbour for innocent intermediaries who are merely caught in the struggle between pirates and the law. However, it may be overridden by other laws regarding copyrights or patents when it comes to the exercise of a person's rights under those laws.⁶³ This has been specifically held by the Delhi High Court in the *MySpace* case.⁶⁴ The Section has also had certain guidelines made under it, which expand on the intermediary's responsibility to not host anything knowingly that might infringe any copyrights, and lays down provisions *fortakedown*, saying that the intermediary, upon learning by itself or receiving written knowledge by an affected person of a contravention of copyright laws shall work to disable access to the contravening information or take it down, while preserving such information and associated records for a period of 90 days for investigation purposes.⁶⁵ The 36-hour requirement was later clarified on March 2013 as being the time stipulated for a response or acknowledgment by the intermediary; the time for actually acting on the complaint was extended to a month.⁶⁶

The Copyright (Amendment) Act of 2012 incorporated similar provisions to the Copyright Act. § 52(b) of the Act excepts "the *transient or incidental storage* of a work or performance purely in the *technical process of electronic transmission or communication to the public*" while §52(c), talks of a similarly transient or incidental storage for the purpose of providing electronic links etcetera and places an additional condition that the person responsible for the storage *should not have reasonable grounds for believing it is an infringing copy*.

The Section also says that if the copyright gives a written complaint to the person responsible to the storage, the latter must "*refrain from facilitating access for a period of twenty-one days or till he receives an order from the competent court.*"⁶⁷ In absence of such an order, he *may* continue to provide access. Strangely, the Act has placed a discretion upon the intermediary, which is usually a private party - most likely a company - without fettering it with the usual clauses of natural justice. If no Court gives an order within 21 days (for example, on account of the fact that the complaint was fictitious), it is still up to the intermediary to restore access. The Rules framed under the Act of 2013 have also referred to this discretionary power of the intermediaries, and

⁶³ Information Technology Act of 2000 §81, proviso.

⁶⁴ *Super Cassettes Industries Ltd. v. MySpace Inc. and Another*, Delhi High Court, 29 July, 2011.

⁶⁵ Information Technology (Intermediaries Guidelines) Rules of 2011 Rule 3.

⁶⁶ Nandita Saikia, *The Intermediary Rules, Takedowns and Free Speech*, Indian Copyright, (last visited Aug. 15, 2014) <http://copyright.lawmatters.in>.

⁶⁷ Copyright Act of 1957 §52(c), proviso.

for the most part, reproduced the provision except for a more detailed description of the contents of the written complaint made by the copyright owner.⁶⁸

From these provisions, it appears that the liability of intermediaries has been restricted to cases where they are actually aware of cases of infringement and still do nothing about it. While the Intermediaries Guidelines of 2011 require the intermediaries to act upon their own knowledge as well, the corresponding provisions of the Copyright Act (which came later and which has been specifically given precedence over general law relating to intermediaries over the internet⁶⁹) does not create any such stipulation for the intermediary, which leads to the conclusion that intermediaries may act as they please unless the owner of a copyright or a Court interferes. This issue will remain a conundrum in the absence of any construction of the Courts.

Conclusion

The laws in India have come a long way to offer protection to the sweat and creativity of copyright owners. However, without an active enforcement mechanism in place, they continue to remain mere pieces of paper, meant to assuage the international community. The numerous shops that flourish in Delhi in places like *Palika Bazaar* display but a tiny fraction of the true volume of digital goods being pirated and traded without consequences. While some States in India have taken some steps forward, their pace has been slow and languid. Without executive action against pirates, few cases have surfaced, especially at the level of the Constitutional Courts.

The law relating to both the liability of uploaders and intermediaries remains stunningly uncertain, blurring the lines of legitimacy and illegitimacy when it comes to the application of the first sale doctrine to digital goods and the discretionary powers given to intermediaries in dealing with allegedly infringing content. Regardless, there is ample groundwork to convict offenders under the laws of the country, at par with the rest of the world. On the civil front, the successful application of Ashok Kumar injunctions have proven to be an effective way of holding someone liable in such a way as to curb piracy, and it will only be a matter of time before an influx civil cases in the future helps the Courts to smoothen the rougher edges.

⁶⁸ Copyright Rules of 2013 Rule 75(1).

⁶⁹ Information Technology Act of 2000 §81.