5 THE INDIAN FILM INDUSTRY'S BATTLE AGAINST PIRACY: SOME REFLECTIONS

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ABSTRACT

This paper provides a brief introduction to the issue of film piracy in India. The paper discusses film piracy trends and laws governing piracy. The author examines some strategies adopted and proposed to be used, by the Indian film industry to counter piracy. The author argues that the industry must realign its strategies to combat piracy. The author suggests certain alternative measures, such as focusing more on piracy in high-income countries and promoting access to entertainment.

Keywords: *India, copyright, film, piracy*

I. INTRODUCTION

In 1896, the inventors of the cinematograph, Auguste and Louis Lumière, hit upon the idea of demonstrating their remarkable invention in India and Australia, two of Britain's most important colonies at the time. The Lumière Brothers entrusted the task to Marius Sestier, a chemist who had joined their employment. On 7 July 1896, Sestier exhibited a few short films at the Watson Hotel in Bombay, charging the princely sum of one rupee as an admission fee.[1] The films received an enthusiastic reception, and screenings of European and American films would go on to become popular across India. It was at one such screening in Bombay—of a film on Christ—that a revolution would germinate. Dhundiraj Phalke, an artist and photographer seated in the audience, experienced an epiphany, of which he later wrote:[2]

> I was gripped by a strange spell. I bought another ticket, and saw the film again. This time I felt my imagination taking shape on the screen. Could this really happen? Could we, the sons of India, ever be able to see Indian images on the screen? The whole night passed in this mental agony.

Phalke would eventually scrape together funds and direct India's first feature film, *Raja Harishchandra*, in 1913.[3] Not everyone in the country thought highly of the cinema. Mahatma Gandhi, for instance, condemned motion pictures as 'sinful'[4] and a 'sheer waste of time.'[5] Over time, however, the cinema would become an important and respectable part of Indian cultural life. Today, in its centennial year, the Indian film industry has grown to become the world's largest in terms of numbers of films made and tickets sold annually.[6] In terms of revenue, the Indian box office is presently the world's sixth largest.[7]

The phenomenon of film piracy in India is nearly as old as the industry itself. Remarkably, film piracy in India bore an international dimension even in the early years of the cinema. In 1928, the Indian Cinematograph Committee—primarily established to examine issues related to censorship—reported that 'valuable rights' of film exhibitors were being 'infringed by the free introduction of pirated copies of … films by other exhibitors.'[8] Chief amongst the aggrieved was Madan Theatres, which owned most film theatres in India and had acquired copies of films from American producers. Madan Theatres complained that some exhibitors in the United States, after lawfully buying copies of films from producers, had unlawfully sold copies of the same films to Madan Theatres' rivals at cheaper rates.[9] The Committee felt that existing copyright laws were inadequate to tackle this problem. The Committee recommended the institution of a central censorship bureau (in place of local censorship bureaus) where film exhibitors could register their right to screen films. The bureau could deny an exhibitor permission to screen a film if another exhibitor had previously registered the right to screen the same film.[10]

The Committee's recommendations were made at a time when films could only be viewed by the public in theatres, and the medium was tightly controlled by the state. Today, access to new technologies by both pirates and consumers has presented the film industry with challenges that are infinitely more complex. In recent years, the Indian film industry has become markedly assertive about enforcing its intellectual property rights. This paper examines some of the strategies that have been employed by

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[1] See Tony Martin-Jones, 'Marius Sestier in India' (*Film History Notes*, 12 June 2011) <http://www.apex.net.au/~tmj/sestier-in-India.htm> accessed 18 September 2013.

[2] Tejaswini Ganti, *Bollywood: A Guidebook to Popular Hindi Cinema* (Routledge 2013) 8.

[3] ibid 8–9.

[4] Gautam Kaul, *Cinema and the Indian Freedom Struggle* (Sterling 1998) 44.

[5] Robin Jeffrey, 'The Mahatma Didn't Like the Movies and Why It Matters: Indian Broadcasting Policy, 1920s–1990s' [2006] 2 Global Media and Communication 204, 211.

[6] UNESCO, *Institute for Statistics, Analysis of the 2010 UIS International Survey on Feature Film Statistics* (2012) 8–10, 17–18. <http://www.uis.unesco.org/FactSheets/Documents/ib8-analysis-cinema-production-2012-en2.pdf> accessed 1 October 2013.

[7] Motion Picture Association of America, *Theatrical Market Statistics* (2012) 5 <http://www.mpaa.org/resources/3037b7a4-58a2-4109-8012-58fca3abdf1b.pdf> accessed 1 October 2013.

[8] Indian Cinematograph Committee, *Report of the Indian Cinematograph Committee* (1928) 85.

[9] ibid pp. 219–20.

[10] ibid 85.

the Indian film industry to counter piracy in the digital age. Part II of the paper will provide an overview of film piracy trends in India, while Part III will provide an overview of the laws governing piracy in India. In Part IV, the author will argue that the industry must realign its strategies to combat piracy.

II. FILM PIRACY TRENDS IN INDIA

Unlike in many developed countries, pirated films in India are mostly consumed through the sale of CDs and DVDs rather than through the Internet.[11] Another distinguishing feature of film piracy in India is that it is closely linked to music piracy, as most popular Indian films are musicals, and pirated albums are usually soundtracks of popular films. Statistics regarding the extent of piracy in India vary. Government estimates suggest that one fifth of all films sold in India are pirated.[12] Industry estimates attribute annual losses worth USD 4 billion due to piracy, coupled with annual job losses of over 500,000.[13] Even if one assumes that the industry estimates are highly exaggerated, and considers the real figures to be three-to-four times less, the extent of piracy would still be significantly high. Indeed, it is a common sight in Indian cities to see vendors sell pirated CDs and DVDs, which can cost as little as USD 1.[14] The brazenness with which Indian pirates operate can be illustrated by the rise of T-Series—one of India's leading entertainment labels. T-Series' founder, Gulshan Kumar, originally accumulated his fortune by selling unlicensed copies of popular Indian film soundtracks in the 1980s and 1990s. Kumar—who was shot dead in mysterious circumstances —refused to enter into a truce with India's leading music companies and chose to defend a lawsuit filed against him, knowing that the Indian legal system was slow and inefficient.[15] Arguably, piracy also enjoys a great degree of social acceptability. For example, when a group of Indian legislators organized a screening of the popular Indian film *Rajneeti*—a new release at the time–they blithely chose to screen a pirated copy of the film.[16] The film's director, Prakash Jha, lamented: 'This social evil has … become a normal phenomenon in everyday life.'[17]

In recent years, the consumption of pirated films through the Internet has increased in India.[18] Presently, only 1 per cent of the Indian population currently has access to broadband Internet, the major causes being unaffordability and an absence of optical fibre cables in many regions.[19] However, although modest when expressed as a percentage, the number of broadband users in India amounts to well over 10 million. There is evidence that much illegal downloading is taking place. For example, 350,000 copies of the popular film *Kaminey* were estimated to have been downloaded from file-sharing websites within a week of the film's release.[20] A number of Indian universities, which offer high-speed Internet connections to students, are hotbeds of illegal downloading. These universities include the campuses of the elite Indian Institute of Technology (IIT), where the author once taught and can claim to have witnessed the phenomenon first hand. Like physical piracy, Internet piracy is also generally viewed as socially acceptable. For example, a report on illegal downloading at IIT's Madras campus reveals that students do not think twice while downloading pirated content, and even quotes a professor who matter-of-factly states that his students use pirated books.[21]

The Indian Government has charted an ambitious plan to increase broadband penetration. The Government aims to provide optical fibre cables and cheaper computers throughout India, targeting 600 million broadband users in 2020.[22] In 2012, the Government took the first step in this direction by launching the Aakash tablet computer, which costs around USD 50 and is aimed at users who cannot afford more expensive computing devices.[23] The Indian film industry has thus expressed concerns

[11] Federation of Indian Chambers of Commerce and Industry and KPMG, *Indian Media and Entertainment Industry Report* (2011) 85.
[12] Committee on Piracy (Ministry of Information and Broadcasting), *Report of the Committee on Piracy* (2010) 11–12 (citing an estimate by the Indian Ministry of Human Resources Development).
[13] Ernst and Young, *The Effects of Counterfeiting and Piracy on India's Entertainment Industry* (2009) 3–4.
[14] See Lawrence Liang and Ravi Sundaram, 'India' in Joe Karganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council 2011) 339, pp. 349–50.
[15] See Lawrence Liang, 'Copyright, Cultural Production and Open-Content Licensing' (2005)1 Indian Journal of Law and Technology 96, 152-3.
[16] Prithwish Ganguly, '75 Politicians Watch Pirated Rajneeti DVD in Rajasthan' *DNA* (Bombay, 31 May 2010) <http://www.dnaindia.com/entertainment/1390219/report-75-politicians-watch-pirated-rajneeti-dvd-in-rajasthan> accessed 1 October 2013.
[17] ibid.
[18] Liang and Sundaram (n 14) 356–9.
[19] See Dilip Maitra, 'India's Broadband Base Touches 13 Million' *Deccan Herald* (Bangalore, 11 January 2012) <http://www.deccanherald.com/content/218464/indias-broadband-base-touches-13.html> accessed 1 October 2013.
[20] See Patrick Frater, 'Online Piracy in India a Global Problem' (*Hollywood Reporter*, 15 October 2009) http://www.hollywoodreporter.com/news/online-piracy-india-global-problem-92365> accessed 1 October 2013.
[21] See Raymond Joseph, 'Combating Piracy' (*Fifth Estate*, 1 November 2011) <http://t5e.iitm.ac.in/2011/11/combating-piracy> accessed 1 October 2013.
[22] See Ministry of Communications and Information Technology, *A Triad of Policies to Drive A National Agenda for ICTE* 11 (2011).
[23] See Jason Burke, 'Indian Computer Tablet Could Herald an Internet Revolution' *The Guardian* (London, 12 January 2012) <http://www.guardian.co.uk/technology/2012/jan/12/indian-computer-tablet-aakash-internet> accessed 1 November 2013.

that the increase in Internet penetration could lead to greater numbers of illegal downloads.[24]

For many years, the attitude of Indian law-makers towards piracy was blasé. For example, during the 1980s, when heads of Indian music companies complained to the then Finance Minister (and future Prime Minister) VP Singh about Gulshan Kumar's activities, he is alleged to have told them: 'Don't come to me with your hard luck stories. You've no marketing strategies … Gulshan has. And you want me to punish him for his entrepreneurial ability?'[25]

Today, however, law-makers have become far more sensitive to the needs of the film industry. A recent example is the reaction of the government of the state of West Bengal to the closure of Music World, a popular nationwide CD and DVD retail chain. Music World, which was headquartered in West Bengal and operated its flagship store from Calcutta, the state's capital, announced the closure of its operations in June 2013, citing declining sales due to piracy. This resulted in unprecedented protests by artists from the state, demanding stricter laws against piracy.[26] The West Bengal government gave in to these demands and enacted the West Bengal Prohibition of Audio and Video Piracy Ordinance 2013, which made it difficult for pirates to obtain bail and increased the maximum punishment for piracy to seven years' imprisonment.[27] This was a remarkable development because West Bengal's political establishment has historically been left-wing and populist. In Calcutta, unlicensed roadside vendors—many of whom sell pirated CDs and DVDs—number over 300,000 and form an important vote bank, enjoying the patronage of major political parties.[28] Furthermore, West Bengal's film industry has traditionally been dominated by niche, art-house filmmakers more concerned with critical acclaim than commercial revenues. The fact that a state, whose artists and politicians were not the most obvious candidates to rail against piracy suddenly did so, challenges the common notion that piracy is exclusively the concern of large entertainment companies and unabashedly capitalistic politicians who kowtow to them. But to think that piracy in India can be eradicated merely by enacting stringent laws would be naïve. This paper will accordingly argue that piracy in India must be seen as a multifaceted problem to be countered using a range of strategies, from the offensive to the accommodative.

III. LAWS GOVERNING PIRACY IN INDIA

India has signed three major international copyright agreements.[29] India's main copyright statute, the Copyright Act 1957 (Act), has 'borrowed heavily' from and 'adopted many principles and provisions' of United Kingdom law.[30] The Act has been amended six times, most recently in 2012. India ratified the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS) in 1994, and the Agreement came into force in India on 1 January 1995. India's decision to sign the TRIPS Agreement met with fierce political opposition from within the country[31], while the Delhi High Court had to hear a petition seeking to restrain the Indian Government from signing the Agreement.[32] However, the political opposition to the TRIPS Agreement mainly revolved around its patent-related provisions. Similarly, the petition filed before the Delhi High Court—which was dismissed due to the Court's reluctance to intervene in matters of economic policy—was directed towards issues concerning plant-variety protection and seeds, rather than copyright issues.[33]

The TRIPS Agreement's impact on Indian copyright law, while significant, has been less far-reaching when compared to its impact on Indian patent law, as Indian copyright law has largely 'developed independently of global influence.'[34] Moreover, the presence of a strong indigenous film industry in India has meant that copyright reform has been a less contentious issue than patent reform. In some instances, domestic interests have prompted the

[24] Committee on Piracy (n 12) 11.
[25] See 'Life in the Twilight Zone' (*Rediff*, 2 September 1991) <http://www.rediff.com/entertai/sep/02sup.htm> accessed 11 November 2013.
[26] See Shoma A Chatterji, 'Protest Against Piracy: Death Knell for Music?' (*India Together*, 27 July 2013) <http://www.indiatogether.org/2013/jul/eco-piracy.htm> accessed 11 November 2013; 'Bengal Music Industry to Protest Music World Closure' (CNN IBN, 14 June 2013) <http://ibnlive.in.com/news/bengal-music-industry-to-protest-music-world-closure/398825-45-75.html> accessed 11 November 2013.
[27] See 'Law Against Piracy' *The Telegraph* (Calcutta, 28 September 2013) <http://www.telegraphindia.com/1130928/jsp/calcutta/story_17399034.jsp> accessed 11 November 2013.
[28] See 'Hawker Raj is Here to Stay' *The Telegraph* (Calcutta, 4 January 2013) <http://www.telegraphindia.com/1120104/jsp/calcutta/story_14957183.jsp> accessed 11 November 2013.
[29] India signed the Convention for the Protection of Literary and Artistic Works in 1928, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations in 1961, and the Geneva Phonograms Convention in 1975. India has not ratified the Rome Convention.
[30] P Narayanan, *Law of Copyright and Industrial Designs* (Eastern Law House 2007) pp. 7–9.
[31] See Hardev S Sanotra and Zafar Agha, 'Fighting with Ignorance' *India Today* (Delhi, 15 January 1994) <http://indiatoday.intoday.in/story/with-indian-govt-putting-up-a-weak-defence-political-opposition-gatt-rises-to-new-high/1/292621.html> accessed 11 November 2013.
[32] *Vandana Shiva v. Union of India* [1995] 32 DRJ 447 (Delhi High Court).
[33] ibid [1].
[34] Shubha Ghosh, 'A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India' (2011) Queen Mary Journal of Intellectual Property 146, 162.

Indian Government to amend the Act and include TRIPS-Plus and Berne-Plus standards. For instance, in 1992, the Act was amended to increase the term of protection for authorial works by a further ten years than the Berne standard (which would later become the TRIPS standard). The primary reason for doing so was that the works of the famous Indian writer and composer, Rabindranath Tagore, were on the verge of falling in the public domain.[35] The copyright in Tagore's works vested with a public university in West Bengal, Tagore's home state. The then government of West Bengal—consisting, ironically, of a coalition of communist parties who would later lead the opposition to TRIPS—lobbied to increase the term of protection, overriding opposition from prominent artists in the state.[36] In a more recent example, the 2012 amendment to the Act saw the introduction of various TRIPS-plus standards recognized by the WIPO Internet Treaties, even though India has not signed these treaties.[37] Unsurprisingly, several influential industry associations had made representations before Indian law-makers when the bill was being drafted.[38]

In terms of civil procedure, there are two procedural advantages which plaintiffs in copyright infringement suits enjoy. First, Indian law normally requires a civil suit to be instituted in a court with jurisdiction over (a) the defendant's residence/place of business or (b) the place where the cause of action wholly or partly took place.[39] However, suits for copyright or trademark infringement may additionally be filed in a court which has jurisdiction over the plaintiff's residence/place of business.[40] Courts have noted this to be 'an obvious and significant departure' from civil procedure rules, enacted to spare plaintiffs the inconvenience of having 'to chase after' pirates.[41] Second, a copyright infringement suit is normally required to be filed in a District Court.[42] However, the High Courts in Delhi, Bombay, Madras, and Calcutta—India's four largest cities—can exercise first-instance jurisdiction in civil suits valued above a certain amount.[43] Plaintiffs are normally at liberty to fix a value to their suit, and it is not very common for courts to return intellectual property suits on the ground of being overvalued. Thus, plaintiffs in copyright infringement suits, who are wealthy enough to litigate in High Courts, can effectively approach one of the four major High Courts if they can show either (a) a place of business within the jurisdiction of the Court or (b) that some part of the cause of action arose within the jurisdiction of the Court. This has at least three practical advantages. First, bypassing District Courts saves plaintiffs a step. Second, High Courts are perceived as more efficient, and also more capable of handling commercial disputes than District Courts. Third, litigating in one of the major Indian cities has various logistical advantages.

In almost all intellectual property infringement suits filed by large companies, the preferred forum has been one of the four major High Courts, particularly the Delhi High Court. Each year, the Delhi High Court hears around 500 new intellectual property suits, and disposes of around the same number.[44] In *Microsoft v. Gopal*[45], the Delhi High Court strongly criticised this practice of forum shopping. The Court noted that, in 'almost every' intellectual property dispute, plaintiff companies were approaching the Delhi High Court in the first instance, rather than the relevant District Court.[46] The Court, however, accepted the suit in question, noting that 'judicial discipline' required it to do so.[47] Incredibly, the suit was filed by Microsoft against an alleged pirate based in the city of Bangalore, which is situated nearly 2,000 km from Delhi—more than the distance between London and Rome. This despite the fact that Microsoft has a large presence in Bangalore, and the city's District Court would clearly have been, in the Court's words, the 'most appropriate forum' for filing the suit.[48]

In terms of civil remedies, the Act allows 'all such remedies by way of injunction, damages, accounts *and otherwise as are or may be conferred by law for the infringement of a right*.'[49] Indian courts, in particular the Delhi High Court, have liberally

[35] See Bibek Debroy, Debashis Chakraborty and Arup Guha, 'Copyright Protection and Consumer Welfare: A Case Study of Rabindra Rachanabali' [2005] 6 Global Business Review 55.
[36] Lok Sabha Deb (Copyright (Amendment) Ordinance, 1991), 17 March 1992 (Girdhari Lal Bhargava) <http://parliamentofindia.nic.in/lsdeb/ls10/ses3/2217039203.htm> accessed 11 November 2013.
[37] See Zakir Thomas, 'Overview of Changes to the Indian Copyright Law', [2012] 17 Journal of Intellectual Property Rights 324, 326–7.
[38] See generally, Department-Related Parliamentary Standing Committee on Human Resource Development, *Report on the Copyright (Amendment) Bill, 2010* (No 227, 2010) <http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf> accessed 15 November 2013.
[39] Code of Civil Procedure (India) 1908 s 20.
[40] Copyright Act 1957 (India) s 62(2); Trade Marks Act 1999 (India) s 134.
[41] *Smithkline Beecham v Singhi* [2001] PTC 321 (Delhi High Court) [6]; *Caterpillar v. Kailash* [2002] 24 PTC 405 (Delhi High Court) [24].
[42] Copyright Act 1957 (India) s 62(1).
[43] See Law Commission of India, *Delays and Arrears in High Courts and Other Appellate Courts* (Law Com No 79, 1979) [2.1]–[2.5],[15.1]–[15.2] <http://lawcommissionofindia.nic.in/51-100/Report79.pdf> accessed 11 November 2013.
[44] See 'How India's Courts are Coping with the IP Boom' *Managing Intellectual Property* (1 September 2010) (remarks by Kaul J) <http://www.managingip.com/Article/2664957/How-Indias-courts-are-coping-with-the-IPboom.html?ArticleId=2664957&single=true> accessed 11 November 2013.
[45] *Microsoft v. Gopal* [2010] 42 PTC 1 (Delhi High Court).
[46] ibid [17]–[18].
[47] ibid [21].
[48] ibid.
[49] Copyright Act 1957 (India) s 55(1) (emphasis added).

granted Anton Piller orders[50] and John Doe orders[51] in copyright cases. In a significant development, High Courts have, of late, granted John Doe orders in a string of cases concerning online file sharing.[52] These orders have been wide in scope and loaded in favour of the plaintiffs, who have been large media companies. For instance, in one case, the Madras High Court prohibited 15 Internet service providers, along with 'other unknown persons', from, *inter alia*, 'making available … or uploading or downloading' the Tamil film *3 '* in any manner', including through the Internet, USB drives, 'or in any other like manner'.[53] Some Internet service providers have erred on the side of caution and blocked entire file-sharing websites, rather than the specific pages hosting the infringing content.[54]

In terms of criminal penalties, the Act provides for imprisonment for between six months to three years (along with a fine ranging from INR 50,000 to INR 200,000) in cases of intentional infringement or intentional abetment to infringement.[55] The Act provides for enhanced penalties for repeat offenders.[56] The Act also empowers police officials to conduct raids and seize infringing material without a warrant, and without permission from any judicial or administrative authority.[57] In this respect, the Act is more favourable toward rights owners than the Indian Trade Marks Act, which requires police officials to at least seek prior clearance from the Indian Trade Marks office.[58] In recent years, governments in certain states—where the film industry wields considerable political clout—have gone even further and arrested suspected pirates under preventive detention laws, called Goonda Acts.[59] One of the most significant arrests under these laws occurred in February 2013, when police in Madras detained an influential pirate and reportedly seized pirated discs worth INR 140 million.[60] The use of these laws, generally meant for criminals who pose a threat to public order, has been criticized as draconian and in violation of civil liberties.[61]

The foregoing shows that, substantively, Indian law does not pose many concerns for copyright owners. Indeed, copyright owners should consider themselves fortunate to receive certain special privileges. However, the practical enforcement of these laws has always been weak, effectively defeating the purpose of these privileges. This is one of the ostensible reasons why India features in the Priority Watch List of countries with weak intellectual property law systems, in a report prepared by the United States Trade Representative (USTR). The USTR's report has acknowledged that 'India boasts a vibrant domestic creative industry', and has seen 'judicial orders that have strengthened enforcement against pirated movies and music online.'[62] However, it has observed that India needs to 'address its judicial inefficiencies' and 'strengthen criminal enforcement efforts, including by imposing deterrent level sentences and giving intellectual property rights prosecutions greater priority.'[63] It should be mentioned that the USTR's report has been strongly criticised in India, and India's placement in the Priority Watch List has been seen as retribution for India's protecting the interests of its generic pharmaceutical companies in patent-related matters.[64] However, in the context of copyright law, even if the USTR's opinion is guided by the narrow interests of American media companies, the concerns expressed by the Indian film industry have not been much different.[65] These concerns led the Indian Government to establish a High-Level Committee on Piracy (the Committee), dominated by industry representatives. In the next section, the author will examine some of the strategies recommended by the Committee, and argue that

[50] See, for example, *IBM v. Kamal Dev* [1993] Entertainment Law Review E40 (Delhi High Court); *Autodesk v. Shankardass* AIR [2008] Del 167 (Delhi High Court).
[51] See, for example, *Taj Television v. Mandal* [2003] FSR 22 (Delhi High Court).
[52] See Juhi Gupta, 'John Doe Copyright Injunctions in India' [2013] 18 Journal of Intellectual Property Rights 351.
[53] *RK Productions v. BSNL* (Madras High Court, 29 March 2012).
[54] See Javed Anwer, 'Blocking Website in India: Reliance Communications Shows It Is Very Easy' *Times of India* (New Delhi, 24 December 2011) <http://articles.timesofindia.indiatimes.com/2011-12-24/internet/30554592_1_block-websites-reliance-communications-reliance-entertainment> accessed 11 November 2013.
[55] Copyright Act 1957 (India) s 63.
[56] Copyright Act 1957 (India) s 63A.
[57] Copyright Act 1957 (India) s 64.
[58] Trade Marks Act 1999 (India) s 115.
[59] See Liang and Ravi Sundaram (n 14) 348, 387.
[60] 'Piracy Racket Kingpin Held Under Goondas Act After Top Cop's Order' *Times of India* (Madras, 19 February 2013) <http://articles.timesofindia.indiatimes.com/2013-02-19/chennai/37178970_1_vcds-dvds-video-piracy-cell> accessed 11 November 2013.
[61] See Prashant Reddy, 'Video Pirates, Preventive Detention and the Constitution of India' (*Spicy IP*, 28 September 2009) <http://spicyip.com/2009/09/video-pirates-preventive-detention-and.html> accessed 11 Nov 2013.
[62] Office of the United States Trade Representative, *Special 301 Report* (2013) 39 <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> accessed 11 November 2013.
[63] ibid.
[64] See Swaraj Paul Barooah, 'USTR's Special 301 Process 2013 – India on Priority Watchlist' (*Spicy IP*, 4 May 2013) <http://spicyip.com/2013/05/ustrs-special-301-process-2013-india-on.html> accessed 11 November 2013; Amiti Sen, 'India Protests against Being Put in US Priority Watch List with Insufficient IP Protection' *Times of India* (New Delhi, 8 May 2012) <http://articles.economictimes.indiatimes.com/2012-05-08/news/31626695_1_ipr-protection-patents-india-protests> accessed 11 November 2013.
[65] 'Music and Video Piracy Up, Cops Blame Lax Law' *Times of India* (Calcutta, 12 July2010) <http://articles.timesofindia.indiatimes.com/2010-07-12/kolkata/28318043_1_piracy-cases-indian-music-industry-imi> accessed 11 November 2013.

these strategies should be reconsidered in favour of certain alternative strategies.

IV. RETHINKING STRATEGIES

The general view expressed by the Indian film industry has been that the solution to curb piracy is to have stricter laws and enforcement measures. In this regard, the Committee recommended three noteworthy measures[66]: (a) that an obligation be placed on theatre owners to bar viewers from bringing camcording devices into theatres; (b) that more states in India apply preventive detention laws against pirates; and (c) that the Government enact 'three-strikes' laws requiring Internet service providers to gradually initiate action against users downloading pirated content. However, arguably, all three recommendations are inadequate or problematic.

With reference to the first recommendation, it will be nearly impossible to diligently implement such a measure in a large country like India. In the age of digital piracy, lax monitoring in even a couple of theatres could lead to pirated prints going viral on the Internet. Moreover, the quality of mobile phone cameras has improved rapidly, and will soon be at par with camcorders. It will be hard for theatres to monitor pirates who bring mobile phones into theatres and discreetly record films. It also needs to be pointed out that, increasingly, pirated copies of films in circulation are not copies of prints recorded in theatres but high-quality copies of master prints leaked even before the film is released, sometimes by employees of film companies themselves.[67]

With reference to the second recommendation, even in the unlikely event that every single state in India applies preventive detention laws to pirates, it will be impossible to expect stringent enforcement of these laws throughout India, especially in smaller towns and villages. Most police forces in Indian states are understaffed and underfunded, and their limited resources surely must be devoted to more pressing law and order problems. If the primary objective of having these laws is simply to carry out a few symbolic arrests and deter other pirates, this objective appears to have failed. In Tami Nadu—one of the first states to implement preventive laws—piracy is still rampant, as most pirates are released within a few days of being arrested via habeas corpus petitions, while such laws have failed to prevent online piracy.[68] Furthermore, there are serious questions regarding the moral and legal propriety of using such draconian laws, which are open to serious misuse, in the first place.

With reference to the third recommendation, the suggestion to adopt a three-strikes model was made to the Committee in a submission by the Motion Picture Association (MPA), the international counterpart of the Motion Pictures Association of America. The Committee's report contains no mention of the feasibility of implementing such a model in India, and no wide-ranging discussions appear to have taken place before the Committee chose to adopt the MPA's views.[69]

Legally, a three-strikes policy would pose challenges related to privacy and civil liberties. A graver problem would be the likelihood of innocent users being disconnected, since most Internet connections are shared connections, often used through cybercafés. From a policy perspective, implementing three-strikes laws could result in Internet service providers passing on costs to consumers, thus hindering the Indian Government's plans to increase Internet penetration. Even from a business perspective, a three-strikes policy might not have long-term benefits for the Indian film industry. It would make sense for the American film industry to lobby for three-strikes laws in India, as their target audience would mostly be confined to wealthy and upper-middle class English-speaking Indians. This segment dominates the 1 per cent of the Indian population that has access to broadband Internet, and can easily access pirated content online.

However, the Indian film industry's target audience includes not just this privileged segment, but a much larger rural and lower middle-class segment that constitutes the vast majority of India's population. As members of the latter segment gradually rise up the economic ladder, they are likely to invest in home Internet connections, if affordable. The availability of free online entertainment on the Internet might even encourage such spending. Thus, if the Indian film companies aid in keeping Internet costs low by not insisting on three-strikes laws, and even upload some content for free online, they might gain access to an enormous, untapped segment of the Indian population. Even if this segment occasionally watches pirated films online, the benefits of gaining access to this segment would outweigh the losses due to piracy within this segment.

[66] Committee on Piracy (n 12) 5–8.

[67] See, for example, 'Editing Assistant Nabbed for Leak of *Attarintiki Daredi*' *DNA* (Bombay, 25 September 2013) <http://www.dnaindia.com/entertainment/report-editing-assistant-nabbed-for-leak-of-attarintiki-daredi-1893643> accessed 11 November 2013.

[68] See Manish Raj, 'Police Helpless as Video Piracy Thrives in City' *Times of India* (Madras, 18 April 2013) 5; K Praveen Kumar, 'Goondas Act Fails to Curb Thriving Video Piracy in TN' *Times of India* (Madras, 20 November 2009) 2.

[69] Committee on Piracy (n 12) 5–8.

Hence, arguably, it is time for the Indian film industry to think beyond the demand for stricter copyright laws and contemplate some alternative strategies to combat piracy. The author would like to propose three such strategies.

First, the industry should devote more resources to fighting piracy in developing countries. The Indian cinema audience is characterized by a sharp demographic divide. A crucial segment of the Indian film audience consists of South Asian communities in developed nations like the United States, the United Kingdom, Canada, and Australia. Since ticket prices in these countries are much higher than in India, a film that is even moderately successful in these countries yields more revenues than a box-office hit in India. Thus, despite being outnumbered by audiences in India, Indian communities abroad form the primary target audience for most large Indian film producers.[70] Just as theatre audiences in developed nations are more profitable to the Indian film industry, downloaders of pirate content in such countries conversely cause more losses to the industry. For example, even in the most expensive theatres in urban India, the ticket price of an Indian film would be around INR 250. In cheaper theatres and in rural areas, a ticket could cost one-tenth that amount. In comparison, a ticket in a British theatre would cost between GBP 10 and GBP 15 (roughly between INR 900 and INR 1,250).

Thus, if a person in London skips a plan to pay GBP 15 to watch an Indian film at a Leicester Square theatre because he or she found the film on a torrent sharing website, the economic loss resulting from this lost viewer will be far more than that caused by a lost viewer in India. There is no doubt that such losses are already taking place. For instance, in the case of *Kaminey*, mentioned above, a third of the illegal downloads originated from outside India. Curiously, the Indian film industry's copyrights have been 'largely unenforced' outside India, due to a reluctance to litigate and lack of industry influence.[71] One of the few exceptions—a suit filed in Canada against alleged pirates of the hugely successful film *3 Idiots*—resulted in a rolling Anton Piller order granted to the producer being set aside due to 'insufficient evidence as to "serious damage" and no proper proof that the defendants would be likely to hide or destroy relevant documents or things.'[72]

Rather than be dissuaded by this example, the Indian film industry should frame better litigation strategies and sue pirates abroad with greater diligence. The fact that courts in developed nations usually award high damages, and that enforcement of copyright laws in developed nations is strong would seemingly promise Indian copyright owners greater rewards than litigating in India. At the very least, the industry should try and mull strategies such as sending warning letters to home users, entering into private agreements with Internet service providers, and investing in lobbying efforts.

Second, the industry should strive to provide consumers in India with cheaper ways of accessing content. The Committee itself suggested that businesses should try to develop an 'innovative business model' and make CDs and DVDs more affordable for consumers.[73] One Indian company, the optical disc manufacture Moser Baer, has led the way. Moser Baer sells licensed copies of films for low prices, and is credited with triggering 'a small revolution in price and accessibility.'[74] In recent times, some leading Indian film studios have made films available online on YouTube for free, or for rental.[75] Sceptics would argue that consumers would prefer to access pirated content for free than pay for lawful content online, even if the latter is cheaply priced. This argument could be bolstered by citing the example of Flyte, an Indian music download website which recently closed operations due to inadequate sales.[76] However, a point often missed is that India is predominantly a cash-based economy. If companies could devise a model through which consumers rent films online by paying in cash rather than through credit cards, such a model is likely to be more successful, just as Moser Baer's business model, which relies on cash-based transactions, has been. Indeed, even executives from Flyte have acknowledged that one of the reasons the website failed was because India lacks a system of 'easy micro-payments.'[77]

Third, the industry should do its bit to address the issue of access to entertainment. The industry should try to promote the establishment of more

[70] See Arpan Banerjee, 'A Case for Economic Incentives to Promote "Parallel" Cinema in India' [2011] 16 Media and Arts Law Review 21, 24.
[71] Liang and Sundaram (n 14) 387.
[72] *Vinod Chopra Films v Doe* [2010] FC 387 (Federal Court of Toronto).
[73] Committee on Piracy (n 12) 29.
[74] Liang and Sundaram (n 14) 370–3.
[75] See Sita Wadhwani, 'Shemaroo's YouTube Bollywood Movie Channel' (*CNN*, 9 May 2011) <http://travel.cnn.com/mumbai/life/shemaroos-bollywood-youtube-channel-973612> accessed 11 November 2013; Nikhil Pahwa, 'Bollywood Movie Dabangg Released On YouTube; Need To Improve Discovery' (*Medianama*, 3 December 2011) <http://www.medianama.com/2011/01/223-youtube-dabangg> accessed 11 November 2013.
[76] See Javed Anwer, 'Flyte Fails to Take Off, Flipkart to Shut Down Music Store' *Times of India* (New Delhi, 29 May 2013) <http://articles.timesofindia.indiatimes.com/2013-05-29/internet/39600700_1_flipkart-itunes-store-music-store> accessed 11 November 2013.
[77] ibid.

theatres in India, along with a culture of watching cinema on the big screen where none such exists. India has a very low screens-per-capita ratio, the industry's excuse being high taxes on theatres and an absence of incentives to invest.[78] Yet, lack of access to legitimate content will only encourage piracy, and it is tempting to argue that it even justifies piracy. For instance, the noted director Anurag Kashyap has observed:

> I am what I am today simply because of piracy … it was because of piracy that people saw my work. Not all films are legally available in every city. Even Hollywood films that you may want to see aren't available in your city and, therefore, often we take the help of piracy because there are no legal alternatives.'[79]

It is thus imperative for the industry to make efforts to open theatres in areas where there are few. If necessary, the industry should lobby with the Government for incentives to make such investments. Even without the presence of large theatres, the industry can explore other monetization options. For example, there is no copyright-collecting society for films in India such as the Motion Picture Licensing Corporation. If the industry works to establish such an organization, it can license films to smaller venues in both urban and rural areas.

V. CONCLUSION

India is often perceived as a country with weak copyright laws. In truth, Indian laws are more than adequate to tackle copyright infringement. It is really the enforcement of these laws, particularly criminal laws, that has been inadequate. In the age of digital piracy, the smallest chink in the enforcement mechanism could lead to pirated films going viral. This is precisely the reason why enacting more stringent laws would do little to curb piracy. There are two facts that the Indian film industry must ponder over: (a) the discouraging fact that India is too large, too poor, and too complex a country to have an enforcement mechanism similar to that in developed countries; and (b) the encouraging fact that a large segment of the Indian population, which lacks access to the Internet and other avenues for entertainment, could grow to become a lucrative market if and when it gains access to these amenities. Thus, the industry should explore alternative strategies to combat piracy, keeping in mind these realities.

[78] See Banerjee (n 70) 8–11.

[79] Prathna Tiwari, 'It Was Because of Piracy that People Saw My Work' – Anurag Kashyap' (*Bolly Spice*, 5 August 2012) <http://bollyspice.com/47518/it-was-because-of-piracy-that-people-saw-my-work-anurag-kashyap> accessed 11 November 2013.

BIBLIOGRAPHY

Anwer J, 'Blocking Website in India: Reliance Communications Shows It Is Very Easy' *Times of India* (New Delhi, 24 December 2011) <http://articles.timesofindia.indiatimes.com/2011-12-24/internet/30554592_1_block-websites-reliance-communications-reliance-entertainment> accessed 11 November 2013

Banerjee A, 'A Case for Economic Incentives to Promote 'Parallel' Cinema in India', (2011) 16 Media and Arts Law Review 21

Barooah S, 'USTR's Special 301 Process 2013 – India on Priority Watchlist' (*Spicy IP*, 4 May 2013) <http://spicyip.com/2013/05/ustrs-special-301-process-2013-india-on.html> accessed 11 November 2013

Burke J, 'Indian Computer Tablet Could Herald an Internet Revolution' *The Guardian* (London, 12 January 2012) <http://www.guardian.co.uk/technology/2012/jan/12/indian-computer-tablet-aakash-internet> accessed 1 November 2013

Chatterji S, 'Protest Against Piracy: Death Knell for Music?' (*India Together*, 27 July 2013) <http://www.indiatogether.org/2013/jul/eco-piracy.htm> accessed 11 November 2013

Committee on Piracy, Report of the Committee on Piracy (2010)

Debroy B, Chakraborty D, and Guha A, 'Copyright Protection and Consumer Welfare: A Case Study of Rabindra Rachanabali' [2005] 6 Global Business Review 55

Ernst and Young, The Effects of Counterfeiting and Piracy on India's Entertainment Industry (2009)

Federation of Indian Chambers of Commerce and Industry and KPMG, *Indian Media and Entertainment Industry Report* (2011)

Frater P, 'Online Piracy in India a Global Problem' (Hollywood Reporter, 15 October 2009) <http://www.hollywoodreporter.com/news/online-piracy-india-global-problem-92365> accessed 1 October 2013

Ganti T, Bollywood: A Guidebook to Popular Hindi Cinema (Routledge 2013)

Ganguly P, '75 Politicians Watch Pirated Rajneeti DVD in Rajasthan' DNA (Bombay, 31 May 2010) <http://www.dnaindia.com/entertainment/1390219/report-75-politicians-watch-pirated-rajneeti-dvd-in-rajasthan> accessed 1 October 2013

Ghosh S, 'A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India' (2011) Queen Mary Journal of Intellectual Property 146, 162.

Gupta J, 'John Doe Copyright Injunctions in India' [2013] 18 Journal of Intellectual Property Rights 351

Indian Cinematograph Committee, *Report of the Indian Cinematograph Committee* (1928)

Jeffrey R, 'The Mahatma Didn't Like the Movies and Why It Matters: Indian Broadcasting Policy, 1920s–1990s' [2006] 2 Global Media and Communication 204

Joseph R, 'Combating Piracy' (Fifth Estate,1 November 2011) <http://t5e.iitm.ac.in/2011/11/combating-piracy> accessed 1 October 2013

Kaul G, *Cinema and the Indian Freedom Struggle* (Sterling 1998)

Kumar PK, 'Goondas Act Fails to Curb Thriving Video Piracy in TN' *Times of India* (Madras, 20 November 2009) 2

Law Commission of India, *Delays and Arrears in High Courts and Other Appellate Courts* (Law Com No. 79, 1979) [2.1]–[2.5],[15.1]–[15.2] <http://lawcommissionofindia.nic.in/51-100/Report79.pdf> accessed 11 November 2013

Liang L and Sundaram R, 'India' in Joe Karganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council 2011)

Maitra D, 'India's Broadband Base Touches 13 Million' *Deccan Herald* (Bangalore, 11 January 2012) <http://www.deccanherald.com/content/218464/indias-broadband-base-touches-13.html> accessed 1 October 2013

Martin-Jones T, 'Marius Sestier in India' (*Film HistoryNotes*, 12 June 2011) <http://www.apex.net.au/~tmj/sestier-in-India.htm> accessed 18 September 2013.

Ministry of Communications and Information Technology, *A Triad of Policies to Drive A National Agenda for ICTE* (2011)

Motion Picture Association of America, *Theatrical Market Statistics* (2012) 5 <http://www.mpaa.org/resources/3037b7a4-58a2-4109-8012-58fca3abdf1b.pdf> accessed 1 October 2013

Narayanan P, *Law of Copyright and Industrial Designs* (Eastern Law House 2007) 7–9

Office of the United States Trade Representative, *Special 301 Report* (2013).

Pahwa N, 'Bollywood Movie Dabangg Released On YouTube; Need To Improve Discovery' (*Medianama*, 3 December 2011) <http://www.medianama.com/2011/01/223-youtube-dabangg> accessed 11 November 2013

Prashant Reddy, 'Video Pirates, Preventive Detention and the Constitution of India' (*Spicy IP*, 28 September 2009) <http://spicyip.com/2009/09/video-pirates-preventive-detention-and.html> accessed 11 November 2013

Raj M, 'Police Helpless as Video Piracy Thrives in City' *Times of India* (Madras , 18 April 2013) 5

Sen A, 'India Protests Against Being Put in US Priority Watch List With Insufficient IP Protection' *Times of India* (New Delhi, 8 May 2012) <http://articles.economictimes.indiatimes.com/2012-05-08/news/31626695_1_ipr-protection-patents-india-protests> accessed 11 November 2013

Thomas Z, 'Overview of Changes to the Indian Copyright Law' [2012] 17 Journal of Intellectual Property Rights 324, 326–7.

Tiwari P, 'It Was Because of Piracy that People Saw My Work' – Anurag Kashyap' (*Bolly Spice*, 5 August 2012) <http://bollyspice.com/47518/it-was-because-of-piracy-that-people-saw-my-work-anurag-kashyap> accessed 11 November 2013

UNESCO, *Institute for Statistics, Analysis of the 2010 UIS International Survey on Feature Film Statistics* (2012) 8–10, 17–18 http://www.uis.unesco.org/FactSheets/Documents/ib8-analysis-cinema-production-2012-en2.pdf> accessed 1 October 2013

Wadhwani S, 'Shemaroo's YouTube Bollywood Movie Channel' (*CNN*, 9 May 2011) <http://travel.cnn.com/mumbai/life/shemaroos-bollywood-youtube-channel-973612> accessed 11 November 2013