COPYRIGHT PIRACY AND THE INDIAN FILM INDUSTRY: A "REALIST" ASSESSMENT♦

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Abstract

In India, the academic discourse surrounding intellectual property (IP) has been marked by great skepticism. Global IP laws have been viewed as a Western imposition detrimental to national interests. In this paper, I will make the case for a "realist" approach to film piracy in India, i.e., an approach that is rooted in legal pragmatism and draws from the New Legal Realism (NLR) movement. I will suggest a rough template for such an approach, referring to seven broad elements: a) international relations realism; b) contextualization of IP; c) contextualization of copyright; d) the views and interests of the film industry (including creators); e) the working of the pirate economy; f)

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the law and its enforcement; and g) reforms in the law and industry strategies. In keeping with the spirit of NLR, I will explore a range of top-down and bottom-up perspectives. I will conclude by commenting on the feasibility of certain legal reforms.

INTRODUCTION

The school of legal realism (specifically, American Legal Realism (ALR))[1] and the school of international relations realism[2] both reject formalist scholarship. Yet, they share "little kinship" with one another.[3] The schools appear divided in terms of their underlying perspectives, i.e., a top-down approach focused on the consolidation of state power in the case of international relations realism and a bottom-up approach focused on the needs of ordinary citizens in the case of ALR. However, the more recent NLR movement[4] arguably provides an opportunity to

[1] Domestic law scholars tend to associate the term "realism" with the ALR movement. *See* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 1-15 (2013) (introducing ALR). Prior to the birth of ALR, Oliver Wendell Holmes had famously advocated a study of law that went beyond textual formalism. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467-69 (1897) (stating, *inter alia*, that judges and lawyers had neglected to weigh the "social advantage" of laws, and that "the man of the future" would not be "the blackletter man" but "the man of statistics and the master of economics"); OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (stating "[t]he life of the law has not been logic: it has been experience"). ALR scholars adhered to such non-formalist methods, focusing on those "[b]ehind decisions," i.e. judges with fallibilities, and those "beyond decisions," i.e. "people whom rules and decisions directly or indirectly touch." Karl N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 HARV L. REV. 1222, 1222 (1931)). However, ALR scholars often leaned towards the post-Depression "New Deal politics" of the American left. Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. SOC. SCI. 555, 557 (2010) [hereinafter, Suchman & Mertz, *Toward a New Legal Empiricism*]. George Peek, a right-leaning Roosevelt administration official went to the extent of describing some ALR scholars as "Lenin baby chicks." GEORGE PEEK & SAMUEL CROWTHER, WHY QUIT OUR OWN 117 (1936).

[2] International law and international relations scholars tend to associate the term "realism" with the concept of "political realism" in international relations theory, where "national interest" assumes primacy over moral considerations. *See* Hans J. Morgenthau, *Six Principles of Political Realism, in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES 7, 12 (Robert J. Art & Robert Jervis eds., 2011) (arguing that "political realism" ought to be "defined in terms of power and rational order," which "refuses to identify with moral aspirations." Statespersons should distinguish between their official duty, which is "to think and act in terms of the national interest," and their personal wish, "which is to see their own moral values and political principles realized throughout the world."). Rudimentary notions of political realism date back to ancient thinkers. *See* Colin Elman, *Realism, in* INTERNATIONAL RELATIONS THEORY FOR THE TWENTY-FIRST CENTURY: AN INTRODUCTION 11, 11-12 (Martin Griffiths ed., 2007) (citing the examples of Thucydides and Kautilya). However, it was Morgenthau who advanced the case for a "truly scientific theory of international law," which understands "international law as it really is" and focuses on "psychological, social, political and economic forces." Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 269-73 (1940). *See also* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 113, 117 (1979) (arguing that "power," "struggle" and "accommodation" are more influential than "authority and law."). According to international relations realists, states are selfish actors and "do not inherently possess a normative interest" in international law. Note, *Tackling Global Software Piracy under TRIPS: Insights from International Relations Theory*, 116 HARV. L. REV. 1139, 1145 (2003) [hereinafter Note, *Tackling Global Software Piracy under TRIPS*].

[3] JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 88 (2011). *See also* Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189, 205 (2015) [hereinafter Shaffer, *New Legal Realist Approach to International Law*] (stating "International relations realism…completely ignored *legal* realism.").

[4] *See generally* Howard Erlanger et al., *Is It Time for a New Legal Realism?* 2005 WIS. L. REV.

reconcile some of these differences,[5] as well as differences between other elite-focused approaches and legal realism. In this paper, I will suggest an NLR-style template for the study of "piracy" of copyright and related rights,[6] with reference to the Indian film industry.

335 (2005) (outlining the vision of the NLR movement and providing examples of NLR studies) [hereinafter Erlanger et al., *Is It Time for a New Legal Realism?*]. An NLR method "implies a rejection of theory-driven orthodoxies that do not take account of people's lived experience of the law in particular settings." *Id.* at 345. It seeks to adopt a "ground-level up" perspective, like ALR, but also pays heed to "the experiences of elites and professionals," arguably not a typical ALR trait. Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 1, at 561-62. Although NLR scholars can be "torn between a moral sympathy for the bottom of the pyramid and a practical dependence on the top," NLR seeks to provide "serviceable empirical answers to the policy questions of the legal sector." Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 1, at 576. NLR is thus "fundamentally pragmatic," recognizing that "law and politics and society, not to mention markets and governments . . . interact simultaneously," again, not a typical ALR characteristic. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 130, 137 (2009) [hereinafter Nourse & Shaffer, *Varieties of New Legal Realism*]. In the context of international economic law, NLR adopts "both a top-down and a bottom-up approach" and examines "the ways in which the national/local and international/transnational are linked." Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 29, 39 (Colin Picker et al. ed., 2008). In doing so, the domestic focus of ALR naturally gives way to one conscious of "the contemporary situation of economic and cultural globalization." Shaffer, *New Legal Realist Approach to International Law*, *supra* note 3, at 189-90. *See also* Erlanger et al., *Is It Time for a New Legal Realism?* at 343-44 (stating "[o]ne of the key tests of New Legal Realism will be its success in taking on major issues involved with the so-called 'globalization of law.'. . . It is not enough simply to export the analytical tools that work well in the context of the United States.").

[5] Shaffer has distanced NLR from international relations realism and stated that the latter takes a "reductive view of state interests." Shaffer, *New Legal Realist Approach to International Law*, *supra* note 3, at 205. In contrast, this paper gives considerable emphasis to international relations realism. However, I have identified international relations realism as only one of the elements that might shape an NLR-influenced approach to studying film piracy. This is not the same as displacing NLR with international relations realism. Rather, it helps provide a top-down perspective to NLR research. Some justifications for this approach may be drawn from an observation by leading NLR scholars that "the foreign policy of the United States has increasingly embraced an active role in promoting democracy and the rule of law abroad." Erlanger et al., *Is It Time for a New Legal Realism?*, *supra* note 4, at 344. Moreover, Shaffer himself has co-authored a paper with an international relations professor. They have argued that developing countries can "creatively" cite case law from the West and "help to foil" pressure from those very countries, citing how India has implemented international law obligations on pharmaceutical patents by "building from the foreign in a manner that advances the local." Gregory Shaffer & Susan K. Sell, *Transnational Legal Ordering and Access to Medicines*, *in* PATENT LAW IN GLOBAL PERSPECTIVE 97, 121 (Ruth L. Okediji & Marco A. Bagley eds., 2014).

[6] The term "copyright" generally refers to a bundle of rights given to authors of literary and artistic works and producers of films and sound recordings. These rights include rights of reproduction, adaptation, distribution, rental or lending, public performance, and communication. The term "related rights" generally refers to certain rights of performers and producers that are similar to copyright but enjoy a lesser degree of protection. *See* BENTLY & SHERMAN, INTELLECTUAL PROPERTY LAW 140-76, 340-41 (4th ed. 2014). The term "[p]iracy" is not commonly used in national IP legislation, but is a popular term for infringements concerning the reproduction, distribution and communication rights. According to a definition by UNESCO, piracy "includes the reproduction and distribution of copies of copyright-protected material, or the communication to the public and making available of such material on on-line communication networks, without the authorisation of the right owner(s) where such authorization is required by law." *What is Piracy?*, UNESCO (2007), http://portal.unesco.org/culture/en/ev.php-URL_ID=

From humble beginnings, the Indian film industry has today become a sizable economic and cultural force.[7] Piracy is a major concern of the industry. This paper advocates a "realist" approach to the subject. By "realist" I mean a "pragmatic,"[8] NLR-influenced approach that, among other things, rejects "left-leaning postmodernism" and "head-in-the-clouds empiric-free reasoning."[9] In part I of the paper, I

39397&URL_DO=DO_TOPIC&URL_SECTION=201.html. This definition contrasts with the legal definition of "pirated copyright goods," by the WTO, as "any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation." Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 51 n. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS of the URUGUAY ROUND of MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. The UNESCO definition is preferable to the WTO definition as it is clearly more conscious of newer forms of piracy, such as online piracy. However, a slight flaw with the UNESCO definition is that it refers to "copyright-protected material," while the WTO definition refers to "copyright or a related right." In my paper, my use of the term "piracy" will correspond to the UNESCO definition, but will include, where appropriate, the piracy of content concerning related rights.

[7] The Indian film industry has grown to become the world's largest in terms of films produced and tickets sold, sixth-largest in terms of box-office collections, and second fastest-growing overall. *See* UNESCO INSTITUTE FOR STATISTICS, DIVERSITY AND THE FILM INDUSTRY: ANALYSIS OF THE 2014 UIS INTERNATIONAL SURVEY ON FEATURE FILM STATISTICS 8-10, 26, UNESCO (2016), http://www.uis.unesco.org/culture/Documents/ip29-diversity-film-data-2016-en.pdf. The cultural impact of Indian cinema in India is enormous. Outside India, Indian cinema enjoys popularity not only among the global Indian diaspora, but also among native populations in parts of Asia and Africa, and forms a component of India's "soft power" in these countries. *See* SHASHI THAROOR, INDIA: FROM MIDNIGHT TO THE MILLENNIUM AND BEYOND xix-xx (1997); DAYA KISHAN THUSSU, COMMUNICATING INDIA'S SOFT POWER: BUDDHA TO BOLLYWOOD 127-154 (2013). *See also* TEJASWINI GANTI, BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA 5-21 (discussing the historical origins of the Indian film industry).

[8] *See* WILLIAM JAMES, PRAGMATISM 32 (1907) (stating that pragmatism "stands for no particular results . . . has no dogmas, and no doctrines."); Brian Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 355 (1996) (stating "precisely because the pragmatists stood for no particular results or doctrines other than urging application of the scientific method in the gathering of knowledge, pragmatism serves as the perfect theoretical foundation for sociolegal studies."); RICHARD POSNER, OVERCOMING LAW 8, 399 (1995) (defining a "pragmatic approach" as one that places "emphasis on the practical and the useful," where the "right rule" is the "the sensible, the socially apt, the reasonable, the efficient rule."). Nourse & Shaffer, *Varieties of New Legal Realism*, *supra* note 4, at 69 n.23 (stating "[o]ver time, Judge Posner has moved away from (if not renounced) his earlier neo-classical law-and-economics claims. . . . (citation omitted). One might say . . . that Judge Posner too has become a new legal realist.").

[9] Nourse & Shaffer, *Varieties of New Legal Realism*, *supra* note 4, at 137. In this paper, I have undertaken empirical research of a qualitative nature. Some scholars prefer an admittedly "narrow definition" of empirical research, confining it to "the subset of empirical legal scholarship that uses statistical techniques and analyses." Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 U. ILL. L. REV. 1739, 1740 (2011). A broader definition of empirical research includes qualitative research methods, such as interviews, surveys, and the analysis of historical material. *See* Lee Epstein & Gary King, *Exchange: Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1, 1-3 (2002). NLR scholars advocate a "methodological eclecticism" that embraces "qualitative as well as quantitative" work. Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 4, at 562.

will argue that there exists a pervasive moral skepticism towards IP and intellectual property rights (IPRs) in India. I will provide a glimpse of such critiques, linking them with broader global critiques of the TRIPS Agreement. In parts II to IX, I will suggest seven elements that ought to form the building blocks of a realist approach to film piracy in India: a) international relations realism; b) contextualization of IPRs; c) contextualization of copyright; d) the views and interests of the film industry (including creators); e) the working of the pirate economy; f) the law and its enforcement; and g) reforms in the law and industry strategies.

In this article, I will disagree with the sweeping opposition to IP regimes expressed by many in India. I will suggest a more nuanced approach that is less swayed by idealism. I will draw a distinction between the different varieties of IPRs and the economic contexts in which they operate, and will acknowledge the self-serving national interests of the Indian state and industry in this regard. I will point to evidence suggesting that Indian policymakers have adopted morally wavering positions on IPRs depending on national economic interests. I will argue that, as India generates copious amounts of indigenous IP in the film sector, a study of film piracy arguably should be rooted in the realization that the interests of the Indian state and industry lie in preventing such piracy. This stands in contrast with the pharmaceutical sector, for example, where India is a net importer of IP.[10] I will then

NLR scholars believe that to be fully informed about "social context and action" requires not only statistical analyses but also "field-intensive methods such as participant observation and interviewing." Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 4, at 562. Thus, NLR has been described as "contemporaneous and kindred" with the Empirical Legal Studies school, but with "distinct (and occasionally discordant) tones." Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 4 at 557. In defense of NLR, it can be argued that the distinction between quantitative and qualitative data "is essentially the distinction between numerical and nonnumerical data," and qualitative data can "be richer in meaning" than quantitative data. EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 36 (9th ed., 2001). There are many understandings of how qualitative research ought to be conducted. Some of the methods and strategies that I have attempted include conducting "loosely structured" interviews, adopting an attitude of "empathy rather than distance," using inductive reasoning, employing a "grounded theory" method that "involves developing theory as the research proceeds rather than testing a hypothesis posited in advance," and qualitatively analyzing documents other than legislation and case law. *See generally*, Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926 (Peter Cane & Herbert Kritzer eds., 2010).

[10] This argument has previously been made by Peter Yu, who has stated "policymakers in less developed countries often find themselves confronted with contradictory intellectual property policies. A case in point is India. Because of its booming computer software and movie industries, it is logical for policymakers in India to push for stronger protection of computer software and audiovisual works. . . . However, this high-protectionist rhetoric has to be toned down dramatically when dealing with patented chemicals, protected drugs, and public health issues. Instead of stronger protection, the country will benefit from weaker protection, or even special exceptions, for pharmaceuticals, chemicals, food, and agricultural products. Thus, it is unwise for policymakers and commentators to take either a high-protectionist or low-protectionist position without considering which economic sectors are at issue." Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 9 (2005). Elsewhere, Yu has

provide an overview of the piracy landscape in India. I will conclude by discussing relevant legislation, case law, and enforcement strategies, as well as the feasibility of certain proposed legal reforms. Throughout my paper, I will refer to both top-down and bottom-up perspectives. I will refer to interviews conducted with, among others, rights owners, creators, practitioners, lawmakers, and both sellers and consumers of pirated content.[11]

Historically, IP law—particularly copyright law—has been a neglected topic in Indian academia.[12] While recent years have witnessed a growth in writings on IP law by Indian scholars,[13] there is still a paucity of literature on film piracy, especially literature falling within the framework of NLR research.[14] I will accordingly seek to address,

described this paradoxical approach as "intellectual property schizophrenia." *See generally* Peter K. Yu, *International Enclosure, The Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1 (2007).

[11] In the context of IP law research, it has been observed that interviews with lawyers and rights owners can "provide a rich picture . . . of how IP is operating in different industries.**"** Kimberlee Weatherall et al., *IP Enforcement in the UK and Beyond: A Literature Review*, 64, INTELL. PROP. OFF. (2009), http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-ipenforcement-200905.pdf. Interviews can also provide useful bottom-up perspectives. For example, Peter Drahos has interviewed Indian patent examiners in Bombay. Drahos' study has drawn a contrast between the "technocratic exercise" of patent law reforms by "policy elites" and the working of patent examiners in "derelict" buildings with "hanging wires and pigeons." Peter Drahos, *The Jewel in the Crown: India's Patent Office and Patent-Based Innovation, in* INTELLECTUAL PROPERTY POLICY REFORMS 80 (Christopher Arup & William van Caenegem eds., 2009). Similarly, Jessica Silbey has noted the paucity of "qualitative studies of the experiences of innovators and creators", and conducted semi-structured interviews of individuals selected through non-random, "stratified" sampling. JESSICA SILBEY, THE EUREKA MYTH 287-291 (2010). The method of selecting interviewees in such studies can be termed "purposeful sampling," its aim being to select "[i]nformation-rich cases . . . from which one can learn a great deal about issues of central importance to the purpose of the research." MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS 46 (1990). In this paper, I have tried to follow this technique.

[12] *See* Upendra Baxi, *Copyright Law and Justice in India*, 28 J. INDIAN L. INST. 497 (1986) [hereinafter Baxi, *Copyright Law and Justice in India*] (observing that "the law of copyright in India has received scant juristic attention"); Shubha Ghosh, A *Roadmap for TRIPS: Copyright and Film in Colonial and Independent India*, QUEEN MARY J. INTELL. PROP. 146, 161 (2011) [hereinafter Ghosh, *A Roadmap for TRIPS*] (stating that "secondary literature is thin" on issues such as "the development of copyright law in India."). *See also* Arpan Banerjee & Ashish Bharadwaj, *Intellectual Property Rights Education in India: A Case for Reform*, 1 L. & POLY. BRIEF 1 (2015), http://www.jgls.edu.in/PDF/Volume-1-Issue-1-Mar-2015.pdf (discussing various shortcomings of IP law research in India).

[13] *See, e.g.* Velmurugan Chandran, *Research Trends in Journal of Intellectual Property Rights (JIPR): A Bibliometric Study*, LIBR. PHIL. AND PRAC., Paper 1043 (2013) (finding that the Journal of Intellectual Property Rights, India's leading IP law journal, published nearly 300 articles by Indian scholars between 2007 and 2012, although the average length of each article only spanned eight pages).

[14] *See* Rahul Telang & Joel Waldfogel, *Piracy and New Product Creation: A Bollywood Story*, SSRN (Aug. 6, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478755 (stating that, in the context of research on film piracy and the Indian film industry, "empirical research has been severely impeded due to lack of data, despite the industry's prominence."). Much of the literature on film piracy in India can arguably divided into two divergent categories. At one end, studies by the U.S.-India Business Council and the Rand Corporation have discussed the

inter alia, four questions that have been comparatively under-researched. First, where does film piracy fit within the Indian government's larger outlook on IP? Second, how do artists and producers in India react to piracy? Third, what legal strategies have been adopted by the Indian film industry to counter piracy, and what challenges do the industry's lawyers face? Fourth, what legal and practical obstacles might stronger copyright laws face in India? Although I will suggest a few legal reforms and business strategies that might help the industry to counter piracy, I must stress that the primary purpose of my paper is to advocate for a change in the outlook to studying film piracy (and IP law in general) in India, and perhaps other developing countries. Thus, some of my prescriptions are tentative and meant to provoke more focused research and deliberation through better empirical and interdisciplinary approaches.

economic harm that film piracy causes the industry. *See* US-INDIA BUSINESS COUNCIL & ERNST & YOUNG, THE EFFECTS OF COUNTERFEITING AND PIRACY ON INDIA'S ENTERTAINMENT INDUSTRY (2009) [hereinafter *USIBC Report*]; GREGORY F. TREVERTON ET AL., FILM PIRACY, ORGANIZED CRIME AND TERRORISM (2009). However, these studies lack a worm's eye view of piracy. They also lack a rigorous analysis of case law and legislation. At the other end, the Indian scholar and activist Lawrence Liang has examined piracy from a sociological perspective. In one paper, Liang has examined how residents of a slum in Bombay create their own home video remakes of well-known films. Lawrence Liang, *Piracy, Creativity and Infrastructure: Rethinking Access to Culture*, SSRN (Jul. 20, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436229). In another (co-authored) paper, Liang has visited bazaars and studied the pirate economy. Lawrence Liang & Ravi Sundaram, *India*, *in* MEDIA PIRACY IN EMERGING ECONOMIES 339, 348-50. (Joe Karganis ed., 2011) [hereinafter Liang & Sundaram, *India*]. Liang's work no doubt provides valuable insights. His work with Sundaram, which contains significant ground-level empirical research, might even be categorized as a model for NLR researchers. However, one problem with using Liang's work as a reference point for NLR research is that he is a "copyleft" activist who has opposed the concept of copyright itself. *Infra* notes 72-74 and accompanying text. Hence, arguably, neither the industry-centric studies nor Liang's writings truly fall within the framework of NLR research. An exception to the paucity of Indian NLR research on film piracy is a recent monograph by a young academician, Arul Scaria. ARUL GEORGE SCARIA PIRACY IN THE INDIAN FILM INDUSTRY: COPYRIGHT AND CULTURAL CONSONANCE 200 (2014). Scaria, noting that there is a "clear dearth of research" in India on film piracy, *id.* at 17, has employed a "mixed methods" approach to studying film piracy, using "qualitative data" like legal analyses and interviews, and "quantitative components . . . includ[ing] data from a survey among consumers in India." *Id.* at 220-22. Like Scaria's monograph, another example of NLR-style research on the subject is a paper by Brandon Hammer, a young American lawyer. Brandon Hammer, *Smooth Sailing: Why the Indian Film Industry Remains Extremely Successful in the Face of Massive Piracy*, 5 HARV. J. SPORTS & ENT. L. 147) [hereinafter Hammer, *Smooth Sailing*]. Hammer has interviewed members representing the Indian film industry, and in this sense his study (like mine) has a fairly strong top-down focus. However, Hammer (like me) has also adopted a bottom-up perspective by personally interacting with vendors selling pirated films. Liang, while criticizing Scaria for confining himself "within the framework of law reform" and being "ahistorical," has nevertheless described his approach as "balanced" and "much overdue" in Indian academia. Lawrence Liang, *Insights on Film Piracy*, 47 ECON. AND POL. WEEKLY 29, 30 (2014) [hereinafter Liang, *Insights on Film Piracy*]. The same can also be said of Hammer's paper. My paper thus aims to add to such emerging literature and suggest a way forward for future researchers.

I. SKEPTICISM TOWARDS IPRS IN INDIA

Before considering whether Indian IP law scholarship ought to be more pragmatic, it is important to understand the strong, if not overwhelming, skepticism that exists towards IPRs in India, starting with general global critiques of IPRs.

The philosophical and historical roots of IPRs date back to Europe many centuries ago.[15] In modern times, courts have protected IP through Lockean reasoning,[16] while economists have viewed IP as an incentive to investment.[17] Yet, numerous scholars have taken a contrary view and have questioned the basis for IP protection.[18] From an ideological

[15] The world's first IP laws are believed to have been enacted in Medieval Europe, particularly 15th century Venice. *See* Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 21 (Ronan Deazley et al. eds., 2010). However, some scholars have traced back rudimentary IP laws to ancient Greece. *See, e.g.*, NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF TRADEMARKS AND DESIGNS 7-8 (2006). Philosophically, IPRs have been justified by transposing the "labor theory" of John Locke—to argue that individuals should have rights over the fruits of their intellectual labor—and the "personality theory" of Georg Wilhelm Friedrich Hegel—to argue that a creative work is an extension of the personality of its author. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

[16] This can be witnessed, for example, in a string of English cases on copyright law. *See* Walter v. Steinkopff (1892) 3 Ch. 489, 495 (Justice North stating "[f]or the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labor and expenditure of the Plaintiffs in procuring news for the purpose of saving labor and expense to themselves."); Walter v. Lane (1900) A.C. 539, 545 (Lord Chancellor Halsbury stating "I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labor, skill, and capital of another."); Ladbroke v. William Hill (1964) 1 W.L.R. 273, 291 (Lord Devlin stating "[f]ree trade does not require that one man should be allowed to appropriate without payment the fruits of another's labor, whether they are tangible or intangible.").

[17] *See, e.g.*, Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616 (1962); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495, 499-500 (1970) (stating that trademarks can serve as a means of rectifying "quality uncertainty"); WILLIAM M LANDES & RICHARD A POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 168, 329 (2003) (stating that trademarks reduce "consumers' search costs," and that, in the absence of patents, "inventive activity would be inefficiently biased towards activities that can be kept secret"); Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 130-34, 152 (1998) (linking stronger IPRs with greater foreign direct investment).

[18] Such scholarship has ranged from theory-based claims that "non-holders of IPRs have moral entitlements to access," STEVEN ANG, THE MORAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS 13 (2013), to empirically-grounded claims that patents hinder access to medicines in developing countries. Joan-Ramon Borrell and Jayashree Watal, *Impact of Patents on Access to HIV/AIDS Drugs in Developing Countries*, HARV. U. CTR. FOR INT'L DEV., (May 2002), http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centersprograms/centers/cid/publications/faculty/wp/092.pdf. Among economists, Joseph Stiglitz has questioned whether patents, particularly pharmaceutical patents, should exist at all. Stiglitz has claimed that "important innovations not driven by IPR" have occurred in the absence of patent protection, such as open-source software. Furthermore, Stiglitz has argued that the "patent system impedes access to lifesaving drugs for billions." Stiglitz has proposed a "prize system" as an "alternative to the patent system," which "entails giving a prize to whoever comes up with an innovation." *See generally* Joseph Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J.

standpoint, the concept of private ownership of IP has been viewed as antithetical to socialist and Marxist principles.[19]

Frequently, critical narratives on IPRs have been framed in terms of a conflict between developing and developed countries. It has been alleged that governments in the U.S. and Europe were "pressured" by their industries to engineer a "regime shift" in the global regulation of IP law from World Intellectual Property Organization (WIPO) to the World Trade Organization (WTO).[20] The U.S. has been criticized for attempting to impose its IPR regime on developing counties through the Trade Related Aspects of Intellectual Property (TRIPS) Agreement and for furthering the interests of its corporations, particularly in the life sciences and pharmaceutical sectors.[21] The adoption of the Development Agenda by the WIPO General Assembly[22] has thus been hailed.[23] There has also been criticism of the attempts by entities in developed countries to appropriate the traditional knowledge of developing countries, ranging from the attempted "biopiracy" of

1693 (2008) [hereinafter Stiglitz, *Economic Foundations of IPRs*].

[19] *See* Eben Moglen, *The dotCommunist Manifesto* (Jan. 2003), http://emoglen.law.columbia.edu/my_pubs/dcm.html (drawing from Marxian concepts of class struggle and calls for the "[a]bolition of all forms of private property in ideas"); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 5 (2003) (referring to American cultural history and calling for a "thin" form of copyright that is "just strong enough" to reward *aspiring* artists); Noam Chomsky, Speech Delivered at Washington State University (Apr. 22, 2005), http://www.worldsocialism.org/spgb/socialist-standard/2000s/2006/no-1217-january-2006/intellectual-property-further-restriction-persona (stating that IPRs "guarantee monopoly pricing power to private tyrannies"); Mick Brooks, *Intellectual Property Rights – The Modern Day Enclosure of the Commons*, INT'L MARXIST TENDENCY (Nov. 22, 2005), http://www.marxist.com/intellectual-property-rights221105.htm (stating that "capitalists . . . destroy the commons by turning them into private property" and that IP laws are "slowing . . . the process of mutual exchange of ideas"); Slavoj Žižek, *The Revolt of the Salaried Bourgeoisie*, LONDON REV. OF BOOKS (Jan. 26, 2012), http://www.lrb.co.uk/v34/n02/slavoj-zizek/the-revolt-of-the-salaried-bourgeoisie (stating that IP laws have led to the privatization of the general intellect); WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 68 (1995) (stating that some communist ideologues in China viewed IPRs as "intrinsically antithetical to socialist principles and inherently corrupting."). *See also* the views of the Third World Approaches to International Law (TWAIL) movement, *infra* note 52.

[20] Major differences between the WIPO-governed regime and the WTO-governed regime include the fact that the WTO has a stronger enforcement mechanism through its dispute resolution mechanism, as well as stronger substantive IP provisions. *See generally* Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System*, 7 PERS. ON POL. 39 (2009).

[21] Joseph Stiglitz, *How Intellectual Property Reinforces Inequality*, N.Y. TIMES (Jul. 14, 2013), http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality.

[22] WIPO Doc. A/42/16, Annex A (Nov. 12 2007), http://www.wipo.int/ip-development/en/agenda/recommendations.html. The proposals adopted as a part of the Development Agenda include calls to "take into account different levels of development" while setting norms, *id.* at ¶ 15, "[c]onsider the preservation of the public domain within WIPO's normative processes," *id.* at ¶ 17, and "further facilitate access to knowledge and technology for developing countries" and Least Developed Countries, *id.* at ¶ 19.

[23] Neil W. Netanel, *The WIPO Development Agenda and its Development Policy Context*, *in* THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 1, 4 (Neil W. Netanel ed., 2008).

medicinal plants like neem and turmeric[24] to the unacknowledged use of traditional cultural expressions.[25]

In India, such critiques have found deep resonance. In public discourse, IPRs are often perceived with great negativity and viewed as a Western imposition meant to benefit Western multinational corporations. I will now provide a brief glimpse of such skepticism, situating it within a broader historical and political narrative.

In ancient India, there existed a rich literary and scientific tradition.[26] However, rights akin to IPRs do not appear to have been contemplated in legal texts.[27] Indeed, the fact that the authors of some Hindu legal texts chose to remain anonymous possibly suggests a juristic outlook indifferent towards IPRs.[28] Similarly, ancient Indian healers were motivated by humanism and were opposed to the commercialization of their skill and knowledge.[29] In the field of commerce, prices of goods were fixed by the state, and industries ranging from ship-building to trade in geographical goods were state-controlled and closed to private enterprise.[30] The *Arthashastra*, ancient India's most well-known political treatise, contemptuously described merchants as "thieves in effect."[31]

Modern IP laws in India were first introduced in colonial India and were modeled on English laws. The origins of copyright laws in the West had much to do with concerns over the economic harm suffered by authors because of book piracy.[32] Some of the West's greatest

[24] *See* Stiglitz, *Economic Foundations of IPRs*, *supra* note 18, at 1709, 1716; Vandana Shiva & Radha Holla-Bhar, *Piracy by Patents: The Case of the Neem Tree*, *in* THE CASE AGAINST THE GLOBAL ECONOMY: AND FOR A TURN TOWARD THE LOCAL 146-47 (Jerry Mander & Edward Goldsmith eds., 1996).

[25] *See* CHIDI OGUAMANAM, INTELLECTUAL PROPERTY IN GLOBAL GOVERNANCE: A DEVELOPMENT QUESTION 186-88 (2012).

[26] *See generally* DEBIPRASAD CHATTOPADHYAY, HISTORY OF SCIENCE AND TECHNOLOGY IN ANCIENT INDIA: THE BEGINNINGS (1986); ABRAHAM ERALY, THE FIRST SPRING: THE GOLDEN AGE OF INDIA 461-506, 595-728 (2011).

[27] *See* A.M .BHATTACHARJEE, HINDU LAW AND THE CONSTITUTION 9 (1994) (stating that ancient Hindu texts instruct individuals to carry out duties, rather than conferring them with "a catalogue of personal rights").

[28] An example is the classical Hindu legal text the *Manu Smriti*. The text opens with the claim that "[t]he great sages approached Manu" and asked the "[d]eign, divine one" to specify the "sacred laws." G. BÜHLER (tr), THE LAWS OF MANU 1, ¶¶1-2 (1886). However, in Hinduism, Manu refers to the mythical progenitor of the human race and cannot be considered to be the actual author of the text. The text probably had a string of authors and editors, who chose to remain anonymous, perhaps to emphasize the primacy of the content. J.D.M. DERRETT (tr.), THE CLASSICAL LAW OF INDIA BY ROBERT LINGAT 87-92 (1973).

[29] DEBIPRASAD CHATTOPADHYAY, SCIENCE AND SOCIETY IN ANCIENT INDIA 209-11 (1977) (quoting the *Caraka-saṃhitā*, a medical treatise, which disapproves of practicing medicine "for the sake of money" and declares that the "real hoard of gold" lies in serving living beings out of compassion).

[30] *See* PROSANTO KUMAR SEN, THE LAW OF MONOPOLIES IN BRITISH INDIA 52-3, 55-6 (1922).

[31] R. SHAMASASTRY (tr.), KAUTILYA'S ARTHASHASTRA 289 (1915).

[32] The Preamble to one of the world's earliest copyright laws stated that unlicensed printing had been to the "very great detriment" of authors and "too often to the ruin of them and their

writers had campaigned against book piracy and sought stronger domestic and international protection for their works.[33] In comparison, the primary motivation for enacting copyright laws—as well as patent laws—in colonial India was to further the interests of British businesses.[34] While there is not much literature that sheds light on whether investors and writers in colonial India shared the enthusiasm of their Western counterparts for IPRs, the views of the renowned scientist Jagadish Chandra Bose,[35] as well as Mahatma Gandhi,[36] are sometimes cited to demonstrate the apparently alien nature of IPRs to traditional Indian values.

In independent India, socialist beliefs have traditionally held strong influence.[37] In the formative years of independent India, the

families." Preamble to the STATUTE OF ANNE, 8 ANNE c. 19 (1710), reprinted in WILLIAM F. PATRY, 3 COPYRIGHT LAW AND PRACTICE 1461 (1994).

[33] *See* Mark Rose, *The Statute of Anne and Authors' Rights: Pope v. Curll (1741)*, *in* GLOBAL COPYRIGHT (Lionel Bently et al., 2010) 70, 71-75 (discussing litigation against book pirates by Alexander Pope and John Gay); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 31-50 (2004) (discussing opposition to book piracy by Daniel Defoe); Samuel Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9 (1986) (discussing the roles of Charles Dickens and Victor Hugo in the campaign for global copyright protection).

[34] Copyright laws in colonial India were enacted primarily to further the commercial interests of British publishers, as India was comparatively deficient in literary works and reliant on British literature. *See generally* Lionel Bently, *Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI-KENT. L. REV. 1181 (2007) [hereinafter Bently, *Copyright, Translations, and Relations between Britain and India*]. Likewise, patent laws were enacted to promote the interest of British industries, which were more technologically advanced and could reap profits from the patent system. *See generally* Rajesh Sagar, *Introduction of Exclusive Privileges/Patents in Colonial India: Why and for Whose Benefit?*, 2 INTELL. PROP. Q. 164 (2007).

[35] Bose refused to patent his revolutionary invention of short-distance radio wave transmission, which predated Guglielmo Marconi's advances in the field. *See* STATHIS ARAPOSTATHIS & GRAEME GOODAY, PATENTLY CONTESTABLE: ELECTRICAL TECHNOLOGIES AND INVENTOR IDENTITIES ON TRIAL IN BRITAIN 152-6 (2013). Bose, in a letter to the Nobel Prize-winning writer Rabindranath Tagore, dismissed the idea of commercializing his invention through patent laws. Bose described how he had spurned an offer worth millions from the Marconi Company, stating that his research was "above commercial profits." Probir K. Bondyopadhyay, *Marconi's 1901 Transatlantic Wireless Communication Experiment*, 31st European Microwave Conference, London (1995), http://home.online.no/~kgroenha/bondy.pdf. Bose's attitude has been described as "the position of the old rishis of India…whose best teaching was ever open to all." PATRICK GEDDES, THE LIFE AND WORK OF SIR JAGADIS C. BOSE 64 (1920).

[36] Gandhi, a fierce critic of capitalism, believed that the "object of making money…should be eschewed." M.K. GANDHI, INDIAN HOME RULE 102 (5th ed., 1922); Gandhi found the "idea of making anything out of" his writings to be "repugnant," and stated, "I have not the heart to copyright my articles." Shyamkrishna Balganesh, *Gandhi and Copyright Pragmatism*, 101 CALIF. L. REV. 1705, 1729, 1733 [hereinafter Balganesh, *Gandhi and Copyright Pragmatism*].

[37] *See* John Kenneth Galbraith, *Rival Economic Theories in India*, 36 FOREIGN AFFAIRS 587, 588, 590-1 ("The commitment to the goal of a socialist society is central in modern Indian thought. It is regularly averred by the government and, indeed, by nearly all articulate Indians. . . .[T]he Indian commitment to the semantics of socialism is at least as deep as ours to the semantics of free enterprise."). *See also* Brant Moscovitcha, *Harold Laski's Indian Students and the Power of Education, 1920–1950*, 20 CONTEMP. SOUTH ASIA 33 (2012) (discussing the influence of Harold Laski on Indian leaders); Shruti Rajagopalan, *Incompatible Institutions: Socialism vs. Constitutionalism in India*, 26 CONST. POL. ECON. 328 (2015).

country's economic and foreign policies were greatly shaped by the socialist outlook of Prime Ministers Jawaharlal Nehru[38] and Indira Gandhi.[39] The Indian government's IPR policies during these years were markedly socialist. Some examples include a prohibition of patents on pharmaceutical products and the allowance of special compulsory licenses in relation to those products,[40] an endeavor to reform international copyright law through measures facilitating greater access to educational works,[41] and, during the brief Prime Ministership

[38] Nehru was Prime Minister from 1947 to 1964. Nehru was influenced by Fabian socialism, the philosophies of Karl Marx and Vladimir Lenin, and the Soviet economic model. *See* A.K. Singh, *Nehru: Socialism and Mixed Economy*, *in* NEHRU AND PLANNING IN INDIA 93 (N.B. Das Gupta et al. eds., 1993). Nehru was not an admirer of capitalism. He stated, "Democracy and capitalism grew up together in the nineteenth century, but they were not mutually compatible. There was a basic contradiction between them, for democracy laid stress on the power for many, while capitalism gave real power to the few." JAWAHARLAL NEHRU, AN AUTOBIOGRAPHY 547 (1936). Nehru and his advisors envisioned a Soviet-style economic model for India, based on self-reliance and a limited role for the private sector. *See* RAMACHANDRA GUHA, INDIA AFTER GANDHI 201-225 (2007). Meanwhile, India's foreign policy was shaped by Nehru's notions of Third World solidarity, marked by his leading role in the Non-Aligned Movement. *See* Nataŝa Miŝković, *Introduction*, *in* THE NON-ALIGNED MOVEMENT AND THE COLD WAR 1 (Nataŝa Miŝković et al., 2014).

[39] Gandhi, Nehru's daughter, was Prime Minister from 1966 to 1977, and again from 1980 to 1984. Gandhi's Prime Ministership witnessed "the growth of the public sector, populist policies, and a left of center tilt." Ashok Bhargava, *Indian Economy During Mrs. Gandhi's Regime*, *in* INDIA: THE YEARS OF INDIRA GANDHI 60, 72 (Y.K. Malik & D.K. Vajpeyi eds., 1988). During her tenure, the Preamble of the Indian constitution was even amended to declare India a "Socialist" republic, notwithstanding judicial dicta limiting such intervention. *See* Granville Austin, *The Unexpected and the Unintended in Working a Democratic Constitution*, *in* INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 319, 324-5 (Zoya Hassan, E. Sridharan & R. Sudarshan eds., 2002).

[40] *See* Tanuja V. Garde, *Circumventing the Debate over State Policy and Property Rights: Section 3(d) of the Indian Patents Act Law*, *in* PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 243, 243-45 (Wolrad Prinz zu Waldeck und Pyrmont et al., 2009); Chan Park & Arjun Jayadev, *Access to Medicines in India: A Review of Recent Concerns*, *in* ACCESS TO KNOWLEDGE IN INDIA 78, 78-80 (Ramesh Subramanian & Lea Shaver eds., 2001) [hereinafter Park & Jayadev, *Access to Medicines in India*]; N.S. Gopalakrishnan & Madhuri Anand, *Compulsory License Under Indian Patent Law*, *in* COMPULSORY LICENSING 11, 14-18 (Reto M. Hilty & Kung-Chung Liu eds., 2015). Indira Gandhi had publicly expressed her opposition to pharmaceutical patents, and it would seem reasonable to assume that India's protectionist patent laws at the time had her blessings. *See* S.K. DHAWAN, SELECTED THOUGHTS OF INDIRA GANDHI 91 (1985) (quoting Gandhi as saying, on Feb.14, 1970, "[o]ne of the major challenges of our country is to provide inexpensive drugs and medical aid […] Patent agreements have been making even the ordinary drugs costly."); VANDANA SHIVA, PROTECT OR PLUNDER? UNDERSTANDING INTELLECTUAL PROPERTY RIGHTS 88 (2001) (quoting Gandhi as saying in an address to the World Health Assembly, on May 6, 1981, "[m]y idea of a better ordered world is one in which medical discoveries would be free of patents and there would be no profiting from life or death.").

[41] India attempted to reform the Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886; revised July 24, 1971 and amended 1979, 1 B.D.I.E.L. 715 [hereinafter Berne Convention]. During the 1967 Stockholm Revision of the Berne Convention Protocol Regarding Developing Countries, the Indian delegation stated that copyright law should be "treated less as a trade matter and more as a question of improving the educational and cultural needs of the less fortunate users" of works. MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST 78-81 (2004). The delegation advocated a compulsory licensing exception to the reproduction and translation rights, which was eventually incorporated in the

of Morarji Desai in the late 1970s, the expulsion of the Coca Cola Company from India after it refused to share its secret formula and knowhow with local manufacturers.[42]

In the early 1990s, India was faced with a serious financial crisis.[43] Under Prime Minister P.V. Narasimha Rao and then-Finance Minister Manmohan Singh, the Indian government initiated a series of free market economic reforms.[44] It is believed that the severity of the crisis left the government with "no choice but to globalize" and, as a consequence, become a member of the WTO and the TRIPS Agreement.[45] The government's decision to sign the TRIPS Agreement was met with huge protests from politicians and activists over concerns that it would lead to increased drug prices and patents on seeds, and the decision even led to a judicial challenge.[46]

Over the past two decades, the TRIPS Agreement has been met with considerable skepticism in India. When India amended its pharmaceutical patent laws to comply with the TRIPS Agreement,

1971 Paris Act of the Berne Convention. *Id.*

[42] The action against the Coca Cola Company occurred in 1977. George Fernandes, the Minister for Industries in Desai's government, played a crucial role in the affair. *See* F. Hawkins, *India's Quest for Coca-Cola's Secret Formula*, PITTSBURGH POST GAZETTE (Aug. 13, 1977), http://news.google.com/newspapers?nid=gL9scSG3K_gC&dat=19770813&printsec=frontpage; *Indian Government Hands Ultimatum to Coca-Cola*, SPOKESMAN-REVIEW (Aug. 10, 1977), http://news.google.com/newspapers?nid=0klj8wIChNAC&dat=19770810&printsec=frontpage; *Backwash: Coke Returns From India Exile: An Interview with George Fernandes*, MULTINATIONAL MONITOR (1995), http://www.multinationalmonitor.org/hyper/issues/1995/07/mm0795_10.html (quoting Fernandes as admittedly saying to officials of Coca Cola, "[l]isten, you have two options. One is to fold up and go, and the other is to have an Indian partner and to tell him what your technology is. It is not just having an Indian partner; tell him about your technology.").

[43] *See* THAROOR, *supra* note 7, at 159-171.

[44] *Id.* at 171-6. While Rao is widely credited as the architect of the economic reform process, its tentative beginnings have been traced back to the government of Prime Minister Rajiv Gandhi, Indira Gandhi's son, between 1984 and 1989. *See* J. Bradford DeLong, *India Since Independence: An Analytic Growth Narrative*, *in* IN SEARCH OF PROSPERITY: ANALYTICAL NARRATIVES ON ECONOMIC GROWTH 184 (Dani Rodrik ed., 2003).

[45] Dipankar Sengupta et al., *India at the WTO: The Story So Far*, *in* BEYOND THE TRANSITION PHASE OF WTO: AN INDIAN PERSPECTIVE ON EMERGING ISSUES (Dipankar Sengupta et al. eds., 2006) 21, 23-4. *See also* RAJ KUMAR SEN, SOCIAL SECTOR DEVELOPMENT IN INDIA 107 (2005) (quoting Manomohan Singh as saying, "[i]f we had not attempted fiscal restricting in 1991-92 we could not have restored confidence in the economy. Our creditors were at our throats, forex reserves had disappeared. If we had continued to mismanage the fiscal system, we would have gone under. I would have had to declare India a debt defaulter […] We opened up the economy to foreign direct investment and institutional investors to buy ourselves some maneuverability.").

[46] *See* Hardev S Sanotra & Zafar Agha, *Fighting With Ignorance*, INDIA TODAY (Jan. 15 1994), http://indiatoday.intoday.in/story/with-indian-govt-putting-up-a-weak-defence-political-opposition-gatt-rises-to-new-high/1/292621.html; John-Thor Dahlburg, *Thousands of Indian Leftists Riot Against Trade Accord*, LOS ANGELES TIMES (Apr. 6, 1994), http://articles.latimes.com/1994-04-06/news/mn-42798_1_police-fire-tear-gas. Vandana Shiva, a well-known agricultural activist petitioned the Delhi High Court, seeking a writ restraining the Indian government from signing the TRIPS Agreement. Vandana Shiva v. India (1995) 32 D.R.J. 447 (Del. H.C.). The petition was dismissed on the principle of judicial non-interference in economic policies. India eventually ratified the WTO Agreement on Dec. 30, 1994.

senior Members of Parliament (MPs) launched a fierce attack on the government, accusing it of compromising national interests and acting at the behest of the U.S. government.[47] Similar views were expressed by MPs when Indian copyright laws were amended to comply with the TRIPS Agreement.[48] Even in the context of trademarks—arguably, one of the least controversial forms of IP—a bill to render Indian trademark legislation TRIPS-compliant was met with similar concerns. One MP even suggested that India ought to "go slow" in granting registration to foreign marks.[49] Today, the manifesto of the Communist Party of India (Marxist) (C.P.I.(M.))—a significant political force in certain regions—still states its commitment to "[r]everse changes in the IP regime that favor big business."[50]

Outside the political arena, skeptical views of IPRs and the TRIPS Agreement have been aired by, among others, one of India's most respected Supreme Court judges,[51] one of India's foremost international law scholars,[52] a senior academician at one of India's top management

[47] One MP nostalgically quoted Indira Gandhi's views on pharmaceutical patents and accused the government of ceding to "pressure exercised by the Americans." *See* Combined Discussion on the Disapproval of Patents (Amendment) Ordinance 1999 and Motion for Consideration of the Patents (Amendment) Bill 1998, Lok Sabha Debates, Mar. 10, 1999 (Statement of T.R. Baalu), http://indiankanoon.org/doc/1368397. Another MP accused the government of enacting "an anti-national legislation" that was "contrary to the interests of the people of" India. *Id.* (Statement of Somnath Chatterjee). Another condemned the TRIPS Agreement as "an unmixed evil." *Id.* (Statement of Jaipal Reddy).

[48] One MP criticized an official of the U.S. government for having the "audacity" to state that Indian IP laws fell "short of providing adequate and effective protection." The MP stated, "Our law has to protect our country. Our law does not need to protect the U.S. interests […] In the name of WTO…we have surrendered our economy[…] Now, in the garb of protecting the Indian interest, the Government seeks to bring an amendment which will be in the interest of U.S. traders and U.S. industry." *See* Discussion on the Copyright (Amendment) Bill 1999, Lok Sabha Debates, Dec. 22, 1999 (Statement of Swadesh Chakraborty), http://indiankanoon.org/doc/335710).

[49] The MP stated "in the name of liberalization and globalization, the wealth of many of the developing nations has been drained. […] Then, what is the purpose in enacting such…a Bill. […] [I]t will be a fatal blow to the small entrepreneurs and small industries of this nation. […] The multinational corporations alone will have the upper hand, if this Bill is passed […] [T]he policy should go slow in according recognition to foreign trade mark[s] with a view to encourage domestic initiatives in the same or similar lines of production." *See* Discussion on the Trade Marks Bill, 1999, Lok Sabha Debates, Dec. 22, 1999 (Statement of T.M. Selvaganapathi), http://www.parliamentofindia.nic.in/lsdeb/ls13/ses2/2422129904.htm.

[50] COMMUNIST PARTY OF INDIA (MARXIST), MANIFESTO FOR THE 16TH LOK SABHA ELECTIONS 16, 32 (2014), http://www.thehindubusinessline.com/multimedia/archive/01831/CPI-M_Manifesto_1831198a.pdf.

[51] V.R. Krishna Iyer, *GATT, TRIPs and Patent Law – I*, THE HINDU (Sept. 11, 2001), http://www.thehindu.com/2000/09/11/stories/05112524.htm (describing India's accession to the TRIPS Agreement as a surrender to "US corporate power," an "alibi for trading India's freedom," and a "contra-constitutional coup.").

[52] B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L. COMM. L. REV. 3, 17 (2006) (stating that the TRIPS Agreement emphasizes "private rights" rather than the "social and economic rights of the poor"); B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OREGON REV. INT'L L. 17, 19-29 (2012) (stating that the TRIPS Agreement has contributed to the rise of a "transnational capitalist class"

schools,[53] and even Jagdish Bhagwati, normally a sympathizer of multinational enterprises.[54] Among specialist IP academicians, N.S. Gopalakrishnan, one of India's senior-most scholars in the field, has stated that the "premise that a strong IP system will promote creativity/innovation" is "questionable."[55]

What has perhaps exacerbated such skepticism is the trenchant criticism and poor ratings of Indian IP laws in certain influential Western reports.[56] To a large extent, these poor ratings are linked to one

in developed countries and a "transnational oppressed class" in developing countries by "undermining . . . the right to health by a strong patent regime adopted to benefit giant multinational pharmaceutical corporations"); B.S. Chimni, *Towards Technological Wastelands: A Critique of the Dunkel Text on TRIPS*, *in* INTELLECTUAL PROPERTY RIGHTS 91, 93 (K.R.G. Nair & Ashok Kumar eds., 1995) [hereinafter Chimni, *Towards Technological Wastelands*] (stating "industrialized countries have built up their technological superiority […] [and] now want to deny the same space and opportunity to the developing countries to ensure that they remain in a permanent state of technological dependence."). Chimni's views may be viewed in light of the fact that he is a member of the radical TWAIL movement. TWAIL scholars critique international law as "statist, elitist, colonialist, Eurocentric and masculine." BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD 46 (2003). One of TWAIL's founders has remarked "[t]he regime of international law is illegitimate. It is a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West." Makau Mutua, *What is TWAIL*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000).

[53] Sudip Chaudhuri, *Is Product Patent Innovation Necessary to Spur Innovation in Developing Countries*, *in* THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES (Neil Netanel ed., 2009) 265, 289 ("[M]ost developed countries adopted pharmaceutical-product patent protection only after they had reached a high degree of economic development. Thus, it is actually morally and historically unfair to deny the developing countries the privileges that developed countries enjoyed at comparable stages in their development.").

[54] Jagdish Bhagwati, *Patents and the Poor: Including Intellectual Property Protection in WTO Rules Has Harmed the Developing World*, FINANCIAL TIMES (Sept. 17, 2002), http://www.cfr.org/intellectual-property/patents-poor-including-intellectual-property-protection-wto-rules-has-harmed-developing-world/p4847 ("Thanks to the mighty political muscle of pharmaceutical companies and their lobby groups, intellectual property protection has formed part of WTO rules."); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 182, 185 (2004) (stating that while "the overall judgment must be that multinationals do more good than harm," the IPR laws "sought by the pharmaceutical companies are unnecessarily harmful to the poor countries," and that "TRIPS should not be in the WTO at all.").

[55] N.S. Gopalakrishnan & Dr. T.G. Agitha, *Comments on the National IPR Policy – IPR Think Tank*, SPICYIP.COM ¶ 10(b.1), (2015), http://spicyip.com/wp-content/uploads/2015/02/National-IPR-Policy-of-IPR-Think-Tank-Comments-N.S.-Gopalakrishnan-and-T.G.-Agitha.pdf.

[56] Three reports are worth mentioning. The first, published by the U.S. Trade Representative (USTR), places India in a Priority Watch List of countries with weak IP laws (a list where India has consistently been featured). *See* USTR SPECIAL 301 REPORT at 38 (2016), *available at https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf* [hereinafter USTR 2016 REPORT]. The second, published by the law firm Taylor Wessing, ranks India's IPR regime 40th among 43 major economies. *See* TAYLOR WESSING, GLOBAL INTELLECTUAL PROPERTY INDEX at 8 (5th ed. 2016), *available at* https://united-kingdom.taylorwessing.com/en/taylor-wessing-launches-fifth-gipi-report. The third, published by the U.S. Chamber of Commerce's Global Intellectual Property Centre (G.I.P.C.), ranks India's IPR regime 37 out of 38 major economies, considerably below other developing nations like China, South Africa and Nigeria. *See* G.I.P.C., G.I.P.C. INTERNATIONAL IP INDEX at 9 (4th ed. 2016), *available at* http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GIPC_Index_2016_Final.pdf [hereinafter *G.I.P.C. 2016 Report*].

Supreme Court decision limiting patents on incremental pharmaceutical inventions and another decision upholding the grant of a compulsory license on an expensive anti-cancer drug, which adversely impacted Novartis[57] and Bayer[58] respectively.[59] These decisions were, conversely, welcomed throughout India for facilitating access to medicines.[60] A prominent Indian free trade economist, now a senior government advisor, criticized the U.S. government and "Big Pharma" for perpetuating "the fiction that India violates its WTO obligations."[61]

The skepticism surrounding IPRs in India is so strong that those perceived to have pro-IPR viewpoints have met with fierce attacks from critics condemning any visible links with Western universities and research funders.[62] A Supreme Court judge (now a judge at the

[57] Novartis v. India (2013) A.I.R. S.C. 1311 (hereinafter *Novartis*). *See also* Linda Lee, *Trials and TRIPS-ulations: Indian Patent Law and Novartis AG v. Union of India*, BERKELEY TECH. L.J. 281.

[58] Bayer v. India (2014) A.I.R. (2013) (Bom. H.C. 2014) 178, upheld in Bayer v. India, Special Leave Petition No. 30145/2014 (Supreme Court, Dec. 12, 2014) (hereinafter *Bayer*). *See also* Enrico Bonadio, *Compulsory Licensing of Patents: The Bayer-Natco Case*, 34 EUR. INTELL. PROP. REV. 719 (2012).

[59] *See* USTR SPECIAL 301 REPORT at 40-41 (2014), *available at* https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf (criticizing the case involving Bayer as one that "could inappropriately pressure innovators outside of India," and the case involving Novartis as having "the effect of limiting the patentability of potentially beneficial innovations."); TAYLOR WESSING, GLOBAL INTELLECTUAL PROPERTY INDEX 33 (4th ed. 2014), *available at* http://asp-gb.secure-zone.net/v2/2308/3081/8029/TaylorWessing---Global-Intellectual-Property-Index.pdf [*hereinafter* TAYLOR WESSING 2014 REPORT] (stating that the enforcement of patents in India is "problematic", and that "[t]he perception of its courts viewing pharmaceutical patents as contrary to, rather than promoting, public welfare was compounded by the landmark Novartis decision of the Supreme Court."); G.I.P.C. INTERNATIONAL IP INDEX 74 (2nd ed. 2014), *available at* http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/Index_Map_Index_2ndEdition.pdf (stating that India's "IP environment has deteriorated particularly with regard to pharmaceutical patents, for which basic protection seems increasingly to be unavailable.").

[60] *See, e.g.*, Andrew Buncombe, *Celebration for Patients after India's Landmark Ruling against Swiss Drug Giant Novartis means Millions can Afford Generic Medicines*, THE INDEPENDENT (Apr. 1, 2013), http://www.independent.co.uk/news/world/asia/celebration-for-patients-after-indias-landmark-ruling-against-swiss-drug-giant-novartis-means-millions-can-afford-generic-medicines-8556109.html; Sujay Mehdudia, *Novartis has no Reason to Complain: Anand Sharma*, THE HINDU (Apr. 20, 2013), http://www.thehindu.com/business/Industry/novartis-has-no-reason-to-complain-anand-sharma/article4598523.ece; *India Upholds Compulsory Licence on Cancer Drug in Bayer Case Appeal*, MÉDECINS SANS FRONTIÈRES (Mar. 4, 2013), http://www.msfaccess.org/content/india-upholds-compulsory-licence-cancer-drug-bayer-case-appeal; *Indian Supreme Court Delivers Verdict in Novartis Case*, MÉDECINS SANS FRONTIÈRES (Apr. 1, 2013), http://www.msfaccess.org/about-us/media-room/press-releases/indian-supreme-court-delivers-verdict-novartis-case.

[61] Arvind Panagriya, *India Must Call the U.S.' Bluff on Patents*, BUSINESS STANDARD (Mar. 4, 2014 9), http://www.business-standard.com/article/opinion/arvind-panagariya-india-must-call-the-us-bluff-on-patents-114030401221_1.html. *See also See* Arvind Subramaniam, US-India Intellectual Property Rights Issues: Comment on USTR Special 301 Review, March 7, 2014, PETERSON INSTITUTE OF INTERNATIONAL ECONOMICS, https://piie.com/sites/default/files/publications/testimony/subramanian20140307.pdf;

[62] For example, in 2010, George Washington University organized a conference on IP laws in

International Court of Justice) even recused himself from *Novartis* after academicians and activists protested that he had attended two IP conferences in the U.S.[63] And, while the IP-skeptic discourse in India has mainly revolved around patents in the pharmaceutical and life sciences sector, other IP issues concerning other sectors have not escaped similar skepticism. Targets of criticism have included the mobile phone[64] and academic publishing[65] industries in the West. Yet,

India. Several activist groups wrote to the then Indian Commerce Minister claiming that the conference was pushing a "one-sided agenda" in support of multinational pharmaceutical companies and was "highly unethical and improper." *See* Judit Rius, *Indian NGOs Confront GWU Law School Efforts to Push Maximalist IPR Norms in India*, KNOWLEDGE ECOLOGY INTERNATIONAL (Mar. 4, 2010), http://keionline.org/node/793. In another incident, Shamnad Basheer, one of India's foremost IP academicians, was criticized by another distinguished scholar, after he accepted overseas funding to write a paper on pharmaceutical patents. *See* Sudhir Krishnaswamy, *Interest Group Capture*, TIMES OF INDIA (Mar. 16, 2007), http://timesofindia.indiatimes.com/home/edit-page/Interest-group-capture/articleshow/1769984.cms; Shamnad Basheer, *The Mashelkar Committee Report and "Industry" Capture Allegations*, SPICY IP (Mar. 16, 2007), http://spicyip.com/2007/03/mashelkar-committee-report-and-industry.html. In another example, Pratibha Singh, a member of the IPR Think Tank—a body established by the Indian government to frame a National IPR Policy—found her integrity questioned by an eclectic mix of opponents. *See* Rema Nagarajan, *RSS Affiliate Flags Conflict of Interest in IPR Panel*, TIMES OF INDIA (Apr. 1, 2015), http://articles.economictimes.indiatimes.com/2015-04-01/news/60719975_1_think-tank-national-ipr-policy-sjm; Latha Jishnu, *Rethinking IP Think Tank*, DOWN TO EARTH (Dec. 15, 2014), http://www.downtoearth.org.in/content/rethinking-ip-think-tank; Sagnik Dutta, *Breach of Promise on IPR Policy?*, FRONTLINE (Dec. 12, 2014), http://www.frontline.in/the-nation/breach-of-promise-on-ipr-policy/article6630087.ece. Singh's presence on the Think Tank had been opposed as she had represented multinational corporations like Gilead and Ericsson in patent disputes. Her opponents have included an affiliate of a right-wing Hindu organization, *see* Nagarajan, *id*., the editor of a left-wing environmental magazine known to be critical of patent laws, Jishnu, *id.*, a "senior academic, speaking on the condition of anonymity," quoted in Dutta, *id*., and "a renowned researcher, who did not wish to be named," quoted in Dutta, *id*.. However, Singh is one of India's most experienced IP practitioners, and was designated as a Senior Advocate by the Supreme Court of India. She appeared opposite Novartis before the Indian Supreme Court and represented the Indian generic pharmaceutical company Cipla in multiple cases. Even Jishnu, while alleging a "conflict of interest" in her appointment, has accepted that "Singh, admittedly, comes with impressive credentials." Jishnu, *id*. Meanwhile, a draft version of the Policy was criticized by Gopalakrishnan for its "message of. . .assuring. . .large foreign corporations, interested in investing in India, that their IP will be well protected and promoted in India." Gopalakrishnan & Agitha, *supra* note 55, at ¶ 8.

[63] *See* Letter from Amit Sengupta et al. to Salman Khurshid, Law Minister of India (Sep. 5, 2009), http://spicyip.com/2011/09/full-text-of-letter-asking-for-justice.html (calling for the recusal of Justice Dalveer Bhandari); *Novartis Patent Plea: SC Judge Recuses Self*, INDIAN EXPRESS (Sep. 7, 2011), http://archive.indianexpress.com/news/novartis-patent-plea-sc-judge-recuses-self/842912.

[64] An open-source software advocacy organization has claimed that the Indian mobile phone manufacturer Micromax has been "forced to channel a significant amount of time and resources to defend itself against patent lawsuits from" Ericsson. *See* Software Freedom Law Alliance, *Comments on Draft National IPR Policy* (Jan. 30. 2015), http://sflc.in/wp-content/uploads/2015/02/IPRDraftPolicyComments_SFLC.pdf.

[65] International academic publishers have recently faced enormous criticism for filing a copyright infringement lawsuit in India over the photocopying of educational materials. *See* Dwijen Rangnekar, *Two Cups of Tea: For the Piracy of Course Packs*, 69 SOC.-LEG. NEWSL. 9 (Sept. 4 2013) (providing a background of the dispute). Amartya Sen, in a letter to one of the plaintiff-publishers, has urged it to "reconsider" the case and argued that the use of "sections of books for

as I will argue in the next section, a dogmatic opposition to all forms of IPRs and their enforcement is problematic. A more pragmatic approach should underlie IP scholarship in India, film piracy being an example.

II. THE CONTOURS OF A REALIST APPROACH

Criticisms of IPRs no doubt merit serious consideration. Even the World Bank, while endorsing the view that IPRs can help developing countries attract foreign investment, has agreed with some of the skeptical views of IPRs.[66] However, an approach that probes legal issues with merely a skeptical perspective can still be rooted in pragmatism and have a positivistic respect for authority. Such an approach is different from the "radical skepticism" of movements like Critical Legal Studies or TWAIL, which tend to appeal to higher, moral principles of theory.[67] For instance, Lawrence Lessig—who can perhaps be categorized as a "copyright pessimist"[68]—has clarified that his

teaching purposes through 'course packs' has enormous educational value." Letter from Amartya Sen to Oxford University Press (Sep. 17, 2012), http://www.sacw.net/IMG/pdf/Amartya_Sen.pdf. An online petition signed by authors and academicians has urged the plaintiffs to withdraw the suit and also argued that the allegedly infringing acts fall within the purview of fair use. Daniel Sheikh, *Appeal to Publishers to Withdraw Suit Filed Against Delhi University*, CHANGE.ORG (Oct. 22, 2012), https://www.change.org/p/academics-appeal-to-publishers-to-withdraw-suit-filed-against-delhi-university; Email from Shamnad Basheer to Emma House, (Mar. 29, 2013), http://spicyip.com/docs/DU%20Photocopying%20case/email-reply-publishers-association-limited.pdf.

[66] WORLD BANK, WORLD DEVELOPMENT REPORT 1998/1999: KNOWLEDGE FOR DEVELOPMENT 35 (1998) (stating "[t]ighter IPRs can. . .disadvantage developing countries in two ways: by increasing the knowledge gap and by shifting bargaining power toward the producers of knowledge, most of whom reside in industrial countries.").

[67] *See generally*, Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988). Posner has argued that an approach employing a skeptical perspective dabbles with skepticism merely as "a stimulant to inquiry and understanding." It uses "practical reason" as "the principal set of tools for answering questions" and is "less freighted with polemical associations." Such an approach uses "not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and of persuasion." However, an approach employing a skeptical theory often involves "doubting everything," believing in "absolutes and unobservable entities," and assuming "that there is a right answer to every legal question." *See also* Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988) (crediting Posner with pioneering the establishment of "Practical Legal Studies," which "expressly abandons the goals of certainty, formal accuracy, and formal legitimacy in legal decision making in favor of more fluid techniques of reasoning and argumentation."); Erlanger et al., *Is It Time for a New Legal Realism?*, *supra* note 4, at 345 (stating "skepticism about legal rules and their potential for effectuating legal change need not imply a nihilist surrender to pure critique."); José E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIO JURIS (Sept. 28, 2010), http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris (criticising TWAIL for being "nihilistic" and "disinterested in. . .pragmatic reforms," and providing insights that are "too radical to be of use."); David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L L. 29, 74 (2003) (criticising TWAIL and observing that those who "attempt to destabilise the international system by challenging the military, political, and economic hegemony of the West" simply face too uphill a task).

[68] Copyright scholars can broadly be divided into "optimists" (who believe that authors should be entitled "to every last penny that other people will pay to obtain copies of their works") and

notion of a "free culture" is "not a culture without property."[69] Lessig even once had found some common ground with Jack Valenti.[70] In comparison, the academic discourse surrounding IPRs in India, including film piracy, has frequently been framed through an overtly skeptical lens.

Consider, for example, some views expressed by Gopalakrishnan and Liang on film piracy. Alleging a lack of financial honesty in the film industry, Gopalakrishnan has stated that the "[i]ndustry has no moral right to fight against piracy."[71] Liang has opposed the idea of copyright law itself, opposing WIPO,[72] criticizing Lessig,[73] and declaring himself to be "a defender of film piracy."[74] Gopalakrishnan and Liang are no doubt highly regarded scholars, and their statements on film piracy are consistent with a steadfast advocacy of free access to knowledge. Yet, a "pragmatic" skeptic would arguably have limited use for such statements. A pragmatist would counter Gopalakrishnan by pointing out that a cast-not-the-first-stone plea cannot deter copyright owners from enforcing their rights against infringers in the real world ("like it or not"[75]), and would counter Liang by pointing out that global

"pessimists" (who consider social interests and believe that copyright should "extend only so far as is necessary"). PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 10-11 (2003).

[69] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY xiv (2004).

[70] During a debate with Valenti, then President of the Motion Picture Association of America (MPAA), Lessig pointed out, "[w]e have no disagreement about what's properly called piracy, and we have no disagreement that Harry Potter and every creative product has and should have the opportunity for copyright protection." *A Debate on "Creativity, Commerce & Culture" with Larry Lessig and Jack Valenti*, University of Southern California, Nov. 29, 2001 34-5, http://learcenter.org/pdf/LessigValenti.pdf.

[71] SCARIA, *supra* note 14, at 200.

[72] *See* Lawrence Liang et al, *Copyright/Copyleft: Myths About Copyright*, INFO CHANGE INDIA (May 2004), http://infochangeindia.org/trade-a-development/intellectual-property-rights/copyrightcopyleft-myths-about-copyright.html. The Alternative Law Forum, an organization that Liang founded, has described its philosophy on IP as "subversive" and has mocked WIPO. *See Right02Copy*, ALTERNATIVE LAW FORUM, http://altlawforum.org/productions/right02copy (providing a comic on copyright parodying a comic produced by WIPO).

[73] *See* Lawrence Liang, *Meet John Doe's Order: Piracy, Temporality and the Question of Asia*, 2 INDIAN J. INTELL. PROP. L. 154, 169-170 (2009).

[74] Liang, *Insights on Film Piracy*, *supra* note 14, at 29. *See also* Lawrence Liang, *Beyond Representation: The Figure of the Pirate*, *in* MAKING AND UNMAKING INTELLECTUAL PROPERTY 167 (Mario Biagoli et al. eds., 2011) (stating, *inter alia*, that the "divide of legality and illegality that separates pirates from others" is "simplistic.").

[75] My use of the phrase "like it or not" is to emphasize the importance of legal positivism over moral convictions. The phrase has been used, for example, by Joseph Raz, who has stated, "Oxford University is my university whether I identify with it or not. Your country is your country whether you like it or not. . . and this government is the government of all the people of this country however much they hate it." JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 163 (2009). I concede that my outlook is conservative and can lend itself to the same attack that critical legal studies scholars have levelled against law-and-economics scholars like Richard Posner, i.e. of being "fancy apologetics for capitalist law." Paul Reidinger, *Civil War in the Ivy*, 72 A.B.A J. 67, 68 (1986) (quoting Richard Posner). Yet, even a radical left-wing

copyright law regimes date back to over a century ago and are not going away anytime soon (like it or not).[76]

At a time when the American critique of "emphasizing abstract theory at the expense of practical scholarship" in legal academia[77] is being loudly echoed in India,[78] there is arguably a pressing need for a pragmatic approach towards IP scholarship in India. Such an approach should be "closer to the ardent positivism" of empiricists "than to more postmodern alternatives."[79] Such an approach should not view IPRs through "maximalist" or "minimalist" theoretical lenses.[80] Rather, it should be divorced from "legal idealism"[81] and adhere to an "empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world."[82]

It is also important to distinguish such an approach from traditional legal realism. Writings by ALR scholars on IP law have been sparse. However, the noted ALR scholar Felix Cohen once described trademark law as "economic prejudice masquerading in the cloak of legal logic," and questioned the assumption that "identifies the interests of business with the interests of society."[83] Cohen thus omitted a top-down

intellectual like Noam Chomsky, while stating that copyrights are "not the moral way" to support the arts, has (grudgingly) acknowledged that if one were to download pirated music from the Internet, "a case can be made saying it's illegal." *Noam Chomsky Interviewed by The Imagineer*, THE IMAGINEER (May 19, 2009), http://www.chomsky.info/interviews/20090519.htm.

[76] To quote India's former representative to the WTO, "[o]ften there is a call that we should come out of the WTO since it infringes on our sovereignty. . .[B]eing in the WTO means giving up sovereignty to some extent for certain gains accruing from it." Ministry of Commerce & Industry, *Quotes and Excerpts*, 3 INDIA & THE WTO (March 1999), http://commerce.nic.in/publications/india_wto_newsletter.asp?link=newsletter_march99.htm (quoting Ambassador B.L. Das).

[77] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

[78] *See* LAW COMMISSION OF INDIA, 184TH REPORT ON THE LEGAL EDUCATION & PROFESSIONAL TRAINING AND PROPOSALS FOR AMENDMENTS TO THE ADVOCATES ACT 1961 AND THE UNIVERSITY GRANTS COMMISSION ACT 1956 ¶ 9.3 (2002) ("Mere bookish knowledge must give way to practical aspects of law."); N.R. Madhava Menon, *The Future of Law Teaching Institutions*, THE HINDU (July 30, 2002), http://www.thehindu.com/thehindu/edu/2002/07/30/stories/2002073000100200.htm ("There is a great void in the training of a lawyer today which requires to be addressed. . .lest India should lose. . .in guaranteeing to the client minimum quality in professional services."); T.S. Sekaran, *Law Students Ticked Off*, IBNLIVE (Aug. 28, 2011), http://ibnlive.in.com/news/law-students-ticked-off/179179-60-120.html (describing an incident where an Indian Supreme Court judge visited a law school and found students unable to answer a mundane question concerning the procedural obstacles in filing a police complaint, leading him to criticize the overt emphasis on "theoretical" legal education and lack of "practical" legal education in India).

[79] Suchman & Mertz, *Toward a New Legal Empiricism*, *supra* note 1, at 565.

[80] *See generally* Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

[81] G.J.H.VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 35 (1983) (discussing the scope of "pragmatic Positivism or Legal Realism").

[82] Nourse & Shaffer, *Varieties of New Legal Realism*, *supra* note 8, at 79.

[83] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 814, 817 (1935). It should be noted that Cohen was a critic of capitalism in general. *See, e.g.*, Felix Cohen, *Socialism and the Myth of Legality*, 4 AM. SOCIALIST Q. 3 (1935) (criticizing "capitalist

perspective that engages with business interests. In contrast, such a perspective was visible in Frank Schechter's seminal paper on trademark dilution—a specific target of Cohen's critique.[84] Schechter, it has been argued, was "a moderate legal realist" who "was also a practicing lawyer and. . . had limited time for abstract jurisprudential reflection," preferring a "pragmatic style of argument."[85] His reasoning was based on "how marks were actually used by companies in the economy of the 1920s and what sort of legal protection was needed to support that use."[86] If Cohen's realism were taken to reflect the traditional legal realist position on IP, such a position would be unsuitable for NLR researchers, especially a variant of NLR conscious of international relations realism and wealth-maximization tendencies. On the other hand, Schechter's strand of realism lacked the crucial bottom-up perspective that NLR aspires to study. Hence, an NLR-influenced approach to IP could seek to augment Schechter's strand of realism with this missing element. Such an approach is likely to have a constructive effect, as policy is typically shaped by pragmatic officials who try to balance competing interests and priorities.

NLR's professed American origins[87] risk exposing aspiring Indian NLR scholars to trite attacks of imitating intellectual trends in the American academy.[88] This can be countered through two arguments. First, the inherent pluralism of NLR's qualitative research methods can unearth valuable developing country perspectives on legal issues, which often go undocumented.[89] Second, it is fallacious and patronizing to assume that notions of pragmatism and realism are alien to Indian intellectual traditions,[90] a vivid example being the "Machiavellian"

law" and "capitalist courts").

[84] *See* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 822 (1927) ("The preservation of the uniqueness or individuality of the trademark is of paramount importance to its owner.").

[85] Robert G. Bone, *Schechter's Ideas in Historical Context and Dilution's Rocky Road*, 24 SANTA CLARA HIGH TECH. L.J. 469, 483-84, 505 (2007).

[86] *Id.* at 487.

[87] Shaffer, *New Legal Realist Approach to International Law*, *supra* note 8, at 193 (stating that the NLR movement has drawn inspiration from the "philosophical pragmatism of John Dewey, Charles Sanders Pierce, William James, and Herbert Mead, developed in the United States.").

[88] *See, e.g.*, Ramachandra Guha, *The Ones Who Stayed Behind*, 38 ECON. & POL. WKLY 1121 (2003) (arguing that a large number of South Asian social science scholars defer to intellectual fashions and cues from American academia, in order to be published in American journals).

[89] For example, Shaffer has remarked that he "gained a greater appreciation" of developing perspectives on the WTO when he "went to Geneva and to developing country sites," and that his "interviews turned into lectures" about how his "questions reflected an American frame." Shaffer, *New Legal Realist Approach to International Law*, *supra* note 8, at 203.

[90] *See* AMARTYA SEN, THE ARGUMENTATIVE INDIAN 23-24, 140 (2005) ("Western approaches to India have encouraged a disposition to focus particularly on the religious and spiritual elements in Indian culture. There has been a tendency to emphasize the contrast between what is taken to be 'Western rationality' and the cultivation of what 'Westerners' would see as 'irrational' in Indian intellectual traditions. . . . The Lokāyata philosophy of skepticism and materialism flourished from the first millennium B.C.E.").

aspects of the *Arthashastra*.[91] In modern India, Gandhi, Bose, and Tagore all adopted pragmatic positions on IPRs, notwithstanding the declared moral convictions of the first two.[92] Having advocated a pragmatic, NLR-influenced approach to IP, I will now try to sketch the contours of such an approach in the context of film piracy in India, discussing the seven elements mentioned earlier.

III. THE FIRST ELEMENT: INTERNATIONAL RELATIONS REALISM

The conventional international relations realist position on the WTO is that it reflects "highly asymmetric bargaining power," and that its IP provisions are "not a plus for the Third World."[93] However, the text of the TRIPS Agreement contains flexibilities that have left considerable "wiggle room" for developing countries.[94] Thus, "[t]o a realist, the machinery of the TRIPS agreement. . .is capable of manipulation, distortion, and even abandonment if such actions serve the interests of states."[95] In India, the examples of *Novartis* and *Bayer* clearly illustrate this flexibility. Similar examples can be seen in the

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91 The *Arthashastra* advocated wealth maximization and the unabashed pursuit of self-interest in international relations. The *Arthashastra* stated that "wealth and wealth alone is important" for a kingdom, that kings should "seduce" powerful enemies "by conciliation or by giving gifts," and that a conqueror "may proclaim war against one and make peace with another." SHAMASASTRY, *supra* note 31, at 17, 396, 548. Such aspects of the *Arthashastra* led Max Weber to describe its philosophy as "[t]ruly radical 'Machiavellianism,' in the popular sense of the word" Max Weber, *The Vocation of Politics*, *in* THE ESSENTIAL WEBER: A READER 257, 264-65 (Sam Whimster ed., 2004). Arguably, a rudimentary justification for copyright law can also be found in the *Arthashatra*. The *Arthashastra* penalized "calumnies" against musicians, outlawed the theft of "articles of small value" from musicians, and guaranteed musicians a minimum wage. SHAMASASTRY, *supra* note 31, at 263, 276, 321). A senior academic has argued that the labor theory of property should be traced back to Kautilya, before Locke. He notes that the *Arthashatra* stated, "[u]narable land, prepared for cultivation by any one [by their own efforts] shall not be taken away." BALBIR SIHAG, KAUTILYA: THE TRUE FOUNDER OF ECONOMICS 264-65 (2014). A similar statement was made by Locke. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 5, § 28 (1689).

92 Gandhi showed "a willingness to accept the utility of copyright" and restricted the unlicensed reproduction of his writings, a position that has been described as a departure from his "abstract economic ideas" and one of "practical idealism" and "pragmatism." *See generally*, Balganesh, *Gandhi and Copyright Pragmatism*, *supra* note *36* at 1733, 1743. Similarly, notwithstanding Bose's "Hindu" views on not profiting from his inventions, he accepted a proposal to jointly patent one of his inventions with an American financier, albeit "less-than-willing[ly]." ARAPOSTATHIS & GOODAY, *supra* note 35, at 152-55. And while it is not known if Tagore agreed with the contents of the letter that Bose had sent him, historical records show that Tagore sued multiple book pirates for copyright infringement. *See, e.g.*, Educational Book Depot v. Tagore (1933) A.I.R. (All. H.C.) 112, ¶ 3 (noting this fact). In this case, Tagore sued a book pirate and even argued through his lawyer unsuccessfully that the damages awarded by the court to him were "inadequate." *Id.* at ¶ 5.

93 Stephen Krasner, *Realist Views of International Law*, 96 AM. SOC'Y INT'L L. PROC. 265, 267 (2002) [hereinafter Krasner *Realist Views of International Law*].

94 J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries*?, 32 CASE W. RES. J. INT'L L. 441, 459 (2000).

95 Note, *Tackling Global Software Piracy under TRIPS*, *supra* note 2, at 1146.

context of agricultural patents.[96] Accordingly, a newer, "softer" strand of international relations realism holds that mechanisms such as the WTO have "positive sum possibilities."[97] For instance, even Iran is lobbying to enter the WTO, following recent backroom dealings with the US.[98] Such viewpoints have gradually gained recognition in India. Today, India's trade policies are said to be oriented towards "*realist* (or perhaps *neorealist*)" strategies, rather than "*ideology* and *norms* prevalent earlier," with India having "maneuvered its policy coordinates in its self-interest to reap maximum relative gains."[99] This was witnessed, for example, in debates in India over the WTO Doha Ministerial Conference.[100] A more recent example is that of trade negotiations between India and the U.S, which occurred in the wake of visits by Prime Minister Narendra Modi to the U.S. and President Barack Obama to India, in 2014 and 2015 respectively.

The issue of IPRs is regarded as a major bone of contention in India-U.S. bilateral relations. As mentioned earlier, India is featured in the U.S. government's Special 301 Report Priority Watch List.[101] During the Obama-Modi visits, individuals in India expressed fears that the government would accede to demands by the U.S. on the issue of pharmaceutical patents in an attempt to secure much-needed foreign

96 To allay domestic concerns, Indian patent legislation has been amended to explicitly prohibit patents on seeds. Patents Act of 1970, Act No. 39 § 3 (j) (Sep. 19, 1970) ("Patents Act"), inserted by Patents (Amendment) Act of 2002, Act No. 38 § 4 (June 25, 2002). Furthermore, the same provision of Indian patent law at issue in *Novartis* was used to deny Monsanto a patent on a method for increasing stress-tolerance in plants. Monsanto v. India (2013) Indlaw I.P.A.B. 72, ¶ 31 (Intell. Prop. Appellate Board) (referring to the Patents Act, § 3(d), and finding that Monsanto's method "entails a journey with many generic method steps . . . not involving inventive step . . . [and] not patentable in view of obviousness and new use of known substance[s]." This stands in contrast to claims from activists that India's post-TRIPS patent amendments were "Monsanto amendments." Vandana Shiva, *The Monsanto Amendment*, ECONOMIC TIMES (May 25, 2002), http://articles.economictimes.indiatimes.com/2002-05-25/news/27351409_1_product-patents-indian-patent-act-bt-cotton.

97 Krasner, *Realist Views of International Law*, *supra* note 93, at 266-67.

98 *See* Allison Carnegie, *Here's What Will Happen if Iran Joins the WTO*, WASHINGTON POST (Oct. 24, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/24/heres-what-will-happen-if-iran-joins-the-wto.

99 *See* Amit Ray & Sabyasachi Saha, *India's Stance at the WTO: Shifting Coordinates, Unaltered Paradigm*, Discussion Paper 09-06, Jawaharlal Nehru University Centre for International Trade and Development, http://www.jnu.ac.in/SIS/CITD/DiscussionPapers/WTO.pdf.

100 Before the Doha Round, the then Indian Commerce Minister had described the WTO as a "necessary evil" that is "power-oriented" instead of "rule-oriented." G. Srinivasan, *Rich Nations have Hijacked WTO: Maran—"New Round will only Widen the Development Divide,"* THE HINDU (Oct. 20, 2001), THE HINDU, http://www.thehindubusinessline.com/2001/10/21/stories/1421201s.htm (quoting the word of Murasoli Maran). However, another political leader, who would later become Commerce Minister himself, criticized the Minister's "fulminations" and argued that India should be "pragmatic and realistic" at Doha, and not be "hung up on assuming leadership of poor nations." Jairam Ramesh, *Maran's Harangues*, INDIA TODAY (Nov. 5, 2001), *in* JAIRAM RAMESH, KAUTILYA TODAY 380, 381-82. He stated, "[t]he issue is one of India seeing where its interests lie. In this round, paradoxical as it may appear, India's interests and those of developed countries like the U.S. and Australia converge." *Id.* at 382.

101 USTR 2016 REPORT, *supra* note 56.

investment and dispel negative impressions resulting from the Special 301 Report.[102] The government was even accused of having established the National IPR Think Tank, which, shortly before Obama's visit, had suggested "transform[ing] India into a world class manufacturing hub" by providing foreign investors a "strong, balanced, predictable and transparent IP regime"[103] at the behest of the U.S. government.[104] However, the Think Tank had also advocated the protection of "public health, food security and environment."[105] Furthermore, an eventual joint statement by the two governments merely contained a bland promise of "enhancing engagement" and "sharing information and best practices" on IPR-related matters.[106] The Modi administration also strategically sought investments from U.S. corporations unthreatened by pharmaceutical patent laws, a prime example being Boeing.

Akhil Prasad, Country Counsel of Boeing in India, shared with me that the U.S. government had sent a questionnaire to several U.S. companies operating in India, seeking their opinion on Indian IP laws.[107] According to Prasad, this measure stemmed from "pressure

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[102] *See* Kundan Pandey, *Obama Visit: Civil Society Appeals to Modi Not to Succumb to U.S. Pressure on IP Laws*, DOWN TO EARTH (Jan. 22, 2015), http://www.downtoearth.org.in/content/obama-visit-civil-society-appeals-narendra-modi-not-succumb-us-pressure-ip-laws; Patralekha Chatterjee, *Will India, U.S. Bridge Divide Over Intellectual Property Rights?*, INTELLECTUAL PROPERTY WATCH (Oct. 12, 2014), http://www.ip-watch.org/2014/12/10/will-india-us-bridge-divide-over-intellectual-property-rights; Amit Sengupta, *Capitulation on IP: Reaching a Point of no Return?*, PEOPLE'S DEMOCRACY (Oct. 27, 2014), http://newsclick.in/india/capitulation-ip-reaching-point-no-return.

[103] NATIONAL IPR THINK TANK, DRAFT NATIONAL IPR POLICY at 25 (Dec. 19, 2014) [hereinafter *Draft IPR Policy*], *available at* http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf. This exact statement was later deleted in the final Policy. However, in an opening message, the Indian Commerce Minister stated that the Policy "will definitely assure both domestic and foreign investors of the existence of a stable IPR regime" in India, while a senior bureaucrat overseeing IPR-related matters stated that strong IP laws "will play a big role in attracting investment into India." *See* GOVERNMENT OF INDIA, NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY (2016), *available at* http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf [hereinafter *Final IPR Policy*] (Message by Minister Nirmala Sitharaman and Secretary Ramesh Abhishek).

[104] In Parliament, two MPs asked the Indian Commerce Minister whether the National IPR Think Tank had been established under U.S. pressure. *See* Rajya Sabha Debates (Dec. 10, 2014) (Statement of M. Achuthan and D. Raja), http://dipp.nic.in/English/questions/10122014/ru1872.pdf. *See also* G. Pramod Kumar, *Will Modi Give up India's Intellectual Property Stand Just to Please Obama?*, FIRSTPOST (Jan, 28, 2015), http://www.firstpost.com/business/obamas-pressure-on-india-over-intellectual-property-rights-betrays-his-double-standards-2067809.html (stating that the establishment of the Think Tank "appeared to have resulted from U.S. pressure," coinciding with Obama's visit).

[105] *Draft IPR Policy*, *supra* note 103, at 5. The final Policy contained a similar recommendation as part of a "Mission Statement." *See Final IPR Policy*, *supra* note 103, at 1,4.

[106] *U.S.-India Joint Statement — "Shared Effort; Progress for All,"* ¶¶ 16, 25, Jan. 25, 2015, WHITE HOUSE PRESS OFFICE (Jan, 25, 2015), https://www.whitehouse.gov/the-press-office/2015/01/25/us-india-joint-statement-shared-effort-progress-all.

[107] Interview with Akhil Prasad, Country Counsel, Boeing, in New Delhi, May 1, 2015 [hereinafter Interview with Akhil Prasad].

from the pharmaceuticals lobby" in the U.S. However, Prasad pointed out that, unlike the pharmaceutical industry, the aviation industry did not face many patent-related challenges in India. Prasad explained that "due to a lack of technological sophistication on the part of Indian companies," the possibility of infringing patents to manufacture aircrafts "looks quite remote."[108] Prasad further stated that the aviation manufacturing sector in India consists of reputed domestic companies like Tata and Mahindra "who respect IP rights of original equipment manufacturers and are aware of the consequences of" IPR infringement.[109] Indeed, in a submission to the U.S. International Trade Commission, Boeing reiterated that its experience with Indian patent laws had been positive.[110] Subsequently, Modi met with the Chairman of Boeing during his U.S. visit, who expressed interest in deepening the company's investments in India.[111] Following the meeting, a senior official from Boeing stated that Modi had assured Boeing of adequate IPR protection.[112] A similar development has underlined the engagement of another major aerospace and defense corporation, Honeywell, with India.[113]

Hence, this shows that countries can, in reality, manipulate international IP standards to suit domestic interests. If the Special 301 Report is an example of "realist policymaking" by the U.S. to ensure "additional, stringent protection beyond the scope of TRIPS's ambiguous provisions,"[114] the Indian government's IP policies and engagement with U.S. industry shows that it is equally a realist actor on the international stage.

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108 *Id.*

109 *Id.*

110 *Statement to the U.S. International Trade Commission by the Boeing Company*, Feb. 7, 2014, *available at* http://keionline.org/sites/default/files/Boeing_ITC%20Statement_India_IPR%20_Feb_2014.pdf.

111 *PM Modi's U.S. visit: Boeing Keen on Greater Engagement with India*, THE ECONOMIC TIMES (Sep, 29, 2014), http://articles.economictimes.indiatimes.com/2014-09-29/news/54437419_1_c-17-indian-air-force-globemaster.

112 *Boeing Bullish on "Make in India,"* STRATPOST, (March 9, 2015), http://www.stratpost.com/boeing-bullish-on-make-in-india (quoting Chris Raymond, an official at Boeing, as saying "the Prime Minister . . . talked about how 'we have to be trusted on things like technology release and security requirements' and I read into that: intellectual property.").

113 *See* Huma Siddiqui, U.S. *Defense Giants Back India's IPR Regime as Big Pharma Frets*, FINANCIAL EXPRESS (March 12, 2014), http://archive.financialexpress.com/news/us-defence-giants-back-india-s-ipr-regime-as-big-pharma-frets/1232784 (quoting a statement from Honeywell as saying "[o]ur experience is that an acceptable IPR legal framework exists in India with laws and regulations that are comparable to IPR regulations in other developed countries."); Amiti Sen, *Honeywell CEO to Meet Modi*, THE HINDU BUSINESS LINE (May 5, 2015), http://www.thehindubusinessline.com/companies/honeywell-ceo-to-meet-modi/article7173991.
ece (quoting an Indian government official as saying that Honeywell "sees a lot of scope" in India).

114 Note, *Tackling Global Software Piracy under TRIPS*, *supra* note 2, at 1147-48.

IV. THE SECOND ELEMENT: CONTEXTUALIZING IPRS

To carry forward the discussion from the previous section, it is simplistic to always view IPRs as a monolithic entity that invariably pits powerful developed countries against hapless developing countries. In the intellectual property-skeptic discourse in India, critics of the TRIPS Agreement, including eminent legal scholars, have often used the terms "IPR" and "patents" interchangeably.[115] But, as a former Indian Commerce Secretary has noted, such discourse is misleading and fails to discuss India's interests in protecting other forms of IPRs, such as geographical indications.[116]

Statistics show that developing countries generally lag behind developed countries when it comes to patents and innovation.[117] It is thus arguable that weaker patent laws may yield some short-term gains for developing countries. For example, it has been pointed out that although India's patent policy "failed to discover newer drugs," it "was . . . successful in promoting domestic pharmaceutical . . . companies in developing a low-cost, high-access generics market."[118] However, the same logic does not necessarily apply when it comes to other forms of IP, where developing countries generate their own IP—something which can be gleaned, for example, from a conversation with the Deputy Secretary General of the Asian African Legal Consultative Organization, who had previously represented Iran at WIPO.[119]

In the case of geographical indications, even Ethiopia, a least developed country (LDC), has attempted to commercialize geographical indications pertaining to coffee through various business agreements.

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115 *See, e.g.*, Chimni, *Towards Technological Wastelands*, *supra* note 52, at 92 (using "IPR" and "patents" interchangeably and stating this fact).

116 *Quotes and Excerpts*, 1 INDIA & THE WTO (Ministry of Commerce, Government of India, Udyog Bhawan, New Delhi), no. 3, 1999, at 11 (quoting A.V. Ganesan as saying "[t]he debate in our country over the TRIPS Agreement is overwhelmingly focussed [sic] on the issue of patents as though it is the only form of IPRs and it is the only IPR covered by the TRIPS Agreement. . . . [I]t is becoming increasingly clear to us that it is in our own interest to enact legislation to protect our products like Basmati rice or Darjeeling Tea in the same manner as Scotch Whisky or French Champagne is protected by the geographic appellation laws of those countries.").

117 *See* WIPO, WORLD INTELLECTUAL PROPERTY INDICATORS 11-13 (2015) (providing statistics on global patent filings); CORNELL UNIVERSITY, INSEAD & WIPO, THE GLOBAL INNOVATION INDEX 197 (2015) (ranking India a lowly 81 in the WIPO Global Innovation Index).

118 Sudhir Krishnaswamy, *Intellectual Property and India's Development Policy*, 1 INDIAN J. L & TECH 169, 170 (2005). *See also* Park & Jayadev, *Access to Medicines in India*, *supra* note 40, at 78-9, 85-6 (stating that the Indian pharmaceutical industry has become one of the world's largest pharmaceutical industries, and is regarded as the "pharmacy of the developing world.").

119 Interview with Mohsen Baharvand, New Delhi (Apr. 23, 2015) [hereinafter Interview with Mohsen Baharvand]. Baharvand felt that developing countries ought to be "more aggressive" in international negotiations to protect their IP, citing the example of traditional knowledge. Baharvand stated that he had proposed at WIPO that a mechanism be devised that would require users of traditional knowledge originating from developing countries to transfer royalties to public institutions in those countries.

For example, Ethiopia entered into an agreement with Starbucks.[120] In addition, the Indian government has spent considerable resources protecting the Darjeeling geographical appellation worldwide.[121] The Tea Board of India, a government entity with rights to the Darjeeling trademark, has scrupulously litigated to protect the mark.[122] Basudeb Banerjee, the former Tea Board Chairman and presently the Chief Secretary of the state of West Bengal, revealed in an interview that he had to oversee enforcement measures in many countries.[123] In his experience, Banerjee found that European industries turn "aggressive" while pushing for stronger protection for geographical indications linked to cheeses and wines in developing countries, but turn "defensive" when asked by the Tea Board to not use the Darjeeling mark on blended teas. "All countries look after their self-interest and we should do the same," Banerjee told me.[124]

Interestingly, developing countries may sometimes forgo idealism in pursuit of self-interest. For example, Cuba, while demanding that the WTO adopt lenient pharmaceutical patent rules to allow for greater access to medicines in the interests of public health,[125] has diligently enforced the trademark rights of its cigar industry, even complaining to the WTO against tobacco plain packaging laws in Australia.[126] In another telling development, one that is hardly discussed by Indian academics, the legal community in Bangladesh has accused India of wrongly appropriating Bangladeshi geographical indications, such as

120 Elizabeth March, *Making the Origin Count: Two Coffees*, WIPO MAGAZINE (Sept. 2007), http://www.wipo.int/wipo_magazine/en/2007/05/article_0001.html.

121 *See* Prashant Reddy, *Tea Board 'Regrets' Earlier RTI Reply; Discloses Legal Expenses on Registering and Defending its Intellectual Property*, SPICY IP (June 19, 2012), http://www.spicyip.com/2012/06/tea-board-regrets-earlier-rti-reply.html.

122 Much like Western luxury brand companies, the Tea Board has filed lawsuits and oppositions based on trademark dilution, its targets including lingerie manufacturers in France and Taiwan. *See* Caroline Le Goffic, *Cancellation of a Trade Mark Based on a Prior Foreign Geographical Indication Related to Different Products*, 3 J. INTELL. PROP. L. & PRAC. 152 (2008) (referring to a case heard by the Court of Appeal of Paris); Shaoli Chakrabarty, *Bikini Storm in Teacup*, THE TELEGRAPH (Calcutta) (Mar. 6, 2012), http://www.telegraphindia.com/1120307/jsp/business/story_15222296.jsp#.VUpEgvmqqko (referring to a decision of the Supreme Administrative Court in Taiwan).

123 Interview with Basudeb Banerjee, Calcutta, Apr. 1, 2015 [hereinafter Interview with Basudeb Banerjee].

124 *Id.*

125 *See* Official Submissions to the WTO, *Statement by the Cuban Delegation on IP and Access to Medicines*, IP/C/W/299 (July 5, 2001), http://www.iprsonline.org/submissions/publichealth.htm; Official Submissions to the WTO, *Submission by the African Group, Barbados, Bolivia, Brazil, Cuba et al. on TRIPS and Public Health*, IP/C/W/296 (June 29, 2001), http://www.iprsonline.org/submissions/publichealth.htm.

126 *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Dispute DS434, WORLD TRADE ORGANIZATION (June 22, 2015), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm.

Jamdani sarees.[127] From a bottom-up perspective, it is not only the Indian state that has gradually realized the potential of commercializing IP, but also grassroots innovators.[128]

Hence, the foregoing supports the argument that actors in a legal system act as "rational maximizers" of their goals.[129] Apart from supporting realist perceptions of international law, this also illustrates the importance of viewing IPRs in context and recognizing the difference between each form of IP. It also tempers the narrative of IPRs solely being used by developed countries to exploit developing countries.

V. THE THIRD ELEMENT: CONTEXTUALIZING COPYRIGHT

A study on the economic contribution of creative industries in developing countries has pointed out that the debate surrounding IP in such countries should distinguish between copyrights and patents.[130] In India, copyrights have sometimes been equated with patents in the IP-skeptic, anti-TRIPS discourse.[131] Yet, in reality, the TRIPS Agreement's

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127 *B'desh Jamdani Ownership Hijack Attempt Draws Flak*, FINANCIAL EXPRESS (Dhaka) (June 18, 2014), http://www.thefinancialexpress-bd.com/2014/06/18/40023. According to one Bangladeshi scholar, "India has ignored the glorious history and unique creativity of Bangladeshi weavers by registering the product as its own" in India. Tapas Paul, *"Jamdani Saree": An Increasing Debate Between Bangladesh and India*, Presentation at the 10th WIPO-WTO Colloquium for Teachers of Intellectual Property (June 25, 2013, Geneva).

128 Madhavi Sunder, citing the example of a farmer in the state of Kerala who sought patent protection over a high-yield method of planting rubber trees, has observed, "[a]fter a decade of resisting the Western imposition of intellectual property, now. . . farmers and artisans in the villages—were beginning to ask, How [sic] can intellectual property rights work for us? TRIPS protected the knowledge and economic interests of the developed world, the rich corporations of the West. Can intellectual property be a tool for protecting poor people's knowledge as well?" Madhavi Sunder, *Intellectual Property and Development as Freedom*, *in* THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 453, 453–54 (Neil W. Netanel ed., 2009).

129 Richard Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 761 (1975).

130 Patrick Kabanda, *The Creative Wealth of Nations: How the Performing Arts Can Advance Development and Human Progress*, WORLD BANK GROUP (Nov. 2014), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/09/02/090224b0828bc20c/1_0/Rendered/PDF/The0creative0w0t0and0human0progress.pdf ("[G]iven the broad nature of intellectual property . . . major misunderstandings are common. One of them is this: to some, protecting intellectual property generally means 'no cheap drugs to AIDS patients' in the developing world. This has truth to it. Nevertheless, protecting a Nigerian movie from piracy, for example, is not the same thing as protecting patents for AIDS drugs.").

131 For example, in 2012, major amendments were being made to Indian copyright legislation. The amendments were greatly influenced by a campaign by the lyricist and M.P. Javed Akhtar to seek greater rights for performers and authors, earlier generations of whom had died in penury. *See generally* Prashant Reddy T., *The Background Score to the Copyright (Amendment) Act, 2012*, 5 NAT'L U. JURID. SCI. L. REV. 469. Yet, one M.P. still argued that IPRs were "inherently anti-India," and that the copyright amendments would be used by "American Companies" to say, "since you have this in the field of music; since you have this in the field of culture; then why cannot you do the same thing in the field of drugs and chemicals?" *Discussion on the motion for consideration of the Copyright (Amendment) Bill, 2012*, Lok Sabha Debates, Mar. 22, 2012 (Statement of Tathagata Satpathy), http://indiankanoon.org/doc/104277827.

impact on Indian copyright law has been less far-reaching compared to its impact on patent law. Indian copyright law has largely "developed independently of global influence."[132] Furthermore, Indian copyright industries have matured from being mere replicators of Western copyrighted works (and, simultaneously, opponents of strong copyright laws) to being generators of indigenous IP.[133] Unlike the science and technology sectors, Indian copyright industries, today, generate copious amounts of IP, and attitudes of Indian lawmakers towards copyright law are generally different when compared with patent law. Pratibha Singh, a senior IP practitioner and a member of India's National IPR Think, told me "India is a victim of copyright piracy."[134] Repeating this statement during a talk, she added that one could "not hear not a single whisper in India about not protecting copyright."[135]

One of the best illustrations of this was an amendment to Indian copyright legislation before India joined the TRIPS Agreement. The amendment increased the term of protection for authorial works by ten years more than the Berne Convention standard (which would later become the TRIPS standard). The sole reason for the increase was the fact that Tagore's works were on the verge of falling into the public domain. Tagore's copyrights were vested with a state university in West Bengal. The then government of West Bengal—led, ironically, by the C.P.I.(M.)—lobbied to pass the amendment.[136] Similarly, copyright amendments in 2012 introduced various TRIPS-plus standards recognized by the WIPO Internet Treaties,[137] such as the introduction of a "making available" right and the protection of technological measures.[138] Several industry associations had made representations before Indian lawmakers when the amendments were being drafted,[139]

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132 Ghosh, *supra* note 12, at 161.

133 An example is the publishing industry. In British India, one of the largest Indian publishing houses at the time opposed strengthening translation rights, stating that "the vernaculars in India are very poor in original stock, and have to depend mainly on translations from English." Bently, *supra* note 34, at 1227-28. However, today, the Indian publishing industry falls within the seventh largest in the world, and publishes many works by domestic authors in vernacular languages. *Publishing*, *Sector Profile*, FICCI, http://www.ficci.com/sector/86/Project_docs/Publishing-sector-profile.pdf (last visited Mar. 31, 2016).

134 Interview with Pratibha Singh, New Delhi (Feb. 16, 2015) [hereinafter Interview with Pratibha Singh].

135 Pratibha Singh, Speech at G.I.P.C. Conference on Innovation and Intellectual Property Rights, New Delhi, (Feb. 16, 2016).

136 Lok Sabha Debates (Copyright (Amendment) Ordinance, 1991) (17 March 1992) (Statement of Girdhari Lal Bhargava), http://parliamentofindia.nic.in/lsdeb/ls10/ses3/2217039203.htm> (accessed 11 November 2013).

137 Treaties and Agreements World Intellectual Property Organization: Copyright Treaty, 36 I.L.M. 65 (1997); Treaties and Agreements World Intellectual Property Organization: Performances and Phonograms Treaty, 36 I.L.M. 76 (1997).

138 *See* Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17 J. INTELL. PROP. RTS. 324, 327, 332 (2012).

139 *See generally* Report on the Copyright (Amendment) Bill, 2010, PARLIAMENT OF INDIA (Nov.

and the enactment of such provisions was clearly meant to address concerns of domestic industry. Even Indian state governments that are avowedly left wing have enacted state laws containing stronger criminal provisions for piracy than national copyright legislation.[140] Meanwhile courts have repeatedly condemned film piracy in strong words, with one High Court describing it as an act "almost equivalent" to printing fake currency.[141]

I perceived a difference in attitude between copyright and patent issues, as well as in support for the Indian film industry's battle against piracy, in conversations with two former Ministers in the Indian government, both with cultural talents themselves. The first was Shashi Tharoor, former Minister of State for Human Resource Development (until recently, the Ministry in charge of copyright matters), who is also an acclaimed writer.[142] The second was Milind Deora, former Minister of State for Information Technology, who is also a part-time blues guitarist.[143] I discerned similar sentiments from G.R. Raghavender,

23, 2010), http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf.

[140] For instance, a C.P.I.(M.)-led government in Kerala enacted a strong anti-piracy law permitting preventive detention. *See* T. Prashant Reddy & N. Sai Vinod, *The Constitutionality of Preventing "Video Piracy" Through Preventive Detention in Indian States*, 7 J. INTELL. PROP. L. & PRAC. 194, 198 (2012) [hereinafter Reddy & Vinod, *Constitutionality of Preventing "Video Piracy"*]. To cite another example, the incumbent Chief Minister of West Bengal, Mamata Banerjee, has described her party as one of "true Leftists . . . . " Subhir Bhaumik, *Bastion of Indian Communism Crumbles*, BBC NEWS (May 17, 2009, 3:02 AM), http://news.bbc.co.uk/2/hi/south_asia/8054289.stm. *See* infra p. 100 and notes 348-49 (describing how her administration enacted a law imposing stronger criminal laws for film piracy than that prescribed in national copyright legislation). *See infra* notes 376 and 377 and accompanying text.

[141] Fox v. John Ceedge, 61 P.T.C. 134, ¶ 12 (Del. H.C. 2015). *See also* Siva v. Commissioner, Indlaw MAD 199 (Mad. H.C., June 24, 2005) (describing film piracy as a "dragon" that is "rapidly spreading its claws").

[142] Tharoor told me that while he would be "hesitant" to support strong patent laws if it impacted access to medicines, he would not feel the same way if there was to be a "crackdown" on "rogues" and "furtive fellows" who were "personally profiting" from selling pirated films. He reasoned that while medicines were a necessary expenditure and it was important to provide access to medicines that "the vast majority of Indians cannot afford," films were a "discretionary expenditure." Tharoor said that piracy not only caused economic harm but also had an impact on the quality of cinema, with producers preferring to invest in commercially viable, action-oriented films to offset losses due to piracy. Tharoor added that he himself found it "a matter of great irritation" to learn that his books were being pirated. *See* Interview with Shashi Tharoor, Former Minister of State for Human Resource Development (Mar. 30, 2015) [hereinafter Interview with Shashi Tharoor]. Incidentally, Tharoor has, in the past, criticized trademark counterfeiters and those who knowingly buy counterfeit products. *See* Shashi Tharoor, *A Spreading Danger*, N.Y. TIMES (Jul. 9, 2008), http://www.nytimes.com/2008/07/09/opinion/09iht-edtharoor.1.14363006.html?_r=0.

[143] Deora told me that film piracy should be distinguished from pharmaceutical patent issues. Deora told me that film piracy was a matter of "serious concern", and that pirated films "should no doubt be banned." *See* Telephone Interview with Milind Deora, former Minister of State for Information Technology (Apr. 7, 2015) [hereinafter Interview with Milind Deora]. *See also* Statement of E.M. Sudarsana Natchiappan, Lok Sabha Debates, Consideration of the Cine-workers Welfare Fund (Amendment) Bill 2000 (Nov. 20, 2001), http://indiankanoon.org/doc/239971 (quoting Natchiappan, an MP who would later become

Director of IPR at the Department of Industrial Policy and Promotion and the former Registrar of Copyright.[144] Jagdish Sagar, a former senior bureaucrat who represented India at TRIPS negotiations, told me that, while India could ally with other developing countries and support diluted pharmaceutical patent laws, India might find it advantageous to "be on the side of the hawks" on certain copyright-related matters.[145]

A leading Indian newspaper recently reported an example of such hawkishness. According to the report, the Indian government had complained to the USTR about pirated Indian films and music being available on websites hosted by U.S. servers.[146] The Indian government rejected a freedom of information request from me seeking more details on the matter.[147] However, the USTR replied to my freedom of information request and annexed a list of 476 websites about which the Indian government had complained.[148] The list was mostly populated by dubious, pirated websites, some of which I found to be blocked in India but not in the U.S.[149] But, the list also contained some reputable, legitimate websites that Internet users might use to access pirated

Minister of State for Commerce and Industry, as saying, "[t]he film industry is totally wrecked by piracy"); *See also* Statement of Jaya Prada, Lok Sabha Debates, Need to Bring a Suitable Legislation to Check Piracy of Films in the Country (Aug. 8, 2005), http://indiankanoon.org/doc/1389050 (quoting Jaya Prada, an MP and former actress, as saying, "[the] Film Industry has been suffering heavy losses on account of the piracy of films . . . [the government is] also losing [a] lot of revenue . . . . [L]arge number[s] of Cinema Halls in the country have been closed down and a number of people have been rendered unemployed.").

144 Raghavender was critical of the Special 301 Report for rating India's IPR laws poorly, and defended the rulings in *Novartis* and *Bayer*. He argued that the TRIPS Agreement only required India to observe a "global minimum standard" in its IP laws. However, he felt that there was a "greater convergence of interest" with developed countries on the issue of film piracy. He told me that film piracy was causing substantial losses to the Indian film industry, and that the government was losing potential tax revenues through sales of pirated DVDs by street vendors. He supported action both against the larger source of such sales and the vendors themselves. Interview with G.R. Raghavender, Director of IPR at the Department of Industrial Policy and Promotion and the former Registrar of Copyright (May 10, 2015) [hereinafter Interview with G.R. Raghavender].

145 Interview with Jagdish Sagar, Intellectual Property Practitioner (Feb. 16, 2015).

146 Sidhartha, *India to US: Tech Companies Violating Copyright Law*, TIMES OF INDIA (Nov. 26, 2014, 12:39 AM), http://timesofindia.indiatimes.com/tech/tech-news/India-to-US-Tech-companies-violating-copyright-law/articleshow/45277212.cms.

147 Letter from V.P. Srivastav, Central Public Information Officer, Ministry of Human Resource Development, to Arpan Banerjee, Author (Feb. 20, 2014) (on file with author). The letter cited a statutory provision permitting the non-disclosure of government information on various grounds, such as prejudice to national or economic security, relations with foreign states, etc. *See* Right to Information Act of 2005, Act No. 22 § 8 (June 15, 2005). It is difficult to see how non-disclosure could be justified in my case.

148 Email from Jacqueline B. Caldwell, Office of the USTR, to the author (May 2, 2015) (on file with author).

149 On May 13, 2015, I tried to access three websites in the list (www.bollywoodmp4.com, www.hindigeetmala.com and www.bollygrounds.com) from New Delhi, but encountered the following message on my browser: "This website/URL has been blocked until further notice either pursuant to Court orders or on the Directions issued by the Department of Telecommunications." On June 1, 2015, I tried to access these websites using the wireless connection for guests at Harvard Law School. I was able to access the three websites.

content, such as YouTube, Google and Yahoo. When I asked Raghavender about the matter, he stated that if the U.S. government expected India to act beyond its TRIPS obligations and take action against the piracy of Hollywood films, the U.S. government should be expected to reciprocate with respect to Indian films.[150] The Indian government's assertive stance coincided with the draft National IPR Policy stating that the government ought to be "[t]aking up the issue of Indian works and products being pirated and counterfeited abroad with countries concerned"— a recommendation retained in the final Policy.[151]

One possibility I mulled over was whether the piracy of Indian films overseas might, as a result of greater dissemination, inadvertently have the positive effect of enhancing India's soft power in some countries.[152] Should the Indian government and film industry then tolerate, or even encourage, such piracy? Tharoor, one of the most vocal proponents of the cinema-as-soft-power theory, did not agree.[153] Neither did Jawhar Sircar, CEO of India's national public broadcasting company and a former Culture Secretary in the Indian government.[154]

Hence, the foregoing indicates that the Indian government is gradually adopting a more nuanced position on IPRs, based on national economic interest. The fact that the Indian government has confronted the United States' government on the piracy of Indian films in the U.S. demonstrates that the Indian government identifies the Indian film industry as an important economic asset, and views film piracy as an issue where it ought to protect rights owners. This stands in contrast to its position on pharmaceutical or agricultural patents. It is also possible that the Indian government's rational calculus on IPRs, including

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150 Interview with G.R. Raghavender, *supra* note 144.

151 *Draft IPR Policy*, *supra* note 103, at 22, ¶ 6.2.7; *Final IPR Policy*, *supra* note 103, at 22, ¶ 6.8.7.

152 Linked to this is the theory of "tolerated use." To quote Tim Wu, "[t]olerated use is infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about. There may be a variety of reasons for tolerating use. Reasons can include simple laziness or enforcement costs, *a desire to create goodwill*, or a calculation that the infringement creates an economic complement to the copyrighted work—it actually benefits the owner." *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (emphasis added). [hereinafter Wu, *Tolerated Use*]. One example that illustrated this is the piracy of Hollywood films in the erstwhile Soviet Union. It has been argued that this "allowed Western culture to spread rapidly through the Eastern bloc . . . ." and that the "subversion of Soviet ideology. . .was in part made possible through massive copyright infringement." DEBORAH HALBERT, THE STATE OF COPYRIGHT: THE COMPLEX RELATIONSHIPS OF CULTURAL CREATION IN A GLOBALIZED WORLD 102 (2014). *See also* James O Malley, *Is Piracy Actually Helping Hollywood?*, ALPHR (Oct. 17, 2015), http://www.alphr.com/life-culture/1001755/is-piracy-actually-helping-hollywood.

153 Tharoor argued that the focus for the government and industry ought to be to distribute licensed copies of Indian films overseas. Interview with Shashi Tharoor, *supra* note 142.

154 Sircar suggested targeting native populations in Asian and African countries through licensed copies of Indian films, with proper subtitles. Email Interview with Jawhar Sircar, New Delhi (May 13, 2015) [hereinafter Interview with Jawhar Sircar].

patents, might shift over time, as Indian domestic industries grow and generate more IP. A recent example is an announcement by Prime Minister Modi promising an 80 percent reduction in patent filing fees for Indian startups,[155] and an announcement by the Indian Finance Minister proposing a reduced rate of taxation on the income earned by Indian businesses through the exploitation of patents worldwide.[156] In the context of copyright, an analogy could be drawn with the U.S., which, towards the end of the 19th century, transitioned from being a global copyright pirate to a global copyright protector.[157] A leading investment law scholar has stated that emerging economies like China and India could "effectively abandon their earlier positions as champions of developing countries" and "act as all-powerful states have done in the past" in the course of "their rush to prosperity and great power status."[158] This could perhaps be true in the context of IPRs.

VI. THE FOURTH ELEMENT: THE INTERESTS OF THE FILM INDUSTRY

In the West, academicians have highlighted the "agenda-setting power" of entertainment companies in matters of copyright legislation.[159] In India, large film studios have campaigned for strong copyright laws,[160] and it is apparent that the government has been sympathetic to the concerns of the industry by enacting anti-piracy

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155 *80% Reduction in Patent Fees for Start-ups: Modi*, BUSINESS STANDARD (Jan. 16, 2016), http://www.business-standard.com/article/news-ians/80-percent-reduction-in-patent-fees-for-start-ups-modi-116011600716_1.html.

156 Arun Jaitley, Minister of Finance, Budget 2016-2017 Speech, ¶ 125 (Feb. 29, 2016), http://indiabudget.nic.in/ub2016-17/bs/bs.pdf.

157 The U.S. was once a "pirate nation" that did not protect the rights of foreign authors. Lawrence Lessig, *Keynote: The International Information Society*, 24 LOY. L.A. ENT. L. REV. 33, 1 (2004). The U.S. government snubbed pleas by the British government, as well as authors like Dickens, to prevent piracy of British works within its borders. However, towards the end of the 19th century, the U.S. shifted its stance and worked towards the establishment of cross-border copyright regimes, following demands by U.S. publishers and authors, notably Mark Twain. *See* VAIDYANATHAN, *supra* note 19, at 35-80.

158 Muthucumaraswamy Sornarajah, *The Case Against a Regime on International Investment Law*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 475, 497 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

159 *See generally* Benjamin Farrand, *Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement*, 35 OXFORD J. LEG. STUD. 487 (2015). *See also* BLAYNE HAGGART, COPYFIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM 102-4 (2014). The influence of the entertainment industry has sometimes been viewed as having negative consequences. For example, in a joint statement, over 50 academicians claimed that a proposal to extend the term of copyright protection for sound recording in the European Union was a result of "fierce and sustained lobbying by the trade bodies of the record industry," and that it could not "be the job of the European Commission to protect the revenues of incumbent companies at the cost of consumers, creativity and innovation." *See* Lionel Bently at al., *Creativity Stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings*, 30 EUR. INTELL. PROP. REV. 341 (2008).

160 *See* Liang & Sundaram, *India*, *supra* note 14, at 385-8.

laws.[161] For IP skeptics who are supportive of piracy, this is naturally problematic. It is, after all, "the case of the Left" that "culture and the economy are. . . mutually hostile," and that "the commodification of art" provides "an ideological legitimization of capitalist societies."[162] But as Sen, whose left-leaning "development as freedom" arguments have been applied in the context of IPRs,[163] has pointed out, the economic contribution of the creative industries are just as important as their cultural contribution.[164]

There exist "numerous claims suggesting that piracy is a major deterrent to income generating activities" in the creative industries and that this is "chiefly acute in developing countries."[165] For instance, a cross-section of voices from Nigeria[166] and Iran[167] (the latter having a

[161] For example, the industry made representations before lawmakers prior to the 2012 copyright amendments, and flagged piracy as an issue of concern. *Report on the Copyright (Amendment) Bill, 2010*, *supra* note 139, at ¶ 22). When the amendments were presented before the Indian Parliament, the then-Minister for Human Resource Development, referring to the introduction of anti-circumvention provisions, stated, "we believe that there is a lot of piracy that is happening through technology in this country . . . . We think the time has come to deal with piracy." *See* Statement of Kapil Sibal, Discussion on the Motion for Consideration of the Copyright (Amendment) Bill, 2012, Lok Sabha Debates (Mar. 22, 2012), http://indiankanoon.org/doc/104277827.

[162] Kabanda, *The Creative Wealth of Nations*, *supra* note 130, at 8.

[163] AMARTYA SEN, DEVELOPMENT AS FREEDOM 148-159 (1999) (arguing that "in judging economic development it is not adequate to look only at…indicators of overall economic expansion," and that democratic freedoms are also important); *See* Sunder, *Intellectual Property and Development as Freedom*, *supra* note 128, at 468-9 (drawing from Sen's work and arguing, *inter alia*, that IP law "must confront its vast social effects and serve a broader range of human values.").

[164] Amartya Sen, *Foreword*, *in* Kabanda, *The Creative Wealth of Nations*, *supra* note 130, at ii ("If the poorer countries of the world. . .have to search rationally for channels of progress and enrichment of human lives, the role of music, drama, dance and other such activities has to be seen also in terms of their economic contributions . . . . [t]hrough generating saleable commodities . . . . The complementarity between the economic and the cultural . . .could be viewed together").

[165] Kabanda, *The Creative Wealth of Nations*, *supra* note 130, at 38; Carsten Fink et al., *The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries*, 30 WORLD BANK RES. OBSERVER 1, 6-7 (2015).

[166] *See, e.g.*, Mairi Mackay, *Nollywood Loses Half of Film Profits to Piracy, Say Producers*, CNN (Jan. 26, 2009), http://edition.cnn.com/2009/SHOWBIZ/Movies/06/24/nollywood.piracy; Monsuru Olowoopejo, *Piracy: Fashola, Film Makers Call for Stiffer Penalties*, VANGUARD (Apr. 21, 2015), http://www.vanguardngr.com/2015/04/piracy-fashola-film-makers-call-for-stiffer-penalties; Jonathan Haynes & Onookome Okome, *Evolving Popular Media: Nigerian Video Films*, 29 RES. AFRICAN LIT. 106, 115 (1998); Tambay Obenson, *On Nollywood's Domestic and International Piracy Problems and Lost Revenues*, INDIEWIRE (Jan. 28, 2014), http://blogs.indiewire.com/shadowandact/nollywoodathingortwoaboutdomesticinternationalpiracylostrevenues.

[167] Iran is not a member of the TRIPS Agreement and has also not signed the Berne Convention. A study has noted that while the country's lack of international obligations has certain "positive aspects," such as decreased costs of publishing translations of foreign books and providing consumer cheaper access to such books, it has also disadvantaged Persian authors publishing abroad, impeded foreign investment in Iran, and hindered collaboration between Iranian and overseas publishers. Shahimeh Sadat Hosseini & Dariush Matlabi, *A Review on the Status of Copyright in Iran's Publication Industry: Studying Tehran Publishers' View*, 16 MIDDLE-EAST J.

strong arthouse film tradition) has claimed that piracy has adverse economic effects for producers and artists. Thus, a realist study of film piracy in India should certainly be conscious of the interests of the film industry—if not in recognition that the industry is an important contributor to the national economy and is adversely affected by piracy, then at least in recognition that the industry's concerns can influence legislation. However, in keeping with the spirit of NLR, two qualifications might be helpful. First, given that much of the anti-piracy discourse reflects the views of large "Bollywood" companies and artists, it is important to refer to the views of the regional and "parallel" film industries.[168] Second, in addition to producers, it is also important to appreciate the views of other members of the industry, such as directors, performers, and other artists.[169]

From the perspective of producers, industry studies have blamed piracy for causing "significant annual losses to the Indian film industry and less-than-potential employment."[170] Some of Bollywood's most

SCIENTIFIC. RES. 383, 388 (2013). In the context of films, over 200 members of the Iranian film industry, led by six well-known directors and producers, have written an open letter blaming piracy for causing them losses and urged consumers not to view pirated content. Rakhshan Banietemad et al., *Letter of Iranian Filmmakers for Audiences of their Films Over the Internet*. (Jul. 20, 2014), http://www.khanehcinema.ir/en/news/38/Letter-of-Iranian-filmmakers-for-audiences-of-their-Films-over-the-Internet. Baharvand informed me that Iranian films are frequently sold on overseas cable channels in the U.S. and Canada, with no royalties being paid to rights owners. Baharvand criticized this practice and felt that copyright revenues were important to the Iranian film industry as it mostly produced "aesthetic films," rather than Hollywood-style "action films." Interview with Mohsen Baharvand, *supra* note 119; *See also* Rita Matulionyte & Farnoosh Adlamini, *Iran: In Search of a Balanced Approach to Copyright*, 2 INTELL. PROP. Q. 114, 117-8 (2013) (describing the global critical success enjoyed by Iranian cinema and citing an anti-piracy campaign in Iran led by the director Mehran Modiri).

168 The term "Bollywood" is a portmanteau word combining "Bombay" and "Hollywood," referring to the popular Hindi-language film industry based in Bombay. The term was coined by the British detective novelist H.R.F. Keating. *See* TEJASWINI GANTI, PRODUCING BOLLYWOOD: INSIDE THE CONTEMPORARY HINDI FILM INDUSTRY 369 (2012). The term "Bollywood" is often used to denote the Indian film industry as a whole. *See, e.g.*, *Bollywood*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/bollywood (defining Bollywood as "the motion-picture industry in India"). However, this is technically incorrect. The Indian film industry consists of many regional film industries producing films in languages other than Hindi (such as Tamil, Telugu, Bengali etc.), as well as a "parallel" arthouse film tradition. *See* Arpan Banerjee, *A Case for Economic Incentives to Promote "Parallel" Cinema in India*, 16 MEDIA & ARTS L. REV. 21, 23-6 (2011) [hereinafter Banerjee, *A Case for Economic Incentives to Promote "Parallel" Cinema in India*]. It might even be instructive to use a "deviant case" sample and interview producers belonging to the underground fringe of the parallel film industry. In social science research, deviant case sampling "focuses on cases that are rich in information because they are unusual or special in some way," to test "implicit assumptions and norms." PATTON, *supra* note 11, at 169-71. In my research, the case of Overdose films can arguably be considered a deviant case sample. *Infra* note 180 and accompanying text.

169 *See* Baxi, *Copyright Law and Justice in India*, *supra* note 12, at 540 (arguing for an "understanding of the social purposes . . . of copyright law" and stating that "copyright legislation must be so designed as to protect as well the rights of intellectual and cultural labourers, upon which ultimately the social interest in cultural progress depends.").

170 PRICEWATERHOUSECOOPERS, INDIA ENTERTAINMENT AND MEDIA OUTLOOK 20 (2013). According to one, industry study, piracy causes the Indian entertainment industry annual financial

renowned artists, directors, and producers have opposed piracy for such reasons.[171] However, the problem with a quantitative approach to studying piracy is that it is difficult to accurately estimate the financial losses faced by the film industry due to piracy.[172] Here, NLR's emphasis on micro-level, qualitative research might be helpful. For example, piracy was cited as a reason for the recent closure of Music World, one of India's largest music and film retail chains, and Flyte, one of India's first digital music download websites.[173] The closure of Music World, which was headquartered in West Bengal and had its flagship store in Calcutta, led to a backlash against piracy by artists in

losses of around USD 4 billion and has resulted in nearly 820,000 job losses, the specific figures for the film industry being around USD 1 billion in annual financial losses and around 600,000 job losses. *See USIBC Report*, *supra* note 14, at 3, 31. This figure was also quoted by a government-appointed committee. COMMITTEE ON PIRACY, REPORT OF THE COMMITTEE ON PIRACY 11-12 (2010) [hereinafter Piracy Committee Report].

171 *See, e.g.*, *100 years of Indian Cinema: An Interview with Bollywood's Anurag Basu*, WIPO MAGAZINE (Feb. 2013), http://www.wipo.int/wipo_magazine/en/2013/01/article_0001.html (quoting the director Anurag Basu as citing statistics regarding the economic harm caused by piracy, and saying, "[p]iracy affects us a lot and we have to stop it . . . . We remain a flourishing industry, but imagine the business movies would do without piracy."); *Deepika Padukone on Anti-Piracy*, https://www.youtube.com/watch?v=-fCW3RNOY6I (providing a message by the actress Deepika Padukone saying, "one should not illegally watch or download movies . . . we all work very, very hard to put out these films. . .there's the right way of watching them."); *Mukesh Bhatt: Digital Piracy is the Biggest Menace*, NDTV (Sep. 19, 2013), http://movies.ndtv.com/bollywood/mukesh-bhatt-digital-piracy-is-the-biggest-menace-613985 (quoting the producer Mukesh Bhatt as saying, "the amount of revenue lost by a filmmaker [due to piracy] is huge and it is killing us . . . . [It] breaks my heart."); Aarti Bhanushali, *Leaked!*, ASIAN AGE, Aug. 20, 2015, http://www.asianage.com/bollywood/leaked-042 (quoting the director Sajid Khan as saying, "the government should take some stringent measures to ban the websites that allow the free download of movies. The film industry's business will multiply four-fold once this is stopped"). In a more nuanced statement, the director Anurag Kashyap has stated that while piracy helped him gain recognition, he also "get[s] bothered by" piracy and that "torrents have killed meaningful cinema worldwide" as such films cannot be appreciated if viewed on laptop computers. *See* Reddit Chat with Anurag Kashyap (July 4, 2013), http://www.reddit.com/r/IAmA/comments/1hmhnx/anurag_kashyap_here_ask_me_anything_begins_3_pm/cavrhah. Recently, pre-release leaks of a number of Bollywood and regional films attracted widespread condemnation of piracy from directors and artists. *See* Rohini Nair, *After "Udta Punjab" Leak, Filmmakers Speak out Against Piracy, Illegal Downloads*, FIRSTPOST, June 17, 2016, http://www.firstpost.com/bollywood/after-udta-punjab-leak-filmmakers-speak-out-against-piracy-illegal-downloads-2838442.html (quoting, *inter alia*, directors Subhash Ghai and Imtiaz Ali, and actress Shweta Tripathi).

172 Piracy Committee Report, *supra* note 170, at 12 (noting that "there are wide variations in computation of piracy losses."). Some scholars have cast serious doubt on industry figures regarding piracy losses, and questioned the methodology used to determine them. *See, e.g.*, Prashant Iyengar, *Fake Facts: An Incredulous Look at Piracy Statistics in India*, 5 INDIAN J. L. & TECH 79 (2009); SCARIA, *supra* note 14, at 25-46. However, Scaria, while suggesting that the film industry has probably over-estimated the economic impact of piracy, has nevertheless stated that "it is hard to deny that piracy is causing revenue loss for the industry." *Id.* at 19.

173 *See Blame Piracy, Streaming: It's the End of Your Favourite Music World Store*, FIRSTPOST (June 13, 2013), http://www.firstpost.com/business/blame-piracy-streaming-its-the-end-of-your-favourite-music-world-store-868397.html; *But see* Nikhil Pahwa, *Why Flipkart Shut Down Flyte Music*, MEDIANAMA (May 29, 2013), http://www.medianama.com/2013/05/223-why-flipkart-shut-flyte-music (arguing that the closure of Flyte could also have occurred due to non-piracy related factors, such as low marketing spends).

the state.[174] Case studies of such businesses might serve as more meaningful alternatives to macro-level quantitative analysis.

Among large entertainment companies, representatives from the Sony Entertainment Network and the well-known Bollywood production company Mukta Arts expressed grave concerns about piracy to me, and stated that piracy cost their respective organizations significant financial losses.[175] Vijay Krishna Acharya, director and screenwriter of many blockbuster Bollywood films (most recently *Dhoom* 3) echoed these concerns, and favored strong punitive measures and technological curbs to counter piracy.[176] Moving beyond Bollywood, I saw concerns about piracy being shared by others. For example, a representative of the Telugu film industry told me that piracy was causing great economic harm to the industry.[177] Sircar informed me that even India's national broadcaster was suffering economic harm from piracy—from illegal Internet uploads, sales of DVDs, and "pilferage of. . .archival materials."[178]

In interviews with the arthouse film community, I discovered opposition to piracy, but the opposition was tempered with some mixed

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174 Following the closure of Music World, a prominent director wrote an article nostalgically recalling the cultural significance of its Calcutta store and condemning piracy. Anjan Dutt, *The Music is Fading*, TIMES OF INDIA (June 30, 2013), http://timesofindia.indiatimes.com/entertainment/bengali/movies/news/The-music-is-fading-Anjan-Dutt/articleshow/20842455.cms. The store's closure also resulted in artists from the state organizing a protest rally against piracy. *See* Shoma Chatterji, *Protest Against Piracy: Death Knell for Music*?, INDIA TOGETHER (July 27, 2013), http://www.indiatogether.org/2013/jul/eco-piracy.htm. Interestingly, one of Bengal's leading film directors, Kaushik Ganguly, recently directed a critically acclaimed, award-winning film, *Cinemawala*, fictionalizing the closure of theatres due to piracy. *See* Sudipto Roy, *Kaushik Ganguly's Cinemawala Hits Theatres Nationwide*, MEDIA INDIA, June 10, 2016, http://mediaindia.eu/cinema/kaushik-gangulys-cinemawala-hits-theatres-nationwide (quoting Ganguly as saying, "Audience[s] have stopped going to theatres and the huge racket of digital piracy is killing the art for no good.").

175 The representative from Sony informed me that his company could not accurately quantify the losses it suffered due to piracy and could only rely on "extrapolation and assumptions." However, he said that the piracy of his company's content was "rampant," and probably ran into "several million dollars" a year. Email interview with Anand Nair, Assistant Manager (Legal), Multi Screen Media Private Limited (Sony Entertainment Network) (Mar. 16, 2015) [hereinafter Interview with Anand Nair]. The representative from Mukta Arts informed me that piracy cost his company "[a]pproximately a million dollars a year on an ongoing basis for library content" and, in years in which they had new releases, "an approximate 25 to 30 percent of revenue of these films." Email interview with Chaitanya Chinchlikar, Vice President, Finance and Strategy, Mukta Arts Limited (Jan. 9, 2015) [hereinafter Interview with Chaitanya Chinchlikar].

176 Email interview with Vijay Krishna Acharya, Bombay (July 31, 2015) [hereinafter Interview with Vijay Krishna Acharya]. Acharya told me:

> [f]ilm piracy is a huge problem for our industry, it affects both the filmmakers and the viewers alike. I think it takes away the experience that one would normally associate with a film viewing for the audience, and also somehow cheapens the effort of the makers . . . . I'd be in favor of strict punitive measures as well as evolve greater tech checks to circumvent any piracy.

177 Interview with Akella Rajkumar, Chairman, Anti-Video Piracy Cell, Andhra Pradesh Film Chamber of Commerce, New Delhi (Feb. 4, 2015) [hereinafter Interview with Akella Rajkumar].

178 Interview with Jawhar Sircar, *supra* note 154.

feelings. An interesting example was Ashim Ahluwalia, director of the Cannes-nominated *Miss Lovely*.[179] One of my most illuminating encounters, however, was with Celine Loop, a producer with Overdose Films.[180] Overdose, which operates out of a modest apartment in Calcutta, would probably be considered an archetypal arthouse cinema enterprise, far removed from Bollywood. One of Overdose's first films was a provocative, sexually explicit Bengali film called *Gandu* (the title being a vulgar Indian expletive). Government censors in India banned the film. The film, however, received critical acclaim and was screened at prestigious film festivals abroad.[181] Loop informed me that a pre-release copy of *Gandu* had been uploaded to YouTube without her permission; she suspects that the leak happened when the copy was sent to some entities in India for preview before the government ban. Loop complained about the matter to YouTube, which promptly took down the video. This sequence of events repeated itself four more times, after which pirated copies of the film flooded the Internet and Loop gave up. Loop revealed to me that this had some unexpected benefits for Overdose. Thousands of individuals in India who were unable to view the film due to the ban were able to do so and appreciation for the film grew. Loop also stated that the losses that the film suffered due to piracy were not substantial, as the film was made with a very low budget and was also able to earn some revenues abroad. However, Loop told me that Overdose was "looking to make money someday."[182] For this to happen, Overdose ideally needed to recoup at least three times the production and marketing budget, since it did not have the financial strength of a large production house. Loop thus told me that piracy would start affecting Overdose once it began investing more money in its films. "People should realize that it costs money to make a film," said Loop.[183]

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179 Email interview with Ashim Ahluwalia, Bombay (May 28, 2015) [hereinafter Interview with Ashim Ahluwalia]. Ahluwalia told me that he "felt ambivalent" about pirated copies of the film circulating on the internet. "On [the] one hand, it's a good thing for a smaller film to get exposure—on the other hand, it did eat at the profits of a project that is not very commercial in nature and did affect our revenues," he said. Ahluwalia told me that he was "not okay" with a "commercial platform" like YouTube using his film to "feed their need for content," and that his producers had complained to YouTube and managed to remove pirated versions of the film from YouTube. However, Ahluwalia "decided to let the film exist on torrents" for the benefit of "cinephiles."

180 Interview with Celine Loop, Calcutta (Jan. 22, 2015) [hereinafter Interview with Celine Loop].

181 *See Gandu Blocked in India, Honored in Berlin*, HINDUSTAN TIMES (June 27, 2011), http://www.hindustantimes.com/entertainment/gandu-blocked-in-india-honoured-in-berlin/article1-714377.aspx; Sharadiya Dasgupta, *Much Awaited "Gandu" Film Screening Cancelled*, CNN-IBN (Jul. 31, 2011), http://ibnlive.in.com/news/much-awaited-gandu-film-screening-cancelled/171842-8-73.html.

182 Interview with Celine Loop, *supra* note 180.

183 Interview with Celine Loop, *supra* note 180.

Soumitra Chatterjee, one of India's most revered art-house actors and star of many films by the legendary director Satyajit Ray, expressed similar indignation. Chatterjee told me that he felt "very upset" to see pirated copies of his films being freely available, as he had devoted "a great deal of labor" to those films.[184] He lamented the fact that consumers failed to appreciate that artists and technicians were ultimately affected by piracy.[185] Anik Dutta, a prominent Bengali director and screenwriter, similarly told me that he regretted the fact that consumers had "no ethical issues" with buying pirated DVDs.[186] Dutta told me that he initially felt "amused and gratified" to see pirated DVDs of his debut film *Bhooter Bhabishyot*, one of the most successful Bengali films of all time, being sold openly by street vendors just days after its release.[187] However, he soon became "very concerned" when the scale of such piracy increased. Acharya similarly felt that while there was "something wonderfully democratic about" films being available freely on the internet, "the resources and the property rights of several people seem compromised."[188] Dutta told me that he found the piracy of unedited "rough cuts" especially "dangerous," as the technical and aesthetic quality of such prints was vastly inferior to the final product and could therefore harm a director's reputation.[189] Dutta also regretted the closure of Music World and pointed out that it meant that consumers now had fewer options to buy genuine DVDs.[190]

The above is not to suggest that producers and artists are uncritically united in a battle against piracy. Tensions between producers and artists are arguably a universal phenomenon. In the Indian film industry, media reports have highlighted the tendency of producers to insist on one-sided contracts.[191] In the case of actors, affirmative performers' rights did not exist in Indian copyright legislation until the 2012 amendments.[192] Furthermore, unlike in many developed countries, a strong tradition of unions protecting the rights of creative artists has mostly been absent in India. Chatterjee, while opposing piracy, pointed out to me that he had received "not one penny" from royalties of acclaimed classic films he had acted in, due to this

184 Interview with Soumitra Chatterjee, Calcutta (Dec. 23, 2015) [hereinafter Interview with Soumitra Chatterjee].
185 *Id.*
186 Interview with Anik Dutta, Calcutta (Dec. 24, 2015) [hereinafter Interview with Anik Dutta].
187 *Id.*
188 Interview with Vijay Krishna Acharya, *supra* note 176.
189 Interview with Anik Dutta, *supra* note 186
190 Interview with Anik Dutta, *supra* note 186.
191 *See* Shanta Gokhale, *What's Mine is Yours*, May 19, 2011, TIMES OF INDIA, http://timesofindia.indiatimes.com/nri/art-culture/Whats-mine-is-yours/articleshow/8437191.cms; Rahul Bhatia, *The "Ban" on Javed Akhtar*, OPEN (Jan. 29, 2011), http://www.openthemagazine.com/article/art-culture/the-ban-on-javed-akhtar.
192 Thomas, *Overview of Changes to the Indian Copyright Law*, *supra* note 138, at 326-27.

legal loophole.[193] While Chatterjee felt that successive Indian governments ought to have paid greater attention to the plight of actors and amended copyright legislation much earlier, he also criticized producers, saying "if you ask me, producers are the first pirates."[194] He felt that artists often "do not care" about piracy, their rationale being "the producer has already robbed me."[195] Indeed, a trade association representing the interests of Indian producers unwittingly provided support for such a view during consultations with lawmakers.[196]

Like Chatterjee, Dutta told me that artists were often "not bothered" by piracy, as they did not see themselves directly losing revenues through sales of pirated DVDs, having signed contracts with one-time copyright-assignment and royalty-waiver clauses.[197] Dutta himself had signed a one-sided assignment over the screenplay copyright for *Bhooter Bhobishyot*. Dutta was quoted in the media as saying that he received "peanuts" from his producer and received no royalties when the film's Hindi remake rights were sold to a Bollywood producer without his consent.[198] To add insult to injury, the Bollywood remake was universally panned by critics, one of whom described it as "making a mockery" of Dutta's "brilliant film."[199] While Dutta had sent a cease-and-desist letter over the matter through a law firm acting pro bono, he did not take the matter further due to the time and costs of litigation.[200] Chatterjee similarly told me that he did not "have enough time and money to go to court" to challenge unfair contractual terms.[201] Ahluwalia felt "there are major issues with the hegemony around commercial film distribution."[202] Acharya pointed out that although piracy affected producers more than artists, "since they run a more tangible financial risk," piracy ultimately affected "all the parties" involved in making a film and that "everybody" in the industry "is quite concerned" about piracy.[203]

193 Interview with Soumitra Chatterjee, *supra* note 184.
194 Interview with Soumitra Chatterjee, *supra* note 184.
195 Interview with Soumitra Chatterjee, *supra* note 184.
196 While opposing a proposal to make directors co-owners of film copyrights with producers, the association stated "it was the producer alone who suffered all the losses in case a film failed, with the director being paid his remuneration/fee beforehand." Report on the Copyright (Amendment) Bill, 2010, *supra* note 139, at ¶ 3.4 (submission by the Indian Motion Picture Producers Association).
197 Interview with Anik Dutta, *supra* note 186.
198 Kushali Nag, *Mr. Bhooter Bhobishyot Breaks his Silence*, TELEGRAPH (Dec. 4, 2012), http://www.telegraphindia.com/1121204/jsp/entertainment/story_16271366.jsp#.
199 Shomini Sen, *"Gang of Ghosts" Review: Easy Steps to Ruin a Potentially Good Film*, CNN IBN (Mar. 22, 2014), http://ibnlive.in.com/news/gang-of-ghosts-review-easy-steps-to-ruin-a-potentially-good-film/459381-47-77.html.
200 Interview with Anik Dutta, *supra* note 186. Here, I would like to disclose that I assisted Dutta on this matter.
201 Interview with Soumitra Chatterjee, *supra* note 184.
202 Interview with Ashim Ahluwalia, *supra* note 179.
203 Interview with Vijay Krishna Acharya, *supra* note 176.

Thus, it seems that a variety of artists and producers across India are opposed to piracy and concerned over its financial implications. However, this unity is marked by some degree of ambivalence and resentment towards producers, who are grudgingly seen to have a greater financial stake in preventing piracy. It is possible that greater empathy towards artists and directors in matters of revenue-sharing could make them more enthusiastic partners in the industry's battle against piracy. In this regard, Dutta told me that the recent copyright amendments, if resulting in guaranteed royalties for authors and artists, could make them keener participants in the battle against piracy.[204] Interestingly, in a media interview, Raghavender stated that, with the introduction of affirmative performer's rights in India, actors might now have to lower their one-time fee and instead sign contracts based on a share of future royalties.[205] If the industry indeed shifts towards such contractual arrangements with actors and authors, such individuals might have a greater financial stake in preventing piracy—an important consideration for future research.

VII. THE FIFTH ELEMENT: THE WORKING OF THE PIRATE ECONOMY

A realist study of piracy should ideally be conscious of the behavior and motivations of consumers and pirates, the varied modes of consumption by consumers, new technological developments, and commercial strategies employed by rights owners to counter pirates.[206] This section identifies some relevant issues.

During the 1990s, a study by the National Productivity Council (N.P.C.), an Indian government body, identified video parlors and cable operators as the major sources for the dissemination of pirated films.[207] The study observed that "[a]ll parties involved in the legitimate transaction of films—from the producers to the theatre owners" lost "heavily because of widespread video or cable piracy," and that the government also lost potential tax revenues.[208] Nearly ten years later, a government-appointed committee, the Committee on Piracy ("Committee"), conducted a fresh study of piracy. In contrast with the N.P.C., the Committee identified Internet piracy as the greater threat for

[204] Interview with Anik Dutta, *supra* note 186.

[205] Anita Iyer, *"Actors Have to Reduce their Initial Fee to Get Royalties…"*, BOX OFFICE INDIA (Jan. 18, 2014), http://www.boxofficeindia.co.in/"actors-have-to-reduce-their-initial-fee-to-get-royalties-"/.

[206] *See* Christopher Arup & William van Caenegem, *Themes and Prospects for Intellectual Property Law Reform*, *in* INTELLECTUAL PROPERTY POLICY REFORMS 1-2 (Christopher Arup & William van Caenegem eds., 2009) (stating that to work "in context," IP law scholars are expected to examine the impact of "new technologies, business practices…and social mores.").

[207] NATIONAL PRODUCTIVITY COUNCIL, STUDY ON COPYRIGHT PIRACY IN INDIA 14 (1999), http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf [hereinafter N.P.C. Study].

[208] *Id.*

rights owners. The Committee predicted that piracy was "set to explode" with the growth of broadband Internet in India, and listed various streaming and torrent websites as major sources of pirated content.[209] This prophecy appears to be coming true. For example, according to one estimate, the largest number of illegal torrent downloads for the Hollywood film *Furious 7* were from India.[210] Mukta Arts' representative disclosed to me that 75 percent of the piracy of its content occurred online.[211] The general counsel of Eros, a major production and distribution company, expressed a similar view.[212]

As of 2014, India had the world's third-highest number of Internet users, after China and the U.S.[213] A recent report claims that India may have now overtaken the U.S.[214] However, in percentage terms, India's Internet penetration rates are among the world's lowest and its Internet speeds are equally abysmal.[215] Although the government has proposed to drastically improve broadband Internet penetration,[216] such grand plans have arguably had limited impact. Thus, in contrast with developed countries, physical piracy through sales of DVDs by street vendors still forms an important component of the piracy market in India. Pirated DVDs are openly sold in bazaars in Indian cities.[217] Furthermore, it is arguable that even if the Indian government was to succeed in its plans of exponentially increasing internet penetration and speed, the easy accessibility and low cost of pirated DVDs in India—as evident from some test purchases I carried out[218]—would still ensure

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209 Piracy Committee Report, *supra* note 170, at 18, 45-46.

210 *See* Sumeet Keswani, *Fast & Furious Downloads: India Tops Piracy Charts*, ECONOMIC TIMES (Apr.19,2015), http://timesofindia.indiatimes.com/entertainment/english/hollywood/news/Fast-Furious-7-downloads-India-tops-piracy-charts/articleshow/46973387.cms

211 Interview with Chaitanya Chinchlikar, *supra* note 175.

212 Email Interview with Aamod Gupte (Sep. 26, 2015) [hereinafter Interview with Aamod Gupte]. Gupte stated that losses from online piracy were becoming "more significant" than physical piracy for Eros, as "physical sales of CDs/DVDs are declining by the day."

213 *See* DELOITTE, BROADBAND: THE LIFELINE OF DIGITAL INDIA 6 (2014), http://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-broadband-noexp.pdf [hereinafter *DELOITTE, BROADBAND REPORT*].

214 *See* Angad Singh Thakur, *India is Now the Second Largest Internet User Market, After China*, FORBES, June 2, 2016, http://forbesindia.com/article/special/india-is-now-the-second-largest-internet-user-market-after-china/43415/1#ixzz4KCx0OJ00 (referring to the Mary Meeker Internet Trends report).

215 As of 2014, only 12.6 percent of India's population had access to the Internet (against a global average of 35.7 percent), a mere 1.1 percent had access to fixed broadband (ranking 122 in the world, against a global average of 9.9 percent), and only 4.9 percent had access to mobile broadband (against a global average of 22.1 percent). *See* DELOITTE, BROADBAND REPORT, *supra* note 213. On the issue of Internet speed, India has been ranked 118 in the world in one study. *See* AKAMAI, STATE OF THE INTERNET 24 (2014), http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf.

216 *See* MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY, A TRIAD OF POLICIES TO DRIVE A NATIONAL AGENDA FOR ICTE 11 (2011).

217 *See* USTR, 2013 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 16 (2014) (listing some of the bazaars).

218 On Dec. 22, 2014, I visited Palika Bazaar, a large bazaar in the heart of New Delhi known for

that physical piracy remains prevalent.

For rights owners, another growing area of concern has been the growth in the piracy of Indian films overseas. One of the most significant developments underlying the growth of the Indian film industry has been the increase in revenue from audiences in developed countries with large Indian populations, such as the U.S. and UK. In many cases, such audiences form the primary target audience for producers, as theatre tickets in these countries are priced significantly higher than tickets in India.[219] According to one report, the hit Bollywood film *Kaminey* was downloaded illegally 350,000 times within a week of its release, with one-third of the downloads originating from outside India.[220] Mukta Arts' representative informed me that nearly half of its piracy losses occurred due to piracy overseas, fueled by the fact that Internet speeds in developed countries were higher than in India.[221] Apart from the Indian diaspora, native, non-Indian populations in certain Asian and African countries also reportedly consume pirated content.[222] The general counsel of Eros informed me that the piracy of its films is "a global phenomenon," especially common in countries with a South Asian diaspora.[223]

The question of how the piracy business operates is an intriguing one. During my test purchases in Delhi and Calcutta, I inquired from

selling pirated DVDs. I conversed with a vendor openly selling pirated DVDs of old and new Bollywood and Hollywood films for only INR 50 each (less than 1 USD). He assured me that they were of "excellent quality." I bought pirated DVDs of the Bollywood film *PK* and the Hollywood film *Boyhood.* I found the vendor's claim to be untrue with respect to *PK* (as the DVD was only a camcorder print), but true with respect to *Boyhood* (as the print was a copy of an original print). On Jan. 20, 2015, I visited street vendors in the Gariahat-Rashbehari Avenue area in Calcutta, another centrally located area rife with pirated DVD sellers. I bought a pirated DVD of the Hollywood film *Birdman* from a vendor for INR 100, a few weeks before the Academy Awards and before the film's official release in Indian theatres. The DVD turned out to be of good quality.

219 *See* Banerjee, *A Case for Economic Incentives to Promote "Parallel" Cinema in India*, *supra* note 168, at 4.

220 *See* Patrick Frater, *Online Piracy in India a Global Problem*, HOLLYWOOD REPORTER (Oct. 15, 2009), http://www.hollywoodreporter.com/news/online-piracy-india-global-problem-92365; *see also* Arul Scaria, *Online Piracy of Indian Movies: Is the Film Industry Firing at the Wrong Target?*, 21 MICH. ST. L. REV. 647 (2013).

221 Interview with Aamod Gupte, *supra* note 212.

222 Such countries include Pakistan, Afghanistan, Uzbekistan, and parts of Africa (for Bollywood films) and Bangladesh (for Bengali films). *See* Aamer Ahmed Khan, *How Piracy is Entrenched in Pakistan*, BBC NEWS (May 8, 2005), http://news.bbc.co.uk/2/hi/south_asia/4523089.stm; Robin Bansal, *Afghanistan Crazy About Bollywood, But Lacks Official Market*, BOLLYWOOD.COM (Apr. 18, 2010), http://www.bollywood.com/afghanistan-crazy-about-bollywood-lacks-official-market; Louise Hidalgo, *Bollywood Stirs Uzbek Passions*, BBC NEWS (Oct. 24, 1998), http://news.bbc.co.uk/2/hi/south_asia/200689.stm; Fakir Hassen, *South Africa "Helpless" Against Pirated Indian Movies*, GLAMSHAM (July 4, 2012), http://www.glamsham.com/ movies/scoops/04/jul/12sa.asp; *Allow Bengal films in Bangla: Partha*, TIMES OF INDIA (Dec. 22, 2012), http://timesofindia.indiatimes.com/city/kolkata/Allow-Bengal-films-in-Bangla-Partha/articleshow/17714367.cms.

223 Interview with Chaitanya Chinchlikar, *supra* note 175.

multiple vendors if they downloaded these films from the Internet themselves. All the vendors replied in the negative and informed me that they received their wares from a larger supplier. These accounts were consistent with findings of the Committee, which observed that piracy is "carried out on a larger scale using burning towers or large scale commercial grade replicators,"[224] and findings in another study, based on conversations with vendors, that cartons of pirated DVDs are brought in large vehicles and distributed to street vendors.[225]

With respect to the distribution chain in the virtual world, the Committee stated that pirated copies of films were uploaded online by "release groups," but did not elaborate further.[226] To learn more, I visited the offices of Markscan, an IP investigation company advising reputed film companies. Abhishek Dhoreliya, who heads Markscan, informed me that release groups comprise individuals who sell pirated copies of films through online "auctions," using common online payment gateways.[227] Dhoreliya said that only a closed circle of people, such as torrent website operators, are aware of the location of the auction (such as chatrooms) and can place bids. Dhoreliya claimed that some auctions also occurred on the "Darknet" and networks like Tor, with Bitcoins replacing standard payment gateways.[228]

But how do release groups access the latest Indian films? According to Rajkumar, there are around 200 major pirate rings in India, with a recent news report suggesting that they are geographically widespread and even have links abroad.[229] Such groups typically access films through camcording or pre-release leaks of original prints[230]—methods that were also mentioned by the Committee and reiterated in recent media reports.[231] With respect to pre-release leaks, Rajkumar

[224] Piracy Committee Report, *supra* note 170, at 14.

[225] Liang & Sundaram, *India*, *supra* note 14, at 349.

[226] Piracy Committee Report, *supra* note 170, at 21.

[227] Interview with Abhishek Dhoreliya, Founder and CEO, Markscan, in New Delhi (Feb. 3, 2015) [hereinafter Interview with Abhishek Dhoreliya].

[228] *See* Brad Chacos, *Meet Darknet, the Hidden, Anonymous Underbelly of the Searchable Web*, PCWORLD (Aug. 12, 2013, 3:00 AM), http://www.pcworld.com/article/2046227/meet-darknet-the-hidden-anonymous-underbelly-of-the-searchable-web.html (explaining the Darknet and Tor).

[229] Interview with Akella Rajkumar, *supra* note 177. *See also* Ch Sushil Rao, *On Bahubali Piracy Trail, International Piracy Racket Busted*, TIMES OF INDIA (Aug. 7, 2015, 8:31 PM), http://timesofindia.indiatimes.com/entertainment/tamil/movies/news/On-Bahubali-piracy-trail-international-piracy-racket-busted/articleshow/48394158.cms (discussing the geographical extent of pirate rings).

[230] Rajkumar informed me that, in a sting operation conducted by Telugu film producers in collaboration with the police, one person confessed to having recorded nearly 400 films in only nine theatres. Interview with Akella Rajkumar, *supra* note 177. The incident was reported in the media. *See Notorious Camcording Pirate Arrested in Hyderabad*, IDLEBRAIN (Jul. 6, 2012), http://www.idlebrain.com/news/2000march20/pirate-manojkumar.html.

[231] Piracy Committee Report, *supra* note 170, at 17,18. *See also* Apoorva Nijhara, *Leaked: What Nawazuddin, Radhika Apte's Manjhi Online Leak Reminds Us Of*, INDIA TODAY (Aug. 16, 2015, 19:01), http://indiatoday.intoday.in/story/leaked-what-nawazuddin-siddiqui-radhika-aptes-

informed me that the attitude of staff in theatres have ranged from apathy to complicity, with some instances of lower-level staff receiving bribes ranging between INR 25,000 to INR 60,000 (roughly USD 400 to USD 1,000) to facilitate a single instance of camcording.[232] With respect to pre-release leaks, Rajkumar informed me that the individuals responsible for such leaks were sometimes employees of production or distribution companies. Their motives were usually monetary gain, but were also sometimes mere "excitement" in the absence of any monetary incentive.[233] Rajkumar said that production houses were increasingly beefing up their security systems and could identify individuals responsible for leaks through watermarking technologies, highlighting one incident concerning a popular Telugu film, reported in the media.[234]

It has been estimated that street vendors in India sell between "fifty and a hundred discs per day" and make daily earnings of up to USD 20.[235] This is a decent income by Indian standards, especially since street vendors can easily avoid paying taxes on their income. Not many studies have hazarded a guess as to how much the kingpins of the piracy business or those operating torrent websites earn. The Committee merely observed that piracy was a "high rewards business," referring to the N.P.C.'s now-outdated estimate of the video and cable piracy market being worth INR 1.4 billion (roughly USD 22 million).[236] However, a single raid against a prominent Indian pirate once yielded pirated DVDs worth over USD 1 million from various warehouses, indicating that the incomes of pirate kingpins are likely to be quite high.[237]Studies outside India have claimed that internet piracy — which was in its early days at the time of the N.P.C. study — has increased the size of the pirate economy. For example, a report by a then British MP, serving as Intellectual Property Advisor to Prime Minister David Cameron, estimated that 600 pirated websites generated over USD 200 million through advertising revenues in 2013, with nearly a third of the

manjhi-online-leak-reminds-us-of/1/458894.html (reporting on the pre-release leak of the Bollywood film *Manjhi*); Dwaipayan Ghosh & Priyanka Dasgupta, *Piracy Kingpins Stay Ahead of Cops*, TIMES OF INDIA (Aug. 23, 2015, 1:28 AM), http://timesofindia.indiatimes.com/city/kolkata/Piracy-kingpins-stay-ahead-of-cops/articleshow/48632483.cms (discussing examples of camcording in Calcutta).

232 Interview with Akella Rajkumar, *supra* note 177.

233 Interview with Akella Rajkumar, *supra* note 177.

234 *See Editing Assistant Nabbed for Leak of 'Attarintiki Daredi'*, DNA (Sep. 25, 2013, 12:00 PM), http://www.dnaindia.com/entertainment/report-editing-assistant-nabbed-for-leak-of-attarintiki-daredi-1893643.

235 Liang & Sundaram, *India*, *supra* note 14, at 350.

236 Piracy Committee Report, *supra* note 170, at 14.

237 *See* A. Selvaraj, *CB-CID Unearths Rs 7cr Worth Materials from Video Pirate*, TIMES OF INDIA (Jan. 20, 2013, 3:57 AM), http://timesofindia.indiatimes.com/city/chennai/CB-CID-unearths-Rs-7cr-worth-materials-from-video-pirate/articleshow/18096084.cms [hereinafter Selvaraj, *CB-CID Unearths Rs 7cr Worth Materials from Video Pirate*].

advertisements being those of "household" brands.[238] According to the report, most businesses were unaware that their advertisements appeared on on such websites.[239]

To test the above claim, I tried to access torrents of pirated Bollywood and Hollywood films through a series of Google searches throughout January 2015. On most torrent websites, I encountered a host of advertisements for dodgy-looking pornographic, dating, and gambling websites. However, pop-up advertisements of many well-known Indian and global companies also surfaced. Dhoreliya shared an internal report with me, in which Markscan had diligently tracked pirated copies of eighty well-known Hollywood and Bollywood films, released in 2014, on 602 websites.[240] According to the report, advertisements of over 800 well-known Indian and global companies had surfaced on those websites. Browsing through the list of companies whose advertisements Markscan had detected, I found reputed companies that belong to sectors such as automobiles, banking, aviation, telecommunications and retail. To emphasize the lucrative nature of the online piracy business, Dhoreliya also informed me of a case he had handled for the producers of the hit Bollywood film *Queen*.[241] In 2014, two websites specifically designed to offer pirated versions of *Queen*[242] were traced by Markscan to pirates in Latvia. A complaint was sent by fax to the Latvian police, who acted on the matter.[243] It is unlikely, Dhoreliya pointed out to me, that a native of Latvia would be motivated to distribute copies of a film in an alien language out of altruism. In my interview with Raghavender, unprompted, he brought up the issue of revenues through online advertising.[244] He told me that this was a matter of concern as the Indian government was losing potential tax revenues to such pirated websites.[245]

Despite this concern, it appears that the size of the pirate economy, both in the physical and virtual realms, is not large enough to be of serious concern to the Indian state. The Committee noted, for instance, that "piracy is low in terms of priority in the radar of law enforcement

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238 *See generally* Mike Weatherley, *'Follow the Money': Financial Options to Assist in the Battle Against Online IP Piracy*, OLSWANG LLP, http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf (last visited Apr. 1, 2016) [hereinafter Mike Weatherley, *Follow the Money*].

239 *Id.* at 2 ("In the majority of instances, display advertising that appears next to infringing material is not intended by the advertiser, its agency or intermediary companies involved in the trading of advertising . . . .").

240 E-mail from Abhishek Dhoreliya, to author (Mar. 26, 2015) (on file with author).

241 Interview with Abhishek Dhoreliya, *supra* note 227 .

242 The sites are www.downloadqueenmovie.com and www.watchqueenmoviecom.

243 The relevant documents can be viewed at www.markscan.co.in/casestudies/Rigacomp.pdf.

244 Interview with G.R. Raghavender, *supra* note 144.

245 Interview with G.R. Raghavender, *supra* note 144.

agencies" compared to other serious crimes.[246] Banerjee told me that while piracy was a "huge concern" for the film industry, it had to be "one of the lowest priorities" for the police, which had limited resources and had to give priority to tackling more serious crimes.[247] Banerjee surmised that if the Indian government was to hypothetically retrieve lost tax revenues from the consumption of pirated films every year, the amount would probably be only a small fraction of its overall earnings.[248] Rajeev Kumar, a cybercrime specialist (presently the Police Commissioner of Calcutta), similarly told me that although film piracy was carried out by "organized gangs" and was affecting the film industry adversely, piracy generated "small profits" compared to trade in narcotics or illegal arms, and was thus a "low priority" for the big organized criminal gangs.[249] According to Kumar, the absence of large organized criminal activity, coupled with public indifference, "essentially pushes fighting piracy at the bottom of the list for law enforcement [as well]." Kumar pointed out that even if one assumed that the pirate trade was as large and harmful as the narcotics or illegal arms trade, the fact that piracy is widely seen by the public as socially acceptable would make it difficult for the police to clamp down on it.[250] "It is not seen as a crime in the perception of the people," Kumar told me.[251]

Indeed, if piracy is to be categorized as an evil, widespread public participation in the pirate economy is probably the elephant in the room. Such is the acceptability of piracy in India that a few years ago several legislators in the state of Rajasthan, including the state's Chief Minister, watched a pirated DVD of a new Bollywood film at a private screening—much to the director's annoyance.[252] The phenomenon of consuming pirated films is particularly common among the youth in India.[253] Outside India, there exists judicial precedent that clearly holds

246 *See* Piracy Committee Report, *supra* note 170, at 14.

247 Interview with Basudeb Banerjee, *supra* note 123.

248 Interview with Basudeb Banerjee, *supra* note 123.

249 Interview with Rajeev Kumar, then Additional Director-General of Police, Crime Investigation Department of Calcutta (Apr. 1, 2015).

250 *Id.*

251 *Id.*

252 *See* Prithwish Ganguly, *75 Politicians Watch Pirated 'Rajneeti' DVD in Rajasthan*, DNA (May 31, 2010, 5:41 PM), http://www.dnaindia.com/entertainment/report-75-politicians-watch-pirated-rajneeti-dvd-in-rajasthan-1390219.

253 For example, a report in the campus magazine of the Indian Institute of Technology (I.I.T.) in Madras, one of India's top-ranked engineering schools, revealed widespread downloading among students. *See* Raymond Joseph, *Combating Piracy*, FIFTH ESTATE (Nov. 11, 2011), http://www.t5eiitm.org/2011/11/combating-piracy. Calcutta recently became the first city in India to offer free wireless broadband in select areas. A newspaper reported that some young individuals were downloading pirated copies of Bollywood films using the connection. *See* Kaushik Ghosh & Rith Basu, *Speed Test on Wi-Fi Street*, TELEGRAPH (Feb. 7, 2015), http://www.telegraphindia.com/1150207/jsp/calcutta/story_2000.jsp.

unlicensed peer-to-peer file-sharing is copyright infringement.[254] In one case concerning the constitutional validity of graduated response systems, the High Court of Ireland observed, "[a]mong younger people, so much has the habit grown of downloading copyright material from the internet that a claim of entitlement seems to have arisen to have what is not theirs for free."[255] In my interactions with policymakers, I discerned a slightly sympathetic approach towards users occasionally downloading pirated content, with most favoring educational campaigns to legal action.[256] Most interviewees disclosed to me that young people known to them downloaded pirated content. Among industry representatives, Prasad informed me that while he was battling against piracy at Disney (where he worked as Director of Legal Affairs, before joining Boeing), he discovered that some of his own family members and friends were downloading pirated films—who he discouraged from doing so.[257]

To gauge an idea of the film consumption habits of Indian youth, I conducted separate surveys among students of two reputed law schools: one an expensive private institution and the other a subsidized, state-funded public institution.[258] My surveys revealed that practically

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[254] For example:

> Although downloading and uploading MP3 music files is not paradigmatic commercial activity, it is also not personal use in the traditional sense. . . . [D]ownloading and uploading MP3 music files with the assistance of Napster are not private uses. . . . Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.

A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912–13 (N.D. Cal. 2000) (citations omitted); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–15 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights. . . . . [T]he district court concluded that Napster users are not fair users. We agree."); BMG Music v. Gonzalez, No. 03 C 6276, 2005 U.S. Dist. LEXIS 910, at *2 (N.D. III. Jan. 7, 2005) ("Numerous courts have held that downloading music from the internet, which the user does not own, constitutes 'direct infringement.'") (citations omitted); BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005) ("[D]ownloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for.") (citations omitted); *Dallas Buyers Club LLC v iiNet Ltd.* [2015] FCR 317, ¶¶ 28–30 (Austl.) (holding that "the downloading of a sliver of the film from a single IP address" constitutes copyright infringement, even if the size of the sliver is "very small," and it infringes the right of communication to the public).

[255] E.M.I. Records & Ors. v. Eircom Ltd., [2010] I.E.H.C. 108, ¶ 5 (H. Ct.) (Ir.) [hereinafter Eircom].

[256] For example, Tharoor felt that it would be difficult to condemn a "poor student with little money" for accessing pirated content. *See* Interview with Shashi Tharoor, *supra* note 142; Raghavender opposed anti-piracy measures that would be "too draconian" against users and instead favored education and awareness among the youth. *See* Interview with G.R. Raghavender, *supra* note 144; Deora similarly favored educating Internet users instead of initiating action against them. *See* Interview with Milind Deora, *supra* note 143; Baharvand felt that the law should only target individuals downloading on a mass scale. *See* Interview with Mohsen Baharvand, *supra* note 119.

[257] Interview with Akhil Prasad, *supra* note 107.

[258] The private law school surveyed was Jindal Global Law School (JGLS) in Sonipat, where I

all of the respondents consumed pirated films, a majority through the Internet and a minority by purchasing pirated DVDs.[259] While both law schools had installed filters to block access to torrent websites, several respondents at the private law school claimed that they still accessed pirated content through an assortment of streaming websites (which were not blocked by these filters), or by torrent downloads using their private connections at home. At the public law school, the respondents revealed a pervasive culture of file sharing within the law school's Local Area Network through the popular file sharing program DC++, a phenomenon also common to other reputed Indian universities with website blocks in place.[260]

While the popularity of pirated content among law students might be disheartening for the film industry, the surveys do offer the industry some hope. A large number of respondents stated that they also viewed films through legitimate channels, namely the theatre, television, licensed streaming websites, and stores selling genuine DVDs.[261] Only a minority of respondents cited price as a reason for

currently teach. The public law school was the National University of Juridical Sciences (NUJS) in Calcutta, my alma mater. The surveys were conducted between October 10, 2014 and January 30, 2015 through structured questionnaires, distributed with the help of a few students. The age group of the respondents was between eighteen and twenty-four years. Apart from convenience and familiarity, I chose to survey these law schools because of five main reasons. First, IP law is a compulsory subject in leading Indian law schools, including JGLS and NUJS. Most respondents were thus likely to have at least a rudimentary awareness of copyright laws. Second, the tuition fee at JGLS and NUJS, especially JGLS, is high by Indian standards. Large numbers of the student population hail from upper-middle class and affluent backgrounds, and would be representative of the Indian film industry's target consumer market. Third, the students would also be representative of India's elite English-speaking minority, who form the target consumer market for Hollywood films. Fourth, both universities offer high-speed broadband Internet to students. Fifth, the two law schools attract students from across India, and are thus linguistically and culturally diverse.

[259] Out of fifty respondents surveyed at JGLS, only five respondents (10%) claimed that they did not watch pirated films, citing factors such as inferior quality and an unwillingness to support an illegal act. Forty-five respondents (90%) stated they consumed pirated entertainment by downloading or streaming from the Internet, and ten respondents (16%) stated that they purchased pirated DVDs. Out of thirty respondents surveyed at NUJS, only one respondent (around 3%) claimed not to watch pirated films. Twenty-seven respondents (90%) claimed to watch pirated films by downloading or streaming from the Internet, one respondent preferred to borrow from friends who downloaded them, and another relied solely on DC++. Seven respondents (around 23%) claimed to buy pirated DVDs, out of which one respondent claimed to do so "very rarely." *See infra* note 260 and accompanying text,

[260] For example, a number of blog posts attest to the popularity of sharing pirated films through DC++ at the various IIT colleges. *See, e.g.*, *See What IIT Kharagpur Students Search and Download*, IIT KHARAGPUR FACTS (Oct. 12, 2014, 8:35 AM), http://iitkgpfacts.blogspot.com; *IIT Guwahati Hostel LAN Networking and...DC!!*, IIT GUWAHATI HELP FOR FRESHER'S (July 5, 2013, 9:49 AM), http://iitguwahatihelper.blogspot.sg/2013/07/iit-guwahati-hostel-lan-networking-naddc.html; *Lan Cuts at IITM*, SARKASHTICA (May 14, 2010, 12:16 PM), http://sarkashtica.blogspot.in/2010/05/lan-cuts-at-iitm.html. According to one estimate, there are over 200 terabytes of data shared over the DC++ network of IIT Kharagpur. *See* Sharang Agarwal, *Day-to-day Kgpian Life*, LIFE AT IIT KHARAGPUR (July. 10, 2012), http://hanco1.blogspot.in/2012/07/day-to-day-kgpianlife.html.

[261] Out of fifty respondents surveyed at JGLS, forty-eight respondents (96%) claimed to watch

viewing pirated content—the number being especially small in the private law school.[262] The majority of respondents stated that they downloaded pirated content because the content they wished to watch was not readily available at local theatres or through other legitimate channels, or because it was simply more convenient to watch a film in the comfort of one's room.[263] The fact that an overwhelming majority of respondents cited a preference for watching pirated Hollywood films in addition to Indian films, is possibly related to this finding, since Hollywood films are usually not shown in Indian theatres as frequently as Indian films. At the public law school, respondents were specifically asked whether they would consider subscribing to Netflix if it was introduced in India (which eventually happened in early 2016). A sizeable majority answered in the affirmative, citing reasons such as ease of access, greater variety, and assurance of picture quality.[264] In this context, many Indian film companies have now started to counter piracy by making content more accessible on YouTube and on television channels, thereby reducing the window period from the date of theatrical release. [265]

films in theatres, thirty-five respondents (70%) claimed to watch films on television, twenty-five (50%) claimed to watch films on legitimate websites, and twelve (24%) claimed to buy genuine DVDs. Out of thirty respondents surveyed at NUJS, nineteen respondents (around 63%) claimed to watch films on television, fifteen respondents (50%) claimed to watch films in theatres, ten (around 33%) claimed to watch films on legitimate websites, and three (10%) claimed to buy genuine DVDs.

[262] Out of fifty respondents surveyed at JGLS, only five respondents (10%) claimed that they preferred to watch pirated films instead of watching them through legitimate channels because the latter option was more expensive. Out of thirty respondents surveyed at NUJS, the corresponding number of respondents was ten (around 33%).

[263] Out of fifty respondents surveyed at JGLS, thirty-four respondents (68%) cited non-availability of content as a reason, and fifteen (30%) cited convenience as a reason. Out of thirty respondents surveyed at NUJS, twenty-two respondents (around 73%) cited non-availability of content as a reason and eight (around 26%) cited convenience as a reason.

[264] Out of thirty respondents surveyed at NUJS, nineteen (around 63%) claimed that they would subscribe, or would consider subscribing, to Netflix. In July 2016, a news report stated that Netflix had not yet divulged its subscriber numbers in India. The report also quoted a source as saying that the response to Netflix in India had so far been "lukewarm," largely as a result of limited content being available. *See* Vidhi Choudhary, *Netflix Completes Six Months in India but There's Little to Show for It*, MINT (July 6, 2016) http://www.livemint.com/Consumer/4o17IyPbJLaVttaIragbTK/Netflix-completes-six-months-in-India-but-theres-little-to.html.

[265] *See* Nikhil Pahwa, *Rajshri Media to Provide 100 Full Length Films on YouTube, Where Piracy Still Flourishes*, MEDIANAMA (Nov. 13, 2008), http://www.medianama.com/2008/11/223-rajshri-media-to-provide-100-full-length-films-on-youtube-where-piracy-still-flourishes;
YouTube to Screen Latest Bollywood Blockbusters Free, ECONOMIC TIMES (June 7, 2011, 2:48 PM), http://articles.economictimes.indiatimes.com/2011-06-07/news/29630014_1_premium-content-new-channel-movies. Chinchlikar informed me that Mukta Arts tries to counter piracy by making content "available across all digital platforms like YouTube, Dailymotion, Hulu, Roku, as well as mobile platforms," as well as ensuring that "movies are distributed well on cable and satellite globally," so that "people are less inclined to download the films off illegal sites." Interview with Chaitanya Chinchlikar, *supra* note 175. Hotstar, an Indian streaming service somewhat similar to Netflix, reported 50 million downloads of its application. Hotstar is owned by Star India, a subsidiary of 21st Century Fox. *See* Speech by Uday Shankar, CEO, Star India,

Hence, the pirate economy should be viewed as including not just mercenary pirates who violate laws, but also rational, morally indifferent consumers who do not mind consuming pirated content to fulfill their need for entertainment. More focused research on the latter can help producers better understand why piracy thrives and how to counter it.

To add a personal anecdote, I was once a member of a local outlet of Cinema Paradiso, a nationwide DVD lending library business.[266] Paradiso housed original DVDs of classic films and the latest Hollywood and world cinema releases. Paradiso charged a hefty, refundable membership deposit and a rental cost per DVD that rivaled the price of a theatre ticket. Warner Brothers effectively managed to shut down Paradiso through a rental rights infringement suit, where the Delhi High Court awarded it an interim injunction.[267] Following Paradiso's closure, its proprietors hotfooted without refunding the membership deposit to many of its customers.[268] Paradiso no doubt epitomizes an unscrupulous infringer. Yet, as evident from its high rental charges and membership deposit, pricing was not the reason why it thrived. As Paradiso argued before the court, the reasons for its success were that its subscribers could watch films "at a time and place of their convenience," that "very few theatres" were exhibiting some of its films, and that it was solving the problem of an "artificial shortage" of entertainment in India.[269] Paradiso even claimed that its customers included "prominent film personalities . . . Governors of some States . . . and foreign embassies and consulates."[270]

VIII. THE SIXTH ELEMENT: THE LAW AND ITS ENFORCEMENT

Studying legislation and case law is no doubt essential to a pragmatic study of piracy. However, as Marc Galanter has observed, Indian laws are "notoriously incongruent with the attitudes and concerns of most Indians," and "to find 'the law' in India" necessitates looking "beyond the records of the legislatures and the higher courts to the working of the lawyers and the police."[271] Thus, in keeping with an

FICCI Frames Conference, Bombay, Mar. 30, 2016, https://blog.21cf.com/blog/2016/03/30/star-india-ceo-uday-shankar-50-million-downloads-hotstar-ficci-frames-2016.

[266] *See A Cine-Buff's Paradise*, TELEGRAPH (Mar. 16, 2006), http://www.telegraphindia.com/1060316/asp/calcutta/story_5970025.asp.

[267] Warner Bros. Entertainment Inc. v. Santosh V.G., (2009) 2 M.I.P.R. (Del. H.C.) 25 (India).

[268] Some complaints by Paradiso's customers can be viewed at http://www.consumercomplaints.in/complaints/cinema-paradiso-chennai-c236071.html. After ignoring repeated phone calls, Paradiso refunded my membership fee—but only after I fortuitously tracked down a member of the management and threatened legal action.

[269] *Warner Bros.*, 2 M.I.P.R. 25, at ¶ 15.

[270] *Id.* at ¶ 14.

[271] Marc Galanter, *The Uses of Law in Indian Studies*, LANGUAGE AND AREAS: STUDIES PRESENTED TO GEORGE V. BOBRINSKOY 37, 37–38 (University of Chicago ed.1967).

NLR approach, it becomes important to interview lawyers and understand the challenges that rights owners face and the strategies used to bypass them. It has been argued, using such an approach, that India's copyright regime provides rights owners "robust" legal provisions and "ample remedies" but is vitiated by an "utter lack of enforcement"—barring, to some extent, a "recent and sporadic phenomenon" of website-blocking orders.[272] This section arrives at a similar conclusion.

Indian copyright legislation provides civil and criminal remedies similar to most advanced jurisdictions.[273] However, numerous reports have pointed out flaws in the enforcement mechanism, especially the criminal enforcement infrastructure.[274] Copyright owners face further challenges within the court system in both civil and criminal cases, as Indian courts are heavily burdened and plagued with delays.[275]

According to official statistics, the annual number of criminal copyright cases filed in India is relatively low as a percentage of overall criminal cases, and the number of convictions even lower.[276]

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[272] *See generally* Hammer, *Smooth Sailing*, *supra* note 14, at 154, 178, 186.

[273] Under Indian law, copyright infringement is deemed to be a civil wrong for which plaintiffs are entitled to seek remedies that include an injunction, damages, or an account of profit. *See* The Copyright Act, 1957, No. 14, § 55, Acts of Parliament, 1957 (India) [hereinafter Copyright Act]. Cases of willful copyright infringement are also deemed to be criminal wrongs punishable with fine and imprisonment, with enhanced penalties for repeat offenders. *See* Copyright Act, §§ 63, 63A. An aggrieved copyright owner has a choice of seeking civil or criminal remedies, or both. *See* Sumeet Machines v. Sumeet Research, (1993) 13 P.T.C. (Madras H.C.) 75 ¶ 13 (holding that "no provision had been engrafted in" Indian copyright legislation "interdicting or inhibiting both civil and criminal actions being proceeded simultaneously before competent forums.").

[274] *See G.I.P.C. 2016 Report*, *supra* note 56, at 51 (identifying the "[p]oor application and enforcement of civil remedies and criminal penalties" in India as a weakness); USTR, SPECIAL 301 REPORT 37 (2014), *available at* http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf (stating that India has a "weak IPR legal framework and enforcement system."); TAYLOR WESSING 2014 REPORT, *supra* note 59, at 42 (stating that "enforcement lets it [India] down"); Liang & Sundaram, *India*, *supra* note 14 (describing the ineffectiveness of raids against street vendors). Arguably, one of the main reasons why criminal enforcement is weak is that India suffers from a nationwide shortage of police personnel. According to one report, India has an average of one police officer for every 1,037 residents, well below the Asian average ratio of 1:558 and the global average ratio of 1:333. *See Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, HUMAN RIGHTS WATCH, 1, 26 (August 2009), https://www.hrw.org/sites/default/files/reports/india0809web.pdf.

[275] In India, to quote Galanter, "[d]elays of *Bleak House* proportions are routine in many sorts of litigation." Marc Galanter, *Foreward: World of Our Cousins*, 2 DREXEL L. REV. 365, 368 (2010). According to the Indian government's own data, nearly 30 million cases are pending before Indian courts, and there exists a severe shortage of judges. *See National Court Management Systems (NCMS) Policy and Action Plan*, SUPREME COURT OF INDIA, 4–6 (2012), http://supremecourtofindia.nic.in/ncms27092012.pdf.

[276] According to India's National Crime Records Bureau (NCRB), the annual number of criminal cases registered under the Copyright Act has wavered in the period between 2004 and 2014, from a high of 7,889 in 2010 to a low of 5,241 in 2015. This number represents between 0.1 to 0.2% of all cases registered in just the category "Special and Local Laws," which refers to around twenty statutes dealing with specific criminal offenses. The annual number of cases resulting in convictions under the Copyright Act has been much lower than the annual number of cases registered (2,739 in 2010, 2,897 in 2011 and 2,358 in 2012). *See Cases Registered, Cases*

Conventional wisdom holds that filing a criminal complaint is a "more expeditious" option for copyright owners than civil litigation.[277] It is also an option that is usually less expensive. However, seeking criminal remedies against infringers can entail various obstacles. To start, local law enforcement in India is under the control of state governments, rather than the Union government,[278] which can lead to uneven results.[279] Apart from this, rights owners face two important procedural obstacles. First, although Indian copyright legislation empowers the police to conduct a raid without a warrant,[280] police officials often vitiate this advantage by insisting on copyright registration certificates as evidence of copyright ownership before conducting raids.[281] This is an obviously incorrect requirement[282] and defeats the purpose of a raid,

Chargesheeted, Cases Convicted, Persons Arrested, Persons Chargesheeted and Persons Convicted During 2010–2012, NATIONAL CRIME RECORDS BUREAU (2013), http://ncrb.nic.in/CD-CII2012/Additional_Tables_CII_2012/Additional%20table%202012/CR%20CS%20CV%20PAR%20PCS%20PCV%20under%20SLL%20crimes%20during%202010-2012.xls; *Crimehead-Wise Cases Registered Under Special and Local Laws (SLL) Crimes During 2001–2012*, NATIONAL CRIME RECORDS BUREAU (2013), http://ncrb.nic.in/CD-CII2012/Additional_Tables_CII_2012/Additional%20table%202012/SLL-CH-2001-2012.xls; NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2012, 41 (2013), http://ncrb.nic.in/CD-CII2012/cii-2012/Chapter%201.pdf [hereinafter NCRB REPORT]. Moreover, it is very likely that these numbers include cases of trademark counterfeiting, as: a) it is *de rigueur* for owners of logo and device marks to file complaints simultaneously alleging infringement under the Copyright Act; and b) the NCRB's data does not even have a separate category for cases registered under trademark legislation, mentioning only the Copyright Act as the relevant statute in the category "Theft of Intellectual Property." *See, e.g.*, NCRB REPORT at 123, http://ncrb.nic.in/CD-CII2012/cii-2012/Chapter%209.pdf.

277 *See* Kader v. Finlay Fleming & Co., (1928) A.I.R. 256, ¶ 15 (India).

278 The Constitution of India contains three lists (the Union List, the State List, and the Concurrent List) delineating legislative domains between the Union legislature and the various state legislatures. Subjects, such as the police and public order, are under the control of state legislatures. *See* INDIA CONST. sch. 7, art. 246, § II, cl. 1–2.

279 *See* Liang & Sundaram, *supra* note 14, at 342, 377 (stating that "enforcement efforts quickly become enmeshed in complex local political contexts" and that attitudes among police officials can also vary, with some indulging in acts of "low-level corruption" where they tip off infringers in exchange for payoffs). Furthermore, some states place stronger emphasis on piracy than others. For example, the police in Tamil Nadu registered around 2,500 more cases under the Copyright Act than their counterparts in Delhi, in both 2011 and 2012. Astonishingly, in 2012, Tamil Nadu alone accounted for 44 percent of all cases registered under the Copyright Act in India. *See Crimehead-Wise Cases*, *supra* note 276; 2012 NCRB REPORT, *supra* note 276, at 42.

280 Copyright Act, § 64(1).

281 *See* Piracy Committee Report, *supra* note 170, at 23–24, ¶ 4.2.9.

282 Although the Copyright Act allows copyright owners to register their works, copyright is treated as an inherent right, which exists on the creation of a work and is not dependent on registration. *See* Copyright Act, §§ 44–45; Masrani v. Tahiliani Design Pvt. Ltd., 2009 A.I.R. 44 (Del.) ¶¶ 31–34 (India); Satsang v. Mukhopadhyay, 1972 A.I.R. 533 (Cal.) ¶ 17 (India). The lack of an obligation to register copyright in a work is also a principle of international law. *See* Berne Convention art. 5(2). Unfortunately, there is some case law which lends credence to the police's insistence on producing copyright registration certificates, even though such cases were wrongly decided. *See, e.g.*, Sahu v. Subudhi, 1986 A.I.R. 210 (Ori.) ¶ 3 (India) (holding that "to have the copyright in any work[,]" one must "get the same registered with the Registrar of Copyrights."); Dewani v. Sonal Info Systems Pvt. Ltd., (2012) 52 P.T.C. (Bom. H.C.) 458 ¶¶ 24–27 (2011) (India) (the court agreed with the decision in *Sahu v. Subudhi* and held that "in the absence of

as it can take a long time to obtain a copyright registration certificate in India. Second, the exercise of long arm jurisdiction by courts in criminal cases is restricted,[283] which can lead to rights owners being forced to pursue infringers in areas with poor enforcement infrastructure and far away from major cities, which are the favored venues for civil litigation.[284] When criminal cases proceed to trial complainants face further challenges. One report, observing that "[c]riminal cases . . . most of the time, have not yielded effective and deterrent results," has identified problems such as the accused being awarded bail easily, lengthy delays, loss of evidence, and low conviction rates.[285]

To better understand the challenges within the criminal enforcement system, I met with some of India's leading IP practitioners. The incorrect insistence on copyright registration certificates was

registration . . . it would be impossible to enforce the remedies under the provisions of the Copyright Act . . . for any infringement." The court further held that in § 45 of the Copyright Act, which states that copyright owners "may" apply to register their copyright, "the word 'may' . . . will have to be read as 'shall' having regard to the scheme of the Act.").

[283] Indian criminal procedure laws require an offence to "ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed." But an offence committed in more than one area may be inquired into and tried by a court in one of the concerned areas. INDIA CODE OF CRIM. PROC. § 177, 178 (1973). Based on the latter rule, courts have permitted complaints against copyright infringers to be tried in a state where the infringer does not reside, but where the infringer commits an act amounting to infringement, such as sale, advertisement, and broadcast. *See, e.g.*, J.N. Bagga v. All India Reporter Ltd., 1969 A.I.R. 302 (Bom.) (India) (holding that the criminal courts in Nagpur, in the state of Maharashtra, had jurisdiction to entertain a copyright infringement complaint against a person based in Allahabad, in the state of Uttar Pradesh, on the basis that the person had offered to sell the allegedly infringing book in Nagpur); Kumar v. Malayalam Communications, (2007) 2 K.L.T. (Ker. H.C.) 14 (India) (holding that entities based outside the city of Kozhikode, including entities in another state, could face trial in Kozhikode for broadcasting a copyrighted film without authorization over a television network that could be viewed in Kozhikode). However, where an act of copyright or trademark infringement is entirely restricted to a certain region, a rights owner wishing to pursue criminal remedies has little option but to pursue the infringer within that region. *See, e.g.*, Kumar v. Sabharwal, (1985) MANU/PH/0688/1985 (Punjab and Haryana H.C.) (Feb. 14, 1985) (India) (quashing a criminal trial before a court in the city of Patiala, in the state of Punjab, against an alleged trademark infringer based in the village of Kalyat, in the neighboring state of Haryana. The court held that the alleged act of infringement, i.e. manufacture, had taken place entirely in Kalyat, and that the rights owner must thus approach the relevant court with jurisdiction over Kalyat).

[284] Official statistics show that nearly every Indian state has seen criminal complaints being registered for copyright infringement. It would seem reasonable to assume that a fair number of such complaints must have been grudgingly filed by traders against localized infringers in towns and villages where they would have ideally preferred not to file such complaints. Interestingly, the number of cases registered annually in several states has consistently outnumbered the corresponding figure for Delhi, which conversely dominates the civil litigation scene. In one year, 10 states saw more criminal cases under the Copyright Act being registered than Delhi. *See Crimehead-Wise Cases*, *supra* note 276.

[285] *See 2014 Special 301 Report on Copyright Protection and Enforcement*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 39, 43 (2014), http://www.iipawebsite.com/rbc/2014/2014SPEC301INDIA.PDF [hereinafter, I.I.P.A. Report] (stating that "bail is often secured on the first day . . . Criminal prosecutions often take years, by which time relevant witnesses and officers are untraceable and in many cases evidence secured is also compromised, leading to acquittals. In plea bargains . . . or even convictions, fines remain low and non-deterrent. . . ."). *Id.*

identified as a major obstacle.[286] Other grievances included the fact that the overall procedure for a criminal case was slow and cumbersome,[287] and a belief that many judges gave low priority to criminal copyright cases.[288] It was thus claimed that, on the whole, complainants were usually "disappointed" with the eventual outcome of a criminal case.[289]

Hence, it is apparent that seeking criminal remedies for piracy is fraught with obstacles. Ordinarily, most copyright owners would regard civil litigation as an expensive and time-consuming alternative. However, litigation costs in India are much lower than in developed countries.[290] Furthermore, through a complex maze of laws, Indian law grants plaintiffs generous forum-shopping options in civil copyright infringement cases. In a nutshell, a plaintiff can: a) engage in "horizontal" forum anywhere in India by suing a defendant at a place where the plaintiff resides or carries out business, even if the cause of action did not occur there and the defendant does not reside there; and b) engage in "vertical" forum shopping in four out of twenty-four High Courts—i.e. Delhi, Bombay (Mumbai), Calcutta (Kolkata), and Madras (Chennai)—by bypassing lower courts and filing the suit in one of these

[286] Ameet Datta, a veteran IP lawyer, stated that some police officials insisted on copyright registration certificates and some did not, and that the trend often differed from state to state. Datta told me that his clients frequently had to apply to a local court for an order authorizing a raid—furnishing alternative documents showing proof of ownership—and then approach the police, a strategy that increased time and costs. Datta informed me that police officials insisted on copyright registration certificates because in the past some parties had unfortunately misrepresented to the police about being owners of copyrighted works, and the police had conduced raids that were unjustified. *See* Interview with Ameet Datta, Partner, Saikrishna & Associates, in Noida (Dec. 4, 2014) [hereinafter Interview with Ameet Datta]; Shwetasree Majumder, another prominent IP lawyer, shared Datta's grievances about the difficulties posed by the insistence on copyright registration certificated by some police officials. She also confirmed that the practice of asking for certificates varied across states. She claimed that police officials sometimes "play ping pong" with lawyers whose clients lack registration certificates, directing them to keep on producing unnecessary documents. Like Datta, Majumder stated that the reason the police exercised caution was because of misrepresentations in the past by some complainants. *See* Interview with Shwetasree Majumder, Partner, Fidus Law Chambers, in Noida (Dec. 12, 2014) [hereinafter Interview with Shwetasree Majumder].

[287] Madhu Gadodia, a partner at a leading entertainment law firm, found criminal actions to be "very slow and time consuming, requiring constant follow ups." *See* Email interview with Madhu Gadodia, Partner, Naik, Naik & Co., Bombay (May 18, 2015) (on file with author) [hereinafter, Interview with Madhu Gadodia]; Gupte felt that there existed an "impediment to implementation of the legislation at the grass root level." *See* Interview with Aamod Gupte, *supra* note 212.

[288] Datta claimed that many judges gave low priority to criminal copyright or trademark infringement cases, viewing such cases as "luxury litigation," initiated by wealthy corporations. *See* Interview with Ameet Datta, *supra* note 269.

[289] *Id.*

[290] *See* Michael Elmer & Stacy Lewis, *Where to Win: Patent-Friendly Courts Revealed*, MANAGING INTELL. PROP., 4 (Sep. 2010), http://www.finnegan.com/files/upload/Articles%20and%20other%20Resources%20-%20PDF%20Files/Managing_Intellectual_Property_Where_to_win_patent_friendly_courts_revealed_09_10.pdf [hereinafter Elmer & Lewis, *Where to Win*] (stating that litigation costs in India are "relatively inexpensive" and cost about "about USD 50,000 for complicated cases over a period of two to three years.").

courts at first instance.[291] Over the years, India has witnessed a trend where lawyers have used civil IP infringement proceedings and obtained *ex parte* search and seizure orders directly from High Courts.[292] As a result, it has become common for lawyers to advise IP owners to consider civil remedies instead of criminal remedies.[293] One practitioner admitted to me that this seemed like a "ridiculous" strategy, but pointed out that it was often more advisable and effective than a criminal complaint.[294]

Civil IP infringement cases in India rarely proceed beyond the interim injunction stage.[295] Moreover, damages awards in even blatant IP infringement cases are usually very low.[296] One practitioner informed me that not only did litigation expenses invariably outweigh costs and damages awards, but that defendants often went missing after such awards, making the process to retrieve damages cumbersome and costly.[297] Thus, what most plaintiffs in civil infringement actions really look for is an ad interim injunction. Here, the Delhi High Court has been liberal in granting such injunctions *ex parte*, through Anton Piller[298] and John Doe orders (a.k.a. "Ashok Kumar" orders),[299]

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291 *See generally*, Arpan Banerjee, *Forum Shopping in Intellectual Property Rights Infringement Cases in India*, ATRIP (2015), http://www.atrip.org/Content/Essays/3.%20Arpan%20Banerjee%20-%20Forum%20Shopping%20in%20IP%20rights%20infringements%20in%20India.pdf [hereinafter Banerjee, *Forum Shopping*]. Technically, the "vertical choice" can also be exercised in two other High Courts (in the mountainous states of Himachal Pradesh and Jammu and Kashmir) but these courts have generally not witnessed forum shopping, presumably due to their comparatively remote geographical location.

292 *Id. See also I.I.P.A. Report*, *supra* note 285, at 42 ("Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as 'courts of first instance') do a creditable job in civil cases, and most positive civil relief and court orders emanate from these areas of the country.").

293 *See, e.g.*, Darshan Ramamurthy and Ranjan Narula, *IP Environment in India*, IN-HOUSE LAWYER (Nov. 16, 2009), http://www.inhouselawyer.co.uk/index.php/intellectual-property/7552-ip-environment-in-india.

294 Interview with Shwetasree Majumder, *supra* note 286.

295 The Supreme Court of India has observed, "[I]n the matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally." Vardhman v. Chawalwala, (2009) 41 P.T.C. (S.C.) 397, ¶ 3 (India).

296 *See, e.g.*, Jane Norman v. Jane Norman, MANU/DE/1384/2014 (Del. H.C.) (India) (discussing a fraudulent, nationwide trademark counterfeiting case where the court awarded INR 200,000 (roughly USD 3,300) as damages); Time v. Srivastava, (2005) 30 P.T.C. (Del. H.C.) 3 (India) (discussing a blatant trademark infringement case where the court awarded INR 500,000 (roughly USD 4,000) as compensatory damages and INR 500,000 as punitive damages). The award in the *Norman* case, concerning the sheer scale of the infringement, seems paltry.

297 Interview with Dhruv Anand, Partner, Anand & Anand, in Noida (Dec. 10, 2014) [hereinafter Interview with Dhruv Anand].

298 Anton Piller orders derive their name from the English case of *Anton Piller v. Manufacturing Processes Ltd.*, (1976) Ch. 55 (C.A.). In this case, the Court of Appeals held that "in the very exceptional circumstances," a court could pass an order allowing a plaintiff to enter the premises of a defendant to inspect and remove material which the latter might destroy or dispose of. The earliest Anton Piller orders in India are thought to have been granted by the Delhi High Court. *See* Pravin Anand, *India—Copyright: First Anton Piller Orders in India*, 4 ENT. L. REV. 40

sometimes in conjunction.[300] This has contributed towards making the Delhi High Court the most popular forum for plaintiffs in IP infringement cases, with the court hearing an astounding 70 percent of all IP cases in India, by some estimates.[301] In the context of film piracy, a number of rights owners have obtained broadly worded John Doe orders from the four major High Courts (particularly Delhi) to compel internet service providers (ISPs) to pre-emptively block infringing websites—a trend visible from 2011 onwards.[302] In some cases, the Indian government's Department of Telecommunications (DoT) and Department of Electronics and Information Technology (DEITY) have also been impleaded as parties and instructed by courts to block

(1993).

[299] A John Doe order is an order restraining anonymous infringers, and is often referred to an Ashok Kumar order in India. The first such order in India was passed by the Delhi High Court in a case involving the piracy of live television broadcasts. The Court appointed a commissioner to "make an inventory and take into custody all such equipment/wires which is or could be used for the broadcast of the plaintiff's channel." *See* Taj Television v. Mandal, (2003) F.S.R. (Del. H.C.) 22, ¶ 18 (India).

[300] *See generally* T. Prashant Reddy, *A Critical Analysis of the Delhi High Court's Approach to* ex parte *Orders in Copyright and Trade Mark Cases*, 3 MANUPATRA INTELL. PROP. REP. 171 (2011); *See also* Juhi Gupta, *John Doe Copyright Injunctions in India*, 18 J. INTELL. PROP. RIGHTS 351 (2013).

[301] *See* Banerjee, *Forum Shopping*, *supra* note 263. The success of this strategy has prompted a senior Delhi-based practitioner to smugly remark, "our courts are the best in the world [in matters] concerning IPR." *See How India's Courts Are Coping With the IP Boom*, MANAGING INTELL. PROP. (Sep. 1, 2010), http://www.managingip.com/Article/2664957/How-Indias-courts-are-coping-with-the-IP-boom.html?ArticleId=2664957&single=true (quoting Anuradha Salhotra). To illustrate the extent to which plaintiffs forum shop before the Delhi High Court to seek interim injunctions, in one case Microsoft sued a defendant situated in Bangalore in faraway Delhi for copyright infringement (the distance between the two cities being more than the distance between London and Belgrade). This was despite the fact that Microsoft had a large commercial presence in Bangalore. The court strongly criticized "wealthy plaintiffs" like Microsoft for repeatedly forum shopping before the Delhi High Court, but acknowledged that Microsoft was entitled to do so under the law, and that "judicial discipline" required it to hear the suit and grant Microsoft relief. *See* Microsoft v. Gopal, (2010) 42 P.T.C. (Del. H.C.) 1 ¶¶ 17–18 (India).

[302] *See, e.g.*, Reliance v. Jyoti Cable, (2011) Civil Suit No. 1724 of 2011 (Del. H.C.) (Jul. 20, 2011) (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=135357&yr=2011 (order concerning the Bollywood film *Singham*, where it was held: "[D]efendants, and other unnamed and undisclosed persons, are restrained from communicating or making available or distributing, or duplicating, or displaying, or releasing, or showing, or uploading, or downloading, or exhibiting, or playing, and/or defraying the movie 'Singham' in any manner without proper license from the plaintiff or in any other manner which would violate/infringe the plaintiff's copyright in the said cinematograph film 'Singham' through different mediums like CD, DVD, Blue-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner."); Reliance v. Jyoti Cable, (2011) Civil Suit No. 2066 of 2011 (Delhi H.C.) (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=173116&yr=2011 (similarly-worded order concerning the Bollywood film *Bodyguard*); Reliance v. Multivision, (2011) Civil Suit No. 3207 of 2011 (Del. H.C.) (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=269404&yr=2011 (similarly-worded order concerning the Bollywood film *Don 2*); *See also John Doe Orders – Stop Piracy*, NAIK NAIK & CO. (Oct. 8, 2014), http://naiknaik.com/john-doe-orders (contains a table with details of John Doe orders awarded by courts, including the Bombay, Madras, and Calcutta High Courts).

websites (a strategy that appears to have some advantages).[303]

The broad wording of some website-blocking orders had initially led to some ISPs blocking entire websites (such as Vimeo and Daily Motion) instead of individual URLs within the website hosting infringing content.[304] Apart from attracting criticism from free-speech advocates,[305] this also led to a consumer court directing an ISP to pay compensation to an aggrieved subscriber.[306] This flaw was rectified by a case in the Madras High Court, where the Court passed a website-blocking order against various ISPs and Ashok Kumars. The court stated that only URLs specifically hosting infringing content ought to be blocked.[307] The court further set the defendants a forty-eight hour deadline to remove the infringing content.[308] Importantly, the court also upheld the legality of such website-blocking orders, and held that ISPs could not evade them through a safe-harbor defense.[309]

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303 *See, e.g.*, Fox v. Macpuler, (2015) Civil Suit No. 2066 of 2011 (Delhi H.C.) ¶ 7 (May 14, 2015) (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=110404&yr=2015 (instructing the DoT and DIETY to block "various websites (named and un-named) . . . primarily indulged in hosting, streaming or providing access to infringing and illegal" copies of the Bollywood film *Bombay Velvet*); Datta informed me that it was advantageous to implead the DoT/DIETY as it could comprehensively block all websites by issuing a notification to all ISPs, as opposed to sporadic blocks by a handful of ISPs impleaded in a case. Datta also stated that notifications from a government department were often "taken more seriously" by ISPs than legal notices from lawyers. *See* Interview with Ameet Datta, *supra* note 269; This is perhaps supported by the fact that an association of ISPs had written to the DoT pointing out that while various law firms had been sending ISPs legal notices annexing copies of John Doe orders, a government notification required the DoT to initiate action following the order and instruct ISPs to block websites. *See* Letter from the Internet Service Providers Association of India to the Secretary, DoT (Sep. 15, 2011), http://www.ispai.in/UI/uploads/submissionAttach/dot(1).pdf.

304 *See* Kunal Dua, *Confusion Reigns as Indian ISPs Block Vimeo, Torrent Website*s, NDTV (May 17, 2012), http://gadgets.ndtv.com/internet/news/confusion-reigns-as-indian-isps-block-vimeo-torrent-websites-223340; Nikhil Pawa, *Update: Files Sharing Sites Blocked In India Because Reliance BIG Pictures Got A Court Order*, MEDIANAMA (July 21, 2011), http://www.medianama.com/2011/07/223-files-sharing-sites-blocked-in-india-because-reliance-big-pictures-got-a-court-order.

305 *See, e.g.*, Shivam Vij, *Web of Deceit*, CARAVAN (July 1, 2012), http://www.caravan magazine.in/perspectives/web-deceit.

306 Vinay v. Airtel, *Consumer Complaint 226 of 2012*, *available at* https://www.scribd.com/document/102423877/Airtel-Websites-Block-Fine-20000-Karnataka-Shimoga-Consumer-Forum (District Consumer Disputes Redressal Forum, Shimoga, Aug. 3, 2012) (discussing how the subscriber could not access a website for over a month. The forum held that this had caused him "mental agony" due to "deficiency in service," and awarded the subscriber compensation and costs. Although the order did not name the blocked website, it stated that the website was a torrent website).

307 Vodafone v. R.K. Productions (2013) 54 P.T.C. (Mad. H.C.) 149, ¶ 4 (India) (quoting an earlier order where the court had stated that "the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website.").

308 *Id.*

309 *Id.* at ¶¶ 22–25, 31. The court stated, "[w]ithout the ISPs, no person would be in a position to access the pirated contents nor would the unknown persons be in a position to upload the pirated version of the film. Therefore, the ISPs are necessary parties to the suit . . . . The ISPs are business driven by volume of customers and downloading. Therefore, they are gaining when multiple persons are illegally downloading such materials." The court also observed that Indian civil procedure rules required details of defendants to be disclosed only "so far as they can be

Recently, the Delhi and Bombay High Courts have further expanded the scope of such orders. A two-judge bench of the Delhi High Court, after initially accepting a contention by the DEITY that only specific infringing URLs ought to be blocked,[310] later recalled its order and held that "rogue websites" indulging in "rank piracy" ought to be blocked outright, rather than specific URLs within the website.[311] The court observed that it was easy for a website to migrate to a different URL within the same website, and that it would be a "gargantuan task" for a plaintiff to keep identifying specific infringing URLs, which could potentially number in the thousands.[312] Meanwhile, a single-judge bench of the Bombay High Court, after some initial hesitation, adopted an effectively similar stance.[313] The court also

ascertained." In cases where "the violators are many in number, the plaintiffs could not identify each and every" defendant, and thus an "Ashok Kumar suit is maintainable." The court also referred to provisions of the Information Technology Act of 2000, No. 21, Gazette of India, section I(2) (June 9, 2000) [hereinafter Information Technology Act], along with the decision of the Delhi High Court in *Super Cassettes v. Myspace*, (2011) 47 P.T.C. (Del. H.C.) 49 (2011) (India). Section 79 of the Information Technology Act states, *inter alia*, that "an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by" the intermediary). However, § 81 of the same statute contains a proviso stating, *inter alia*, that "nothing contained in" the Information Technology Act "shall restrict any person from exercising any right conferred under the Copyright Act." Information Technology Act. In *Super Cassettes*, the court accordingly held that the safe-harbor rule in § 79 covered "internet wrongs" such as "auctioning, networking servicing, news dissemination, uploading of pornographic content," but not wrongs "relating to . . . copyright infringement." 47 P.T.C. 49 at ¶ 68.3.

310 DEITY v. Star, First Appeal Order No. 57 of 2015 (Del. H.C. March 10, 2016), *available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=54187&yr=2016.

311 DEITY v. Star, Review Petition in First Appeal Order No. 57 of 2015, ¶ 14 (Del. H.C. July 29, 2016), *available at* http://lobis.nic.in/ddir/dhc/PNJ/judgement/29-07-2016/PNJ29072016REVIEWPET1312016.pdf.

312 *Id.*

313 In a case involving a major Bollywood film, Justice Gautam Patel refused to grant a John Doe directing ISPs to block 800 websites, finding the plaintiff's suit to be "sketchy and formless" (Balaji Motion Pictures v. Bharat Sanchar Nigam, Civil Suit No. 694 of 2016 (Bom. H.C. July 1, 2016), ¶ 6, *available at* http://spicyip.com/wp-content/uploads/2016/07/Great-Grand-Masti-1.pdf). The judge directed the plaintiff to instead produce "a list of individual links to downloads," further stating that "a technically competent officer" of the plaintiff must check "if not all, at least a sufficient sampling of these links so as to warrant the grant of an injunction" (*id.* at ¶¶ 7-8). In a subsequent order, Justice Patel granted the plaintiff an injunction against a revised list of 482 specific URLs. These URLs were tracked by Markscan (whose representative also appeared before the court), and annexed to an affidavit signed by the plaintiff's general counsel (Balaji Motion Pictures v. Bharat Sanchar Nigam, Civil Suit No. 694 of 2016 (Bom. H.C. July 4, 2016), ¶¶ 3, 5-6, 12, 14-15, *available at* http://spicyip.com/wp-content/uploads/2016/07/Great-Grand-Masti-2.pdf). On the same day, in another similar case, Justice Patel granted a John Doe order against 102 specific URLs in favor of another production house, which had taken the precaution of conducting an online investigation before approaching the court (Yash Raj Films v. Bharat Sanchar Nigam, Civil Suit No. 692 of 2016 (Bom. H.C. July 4, 2016), *available at* http://spicyip.com/wp-content/uploads/2016/07/Yash-Raj-Sultan.pdf). While it may be argued that Justice Patel took a different view than the Delhi High Court, the argument that there exist websites specifically designed to disseminate infringing content was not contended before the judge. Moreover, in a subsequent order, the judge, examining a report by Markscan finding 110 pirate websites, stated, "I have no manner of doubt that access to all these 110 websites must be blocked." (Balaji Motion Pictures v. Bharat Sanchar Nigam, Civil Suit No. 694 of 2016 (Bom.

pointed to a provision, introduced as a part of the 2012 copyright amendments, which states that till such time a court passes a website-blocking order, rights owners can compel intermediaries to block pirated content for three weeks by sending a takedown notice.[314] The court held that an ISP had been wrong to reject a takedown notice (from Markscan) and insist on a prior court order, observing that "the failure of intermediaries or service providers to comply with their statutory obligations" could "ultimately attract a claim in damages."[315]

Thus, website-blocking orders are clearly a common and handy enforcement strategy, and the recent orders will only encourage rights owners to persist with this strategy. Media reports have quoted industry representatives and lawyers as expressing satisfaction with the ease and efficacy of website-blocking orders.[316] Even the USTR, in a departure from its usual cynical view of India, has acknowledged that the spate of website-blocking orders have "strengthened enforcement against pirated movies."[317] Most industry representatives and lawyers I spoke to felt that the website-blocking strategy had been successful.[318] However, they also highlighted some shortcomings of these orders. For example,

H.C. July 8, 2016), ¶ 4, *available at* http://s3.documentcloud.org/documents/2944079/Great-Grand-Masti-Order-Dated-8th-July-2016.pdf). The list of websites included full websites instead of specific URLs, such as www.limetorrents.cc, www.thepiratebay.org and www.ugtorrents.com (*see* Kian Ganz, *Bombay HC Blocks 110 Filesharing Websites Completely After Changed Mind About SpicyIP Blog Arguments*, LEGALLY INDIA, July 8, 2016, *available at* http://www.legallyindia.com/bar-bench-litigation/bombay-hc-blocks-110-filesharing-websites-completely-after-changed-mind-about-spicyip-blog-arguments).

314 Under § 52(1)(c) of the Copyright Act, if a "person responsible for" the "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration" receives a complaint from the copyright owner claiming that such storage constitutes copyright infringement, the person "shall refrain from facilitating such access" for 21 days, in the absence of a court order. After 21 days, the person "may continue to provide the facility of such access," if no court order is received.

315 Balaji Motion Pictures v. Bharat Sanchar Nigam, Civil Suit No. 694 of 2016 (Bom. H.C. July 8, 2016), ¶ 9, *available at* http://s3.documentcloud.org/documents/2944079/Great-Grand-Masti-Order-Dated-8th-July-2016.pdf. In two subsequent orders, Justice Patel clarified the wording of the notifications to be displayed by the ISPs on blocked web pages, and further suggested the appointment of an ombudsman by ISPs to examine grievances. *See* Eros v Bharat Sanchar Nigam, Civil Suit No. 751 of 2016 (Bom. H.C. Aug. 9, 2016), *available at* http://spicyip.com/wp-content/uploads/2016/08/Eros-v.-BSNL.pdf; Eros v Bharat Sanchar Nigam, Civil Suit No. 751 of 2016 (Bom. H.C. Aug. 30, 2016), ¶¶ 6-8 *available at* http://spicyip.com/wp-content/uploads/2016/09/Bom-HC-order-in-Dishoom_-August-30.pdf (discussing the need for an ombudsman). *See also* Shamnad Basheer, *In Bollywood's Battle Against Piracy, A Neutral Ombudsman Might Be the Answer*, THE WIRE, Aug. 23, 2016, http://thewire.in/61034/of-bollywood-blocks-and-johndoes-towards-a-neutral-ombudsman (article suggesting the appointment of an ombudsman, cited by the court).

316 *See, e.g.*, Kavitha Shanmugam, *Dear John*, TELEGRAPH (Calcutta), July 1, 2012, http://www.telegraphindia.com/1120711/jsp/opinion/story_15714941.jsp.

317 *See 2013 Special 301 Report*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 39 (May 2013), http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf.

318 For example, Gupte stated, "[t]he Copyright Act amendments and judicial pronouncements on 'John Doe Orders' have led the way in creating awareness and supporting the Indian Film Industry in its fight against piracy." Interview with Aamod Gupte, *supra* note 212.

if only specific URLs are blocked, a pirate can migrate to a different URL.[319] In one instance, a pirated music website blocked by the Calcutta High Court did precisely that.[320] Here, it can also be argued that despite the recent Delhi and Bombay High Court orders allowing the blocking of entire websites, a pirate could migrate to a new website with a completely different domain name, which could defeat the purpose of a John Doe order. Even if some determined rights owners prepare a list of new infringing websites, the new websites cannot be blocked instantaneously. Thus, the absence of a real-time blocking mechanism means that there will always be leakages.[321]

Another problem highlighted was that the vertical forum-shopping mechanism could only be availed of at only at a few High Courts in big cities. Thus, for regional film industries situated in states geographically distant from these cities, the costs of seeking such a John Doe order would increase.[322] Although theoretically a local district court could also issue a website-blocking order, district courts are widely perceived to lack the infrastructure and expertise necessary to hear IP disputes, which has necessitated forum shopping in the first place.[323] Moreover,

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319 Anand expressed this view in his interview. Interview with Dhruv Anand, *supra* note 297.

320 The court ordered the blocking of the website www.songs.pk, with the rider that the "order of blocking should be confined to" that specific URL and "should not otherwise interfere with internet service." *See* Sagarika Music Pvt., Ltd. v. Dishnet Wireless Ltd., (2012) Civil Suit 23 of 2012 (Cal. H.C.) (Jan. 27, 2012), http://www.netrival.com/files/calcutta-high-court-order-ban-songs.pk.pdf. The website subsequently migrated to a different URL. *See* Anupam Saxena, *Songs.Pk Relaunched as Songspk.pk; Ad Networks?* (Mar. 12, 2012), http://www.media nama.com/2012/03/223-songs-pk-relaunched-as-songspk-pk-ad-networks.

321 Datta and Rajkumar expressed this view. Interview with Ameet Datta, *supra* note 286; Interview with Akella Rajkumar, *supra* note 177.

322 Rajkumar pointed out that as the Andhra Pradesh High Court is not vested with powers that allow vertical forum shopping, the Telugu film industry would have to litigate outside the state of Andhra Pradesh, where the industry is based. Rajkumar identified this as a problem for the Telugu film industry. *See* Interview with Akella Rajkumar, *supra* note 177.

323 Datta and Majumdar expressed this opinion in their interviews. Interview with Ameet Datta, *supra* note 286; Interview with Shwetasree Majumder, *supra* note 286; *See also* Rebecca Abraham, *Can IP be Owned in India?*, INDIA BUS. L.J. 19, 20 (Apr. 2012), http://www.indilaw.com/pdfs/Can%20IP%20be%20owned%20in%20India.pdf (quoting Gunjan Paharia, an experienced IP practitioner as saying: "[o]nly the courts in the urban areas are IP savvy . . . the district courts are still a problem"); I.I.P.A. REPORT, *supra* note 285, at 42 (referring to litigation outside the four major High Courts and stating, "[t]he experience in other regions, where District Courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright including: clogged dockets; delays due to archaic procedural laws, such as the failure to accept electronic documents and multiple opportunities for parties to delay proceedings; problems with retaining evidence (and lack of familiarity with the evidentiary requirements in relation to electronic evidence in online piracy cases); onerous requests to produce evidence of ownership and/or witnesses; failing to grant seizure orders to copyright owners as a matter of right in civil cases; and difficulty enforcing civil court orders."). Two experienced lawyers have claimed that there are "no known orders of this nature passed by District Courts anywhere in" India (Binny Kalra & Achuthan Sreekumar, *Hunting Down India's Nameless Infringers*, MANAGING INTELL. PROP., Feb. 26, 2014, http://www.managingip.com/Article/3313829/Hunting-down-Indias-nameless-infringers. html). I was able to find a newspaper report, referring to an order of a district court in Kerala, that

for small-budget producers, the costs of seeking an order from even a district court would still be prohibitively expensive. [324]

Yet another problem that was highlighted was that website-blocking orders only have application within India,[325] an issue that came to the fore when an overseas torrent website announced its refusal to comply with Indian court orders.[326] Considering that a significant amount of piracy of Indian films occurs overseas, this is an obvious problem for the industry. In general, the Indian film industry's copyrights have been "largely unenforced" abroad.[327] Most lawyers and industry representatives I spoke to attributed this to high legal costs in developed countries. Two IP practitioners in the U.K.—a major overseas market for Indian films—confirmed that civil litigation was very expensive in the U.K., providing some rough figures that were very high compared to costs in India. [328] Although one Indian film company has been an outlier of sorts and regularly enforced its rights overseas through multiple civil and criminal actions,[329] the experience for many others has been sobering.[330] The general counsel of Eros informed me that on some occasions it was not possible to detect the place of infringement, due to the use of sophisticated programs by infringers to mask their locations.[331]

contradicts this claim, but could not find information about any other district court that passed such as order. *See* Asha Prakash, *Court Shield Against Piracy; Relief in M'wood*, TIMES OF INDIA, Oct. 17, 2012, http://timesofindia.indiatimes.com/entertainment/malayalam/movies/news/Court-shield-against-piracy-relief-in-Mwood/articleshow/16836668.cms?.

[324] For example, Loop told me that it would be "too expensive" for Overdose to engage a law firm and approach any court to seek a John Doe order. *See* Interview with Celine Loop, *supra* note 180.

[325] Garodia expressed this view in his interview. Interview with Madhu Gadodia, *supra* note 287.

[326] *See* Ernesto, *Torrent Sites Get "Restraining Order" from Indian High Court*, TORRENT FREAK (July 31, 2011), http://torrentfreak.com/torrent-sites-get-restraining-order-from-indian-high-court-110731 (referring to comments by the owner of BitSnoop).

[327] *See* Liang & Sundaram, *India*, *supra* note 14, at 387.

[328] One practitioner informed that "IP litigation is very expensive in the U.K.," with "a very broad average" of legal fees being between GBP 500,000 to GBP 1 million for a case that proceeds to full trial. Email Interview with Sarah Burke, Senior Associate, Herbert Smith Freehills, London (Nov. 4, 2014) (on file with author); Another practitioner informed me that litigating in the UK was "very costly," and that the minimum amount that a plaintiff would have to part with to seek a website-blocking injunction would have to be GBP 15,000 per website. *See* Email Interview with Ted Shapiro, Partner, Wiggin LLP., London (Jan. 28, 2015) (on file with author).

[329] *See* Fight Piracy, YASH RAJ FILMS, http://www.yashrajfilms.com/FightPiracy.aspx (last visited Mar. 30, 2016).

[330] For example, Rajkumar informed me that a production house that had once pursued infringers in the U.S. found its legal expenses to be "enormous," and that it "burnt a huge hole in the pocket" of the production house. *See* Interview with Akella Rajkumar, *supra* note 177; On the civil litigation front, a major Bollywood producer had once obtained an Anton Piller order in Canada, but the order was overruled on appeal. *See* Vinod Chopra Films Private Ltd. v. Doe, [2010] F.C. 387 (Can.). This also puts into perspective how easy it actually is to secure *ex parte* injunction orders in Indian courts, compared to courts overseas.

[331] Interview with Aamod Gupte, *supra* note 212.

In sum, the copyright enforcement scenario in India is one that is fairly disappointing for rights owners, but recent website-blocking orders represent an area of success. However, the fact that obtaining such an order usually requires recourse to civil litigation at appellate courts in large cities means that it privileges wealthy Bollywood companies over smaller production houses. Furthermore, the fact that real-time blocking cannot be obtained means that a pirated print could still be leaked, and only a few downloads could lead to mass piracy (for example, through the physical DVD route, as street vendors are unaffected by website bans).

IX. THE SEVENTH ELEMENT: REFORMS IN THE LAW AND INDUSTRY STRATEGIES

One of the important goals of NLR is to impact policy.[332] In this section I will discuss the scope of a few reforms to the law, as well as to business strategies. I will focus on three recommendations of the Committee, all involving TRIPS-plus measures.

Practically all lawyers and industry representatives I spoke to felt that substantive laws in India were largely adequate to counter piracy; their primary grouse was the lack of enforcement and compliance.[333] They also felt that piracy could effectively be tackled through smarter business strategies, such as wider and cheaper access to content as well as more focused consumer awareness campaigns[334]—sentiments also

[332] *See* Erlanger et al., *Is It Time for a New Legal Realism?*, *supra* note 4, at 337 (stating that NLR "scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy").

[333] For example, Chinchlikar stated, "[l]egislatively all the mechanisms exist to prevent piracy and act against pirates. However, enforcement of the same is very, very limited. It is not a law problem, it is an order problem." Interview with Chaitanya Chinchlikar, *supra* note 175; Nair stated, "[w]e believe that while the legal provisions we presently have in India are sufficient to tackle piracy, the problem is the attitude and general perception in relation to piracy." Interview with Anand Nair, *supra* note 175; Rajkumar stated that current substantive laws were "pretty good," the problem only lay with inadequate enforcement. Interview with Akella Rajkumar, *supra* note 177; Singh told me that there was "no problem" with substantive laws, and the "challenge is technological, not legal." Interview with Pratibha Singh, *supra* note 123; Gupte expressed a similar view stating that the "judicial and legislative response[s] to piracy have been improving over the years." Gupte instead called for "[a] more sensitized approach by the police machinery with swift action, prompt filing of watertight F.I.R.s [First Information Reports], collection and presentation of irrefutable evidence to build iron clad cases in courts and severe punishments including grant of claims for pecuniary damages to cover financial losses suffered by film studios." Interview with Aamod Gupte, *supra* note 212; Datta, Majumdar and Anand expressed similar views. *See* Interview with Ameet Datta, *supra* note 286; *See* Interview with Shwetasree Majumder, *supra* note 286; *See* Interview with Dhruv Anand, *supra* note 297.

[334] For example, Gupte stated, "[o]ffering legit on-demand services is the way forward in the long run to counter piracy. Piracy thrives in the absence of easy availability of quality content to consumers. . . . [i]mportant . . . are the ad-supported and 'freemium' business models, which help consumers to gradually scale up to quality paid content and wean them away from basic free offerings over a period of time." Interview with Aamod Gupte, *supra* note 212.

expressed by the Committee.[335] For rights owners, one solution to curb piracy might be greater engagement with the youth and the promotion of a culture of watching films on the big screen and paying for content. This strategy could range from collaborating with theatres and offering student discounts on theatre tickets (a concept largely unknown in India), to encouraging film clubs in universities and licensing films to these clubs for a nominal, if not minimal, fee. The recent introduction of Netflix in India and the greater availability of films on YouTube[336] could also help reduce piracy, if this paper's modest survey of law school students reflects a broader mindset among Indian middle class youth. Here, Eros' representative identified video-on-demand services as "a great business opportunity" for the Indian film industry.[337] With respect to awareness campaigns as pointed out earlier, if the new copyright amendments lead to authors and performers being more directly affected by piracy, they could show more interest in participating in consumer awareness campaigns. Considering the hallowed status that many actors enjoy in India, such awareness campaigns may be quite effective.

An achievable industry strategy could be to press for non-binding "soft law" measures aimed at throttling online advertising revenues for pirate websites. In the U.S., major online advertisement companies including Google, Microsoft, Yahoo, and AOL have framed a set of voluntary best practices guidelines. The guidelines require companies offering an "Ad Network" to "[m]aintain policies prohibiting websites that are principally dedicated to . . . engaging in copyright piracy and have no substantial non-infringing uses from participating in the Ad Network's advertising programs . . . ."[338] The guidelines also require such companies to "[a]ccept and process valid, reasonable, and sufficiently detailed notices from rights holders . . . ."[339] The U.S. government has supported this effort and praised it as a "positive step."[340] Even a website that is usually critical of pro-copyright

335 Piracy Committee Report, *supra* note 170, at 5–8; Here, it is important to note that India has a very low screens-per-capita-ratio, which can only encourage piracy. *See* Banerjee, *A Case for Economic Incentives to Promote "Parallel" Cinema in India*, *supra* note 168, at 24.

336 *See* Rajesh Srivastava, *Can Netflix Win Over India and Other Stories*, LIVE MINT (Feb. 2, 2016, 1:50 AM), http://www.livemint.com/Companies/sxYn2mTT2BeCStYsyulTiK/Can-Netflix-win-over-India-and-other-stories.html; Vindu Goel, *India Offers Atypical Video Challenges*, NEW YORK TIMES (Dec. 27, 2015), http://www.nytimes.com/2015/12/28/technology/bollywood-and-us-media-giants-try-to-induce-indians-to-pay-for-video.html?_r=0.

337 Interview with Aamod Gupte, *supra* note 212.

338 *Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting*, General Commitment § (a), http://www.2013ippractices.com/bestpracticesguidelinesforadnetworksto addresspiracyandcounterfeiting.html.

339 *Id*. at Complaint Process § (f).

340 Victoria Espinel, *Coming Together to Combat Online Piracy and Counterfeiting*, WHITE HOUSE BLOG (July 15, 2013, 8:33 AM), https://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting.

businesses has conceded that the guidelines were the "least destructive approach" to countering piracy and were probably not "that bad" an idea.[341]

In India, the film industry could consider working towards framing a set of guidelines modeled on the above. In addition, some other soft law strategies could be considered. For example, the Advertising Standards Council of India (ASCI), a self-regulatory body, could be requested to advise corporations to refrain from advertising on websites designed to host pirated content.[342] Arguably, most reputable corporations are not likely to object to such a request. Indeed, they might actually view the inadvertent association of their brands with pirate websites as a form of brand dilution, especially since many of these websites host advertisements for pornographic websites.

The Indian film industry could also frame better strategies to ensure stronger enforcement of its rights abroad. It has been observed that the Indian film industry has "no coordinated representation of the kind U.S. studios have" overseas, and that there exists a "lack of global Bollywood anti-piracy networks."[343] The Indian film industry could thus work towards creating a global association with representation in important overseas markets. Such an association could represent not only Bollywood, but the regional and parallel film industries. The inclusion of these industries could not only give the association more credibility, but also more political leverage. As regional political parties in India play an influential role in national politics, such parties may be more sympathetic to associations that fight for the cause of regional film industries, rather than only Bollywood. The association could enter into partnerships with law enforcement agencies abroad, aided by Indian diplomatic missions. Membership of the association could entail an annual fee, heavily discounted for small production houses. The amount collected as membership fees could be used to strategically institute

341 *See* Mike Masnick, *Google, Microsoft and Other Ad Networks Agree to 'Best Practices' to Stop Ads From Appearing on 'Pirate' Sites*, TECHDIRT (July 15, 2013, 10:43 AM), https://www.techdirt.com/articles/20130715/01561923800/google-microsoft-other-ad-networks-agree-to-best-practices-to-stop-ads-appearing-pirate-sites.shtml.

342 ASCI's existing self-regulation code regulates the content of advertisements, and is silent regarding the medium in which advertisements can be issued. Thus, for the suggested advisory to be issued, ASCI will either have to amend its code or liberally interpret it and issue an advisory based on such an interpretation. The latter option could revolve around a general principle of the code that required advertisers to "safeguard against the indiscriminate use of advertising for the promotion of products which are . . . of a type which is unacceptable to society at large." *See*, *The Code for Self-Regulation in Advertising*, ADVERT. STANDARDS COUNCIL OF INDIA 1, (2013), http://www.ascionline.org/images/pdf/asci_code2new.pdf. If "products" are considered to include services, it could be argued that this provision is wide enough to enable the ASCI to issue an advisory asking advertisers not to advertise on websites that promote piracy, gambling or pornography, even if the advertisement itself is acceptable.

343 *See* Liang & Sundaram, *India*, *supra* note 14, at 387.

civil and criminal actions against pirates who pose a threat to multiple members of the association. Since damages and costs awarded by courts in developed countries are much higher than in India, civil litigation could target pirates from whom large damages awards could be retrieved to offset legal expenses. The association could also lobby with the Indian government to press for stronger copyright enforcement in other countries during bilateral trade discussions, as seems to be happening with the U.S.

To attract a broader membership base, the mandate of the association could be expanded to include assistance with general legal and commercial issues. For example, the association could assist members with issues such as commercializing their IP in India and abroad, overseas shoot locations, financing options, and domestic and international tax and labor law issues. Since many large Hollywood companies are now investing in Indian films,[344] such companies would presumably find it in their interest to be members of this association. These companies could in turn strengthen the association through their resources and expertise. To help the financially weaker members of the association, the association could tap the large Indian diaspora and form a network of lawyers willing to advise smaller production houses pro bono.

On the domestic enforcement front, there is arguably little change that can be expected in the short term given the constraints faced by Indian courts and the police. However, a few simple but significant reforms could be achievable. For instance, the problem of police officials insisting on copyright registration certificates could be solved through corrective notifications issued by the Union government and state governments. Such notifications could declare that a notarized affidavit, in place of a copyright registration certificate, would be sufficient evidence of copyright ownership for the purposes of carrying out a police raid. In place of a notarized affidavit, a certificate from Indian government censors—a prerequisite for screening a film in public in India—could also suffice.[345] Given that lawyers have complained of inconsistency in enforcement between different states,

[344] *See* Meenakshi Verma Ambwani & Sobia Khan, *Hollywood Studios Fox Star, Viacom18, Walt Disney Keen to Produce Films in Regional Languages in India*, ECONOMIC TIMES (Aug. 31, 2011, 7:35 AM), http://articles.economictimes.indiatimes.com/2011-08-31/news/29949374_1_regional-language-bhojpuri-ravi-kishan; Saikat Chatterjee, *Hollywood Goes Bollywood as U.S. Studios Target India Filmgoers*, SEATTLE TIMES, http://www.seattletimes.com/business/hollywood-goes-bollywood-as-us-studios-target-india-filmgoers (last updated June 6, 2010, 12:01 AM).

[345] This suggestion was made by the Committee. Piracy Committee Report, *supra* note 170 at 7, 23–24, ¶¶ 1.12, 4.2.9). In India, it is mandatory for films intended for public release to be submitted to Indian government censors. Criminal penalties are prescribed for those who do not comply with this requirement. *See* The Cinematograph Act, No. 37 of 1952, INDIA CODE (1952), §§ 4, 7.

the Indian government could publish a manual for police officials (also accessible to the public online) specifying the practices that ought to be followed in criminal copyright matters.[346] As mentioned earlier, instances of misrepresentation regarding copyright ownership have partly prompted the police's insistence on copyright registration certificates. This problem could be solved if the manual advises the police to strictly enforce a provision in Indian copyright legislation that makes it a criminal offence to willfully make such misrepresentations.[347] Another achievable criminal law reform could be the establishment of bodies similar to the Police Intellectual Property Crime Unit (PIPCU) of the London Police. The PIPCU performs a range of anti-piracy functions, notable among which are efforts to disrupt revenue streams of pirate websites.[348] Recently, following reports of the widespread piracy of Telugu films, the state of Telangana established the Telangana Intellectual Property Crime Unit (TIPCU), modeled on the PIPCU.[349] If the TIPCU experiment succeeds, other states may wish to follow suit—although some states may ask why they should allocate precious resources for such a purpose.

With respect to civil remedies, a law recently passed by the Indian Parliament fast-tracks commercial cases (including IP cases) pending in High Courts by creating specialized commercial divisions.[350] In addition, the Committee and the National IPR Policy have both proposed the establishment of specialized IP courts.[351] Such measures certainly ought to be of assistance to rights owners. For example, if the government creates specialized IP courts at the district level, these might replace the Delhi High Court as a more convenient forum in which to seek website-blocking orders and reduce costs for rights owners, especially smaller production houses. However, it is questionable whether the Indian government actually has the resources

346 A similar suggestion was given to me by Datta. *See* Interview with Ameet Datta, *supra* note 286.

347 Section 68 of the Copyright Act criminalizes the making of "a false statement or representation knowing the same to be false," if it is done "with a view to deceiving any authority or officer in the execution provisions" of the Copyright Act, or "with a view to procuring or influencing the doing or omission of anything in relation to" the Copyright Act. The provision states that such an act "shall be punishable with imprisonment which may extend to one year, or with fine, or with both." The Copyright Act, 1957, § 68 (India).

348 *See* Mike Weatherley, *Follow the Money*, *supra* note 238, at 7–9.

349 *TIPCU to Tackle Online Piracy*, THE HINDU, June 25, 2016, http://www.thehindu.com/news/national/andhra-pradesh/tipcu-to-tackle-online-piracy/article8771496.ece.

350 The Commercial Division of High Courts Act, 2016, No. 4, Acts of Parliament, *available at* http://www.indiacode.nic.in/acts-in-pdf/2016/201604.pdf.

350 Piracy Committee Report, *supra* note 167, at 25, ¶ 4.2.16; *Final IPR Policy*,

351 *See* Piracy Committee Report, *supra* note 170, at 25, ¶ 4.2.16; *Final IPR Policy*, *supra* note 103, at 4, 16, 17, ¶ 6.10.1. In the draft version of the Policy, the National IPR Think Tank had suggested the institution of IP courts at the "district level" (*Draft IPR Policy*, *supra* note 103, at 24, ¶ ¶ 6.3.2), but in the final version the phrase "appropriate level" was used.

to establish specialized IP courts across India. On the other hand, focusing on commercial divisions in High Courts is more feasible. Since most IP litigation happens at the first instance at the Delhi, Bombay, Madras, and Calcutta High Courts due to forum shopping anyway, the government could allow pleadings to be filed online and hearings to occur via video conferencing before the commercial benches in these four High Courts (at least at the *ex parte* stage).

If specialized IP courts are indeed created across India, it is important that judges appointed to these courts possess the knowledge and awareness of the latest developments in the IP world. For instance, one area where Indian IP jurisprudence lags behind is in the award of damages. Thus, judges appointed to these courts could be made aware of how courts elsewhere calculate damages awards, not just in developed countries but also in developing countries. In this regard, the National IPR Policy has already suggested the introduction of IP courses and workshops in judicial training academies.[352] To start, a simple measure could be the publication of a handbook for judges. The handbook could elaborate on the legal and technological issues involved, and provide information on developments in other jurisdictions.

With respect to major substantive law reforms, the Committee had recommended three significant reforms: a) laws placing the onus on theatres to prevent camcording; b) preventive detention laws against pirates; and c) graduated response systems to keep habitual uploaders and downloaders in check.[353] It is quite possible that these recommendations will be contemplated by Indian lawmakers in the near future. Here, an NLR approach can contribute in several ways. From a top-down perspective, such an approach can first explore the legal feasibility of such laws weighed against constitutional law principles. It can also explore their practical feasibility amidst the sometimes competing interests of the Indian state, film industry, ISPs, and theatre owners, and perhaps suggest a compromise. A bottom-up perspective could explore the social impact of such laws—whether, for example, they might impede access to entertainment, breed popular resentment, or be vulnerable to misuse. I will now employ some of these approaches and briefly discuss the three recommendations.

A. *Camcording Laws*

With respect to the first recommendation, Indian copyright law prohibits "authori[zing] the doing of" certain acts without a license from a copyright owner, including "to make a copy of" a film through "the

352 *Final IPR Policy*, *supra* note 103, at 2, 16, 17.
353 Piracy Committee Report, *supra* note 170, at 5–8.

storing of it in any medium by electronic means."[354] The "authorization" of copyright infringement has been held (in a foreign case) to mean to "sanction, approve, countenance" all of which have "the element of approval or favour with what is said to be authorised, whether it be explicit or to be implied."[355] Thus, Indian copyright law arguably does not place any positive duty on theatre staff to prevent camcording. The law only appears to make illegal camcording actively facilitated by theatre staff, which usually represents a minority of instances. The Committee, presumably to overcome this, recommended that "the responsibility should be cast on the theatre/multiplex operators to ensure that viewers do not carry a camcording device inside the theatre," and that "this may be made a condition of license granted to theatres and multiplexes by the district authorities." [356]

It is possible that such a legal obligation will be met with resistance from theatre owners. Theatre owners could argue that it breaches their constitutional safeguard of freedom of business.[357] Perhaps in anticipation of such opposition, the Committee reasoned that since security checks and frisking commonly occur at Indian theatres due to security reasons, checking for camcording devices at this point would "not amount to placing any additional burden on the theatre owners."[358] This would appear to be a sound counter-argument, and arguably pass the permissible "reasonable restriction" qualification on the freedom of business.[359] But there might still be two practical objections raised. First, although security checks and manual frisks are the norm at many Indian theatres, many smaller theatres do not have such mechanisms in place. Requiring such theatres to install security equipment or hire security personnel merely to detect camcorders, could hurt them financially. Second, with the quality of mobile phone cameras improving rapidly, mobile phone recording is a growing phenomenon. If a person can record via mobile phones—which obviously cannot be denied entry by theatres—it defeats the purpose of checking audience members for camcording devices. Thus, a more sensible, cost-effective way for theatre to prevent camcording might be to conduct checks inside the theatre during a film screening. A person could walk down the aisles and conduct three to four periodic checks during every screening. Such a responsibility could be given to ushers, who are a

354 The Copyright Act, 1957, §§ 14(a)(i), (d)(i) (India).
355 *Roadshow Films Pty. Ltd. v iiNet Ltd. (No. 3)* [2010] FCA 24, ¶¶ 493, 500 (Austl.).
356 Piracy Committee Report, *supra* note 170, at 7, ¶ 1.10.
357 *See* INDIA CONST. art. 19, § 1, cl. g. ("All citizens shall have the right . . . to practise any profession, or to carry on any occupation, trade or business.").
358 Piracy Committee Report, *supra* note 170, at 32, ¶ 5.4.2.
359 INDIA CONST. art. 19, §6 (allowing the State to make "any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right" to freedom of business "in the interests of the general public.").

ubiquitous feature of every Indian theatre, and theatres would probably not be unduly burdened by such a requirement. Rights owners could also assist by dispatching their own inspectors to theatres. In the U.K., similar measures have recently been adopted, with theatre staff monitoring theatres using night-vision goggles.[360]

However, what theatre owners will perhaps be most concerned about is the effect of non-compliance of any obligation to prevent camcording—an issue that the Committee did not comment on. It is surely impossible for theatres to diligently prevent every instance of camcording. Penalizing theatres for isolated lapses would appear to be unfair, and arguably impair their freedom of business. Thus, theatres could instead be warned for failing to conduct regular checks and penalized only in cases of repeated, avoidable lapses. The penalty could take the shape of an incremental fine system. In any event, the main purpose of such a law must surely be to deter pirates, rather than to penalize theatres.

B. *Preventive Detention Laws*

With respect to the second recommendation, the Indian Constitution explicitly permits the Union government, as well as state governments, to enact preventive detention laws "for reasons connected with . . . the maintenance of public order."[361] Preventive detention is permitted for up to three months, and may be extended in certain circumstances.[362] In the context of film piracy, some Indian states have expanded preventive detention laws meant to curb crimes such as drug-trafficking and bootlegging—known as "Goonda Acts"—to target film pirates.[363] The Committee therefore recommended that other state governments enact similar laws.[364] Such a measure would obviously be very stringent, and is unheard of in most countries. However, the

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[360] *See* Victoria Ward, *Staff to Patrol Cinemas in Night-Vision Goggles in a Crackdown on Piracy as New James Bond Film is Released*, TELEGRAPH (Sep. 23, 2015, 8:28 AM), http://www.telegraph.co.uk/culture/film/jamesbond/11884294/Staff-to-patrol-cinemas-in-night-vision-goggles-in-a-crack-down-on-piracy-as-new-James-Bond-film-is-released.html.

[361] INDIA CONST. art. 246, § 3, cl. 3. Preventive detention "means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention." District Collector v. Shaik Hasmath (2001) A.I.R. 2001 S.C. 168, ¶ 5. The Constitution normally requires an arrested person to be produced before a judicial magistrate within twenty-four hours of arrest, and permits detention beyond this period only if authorized by the magistrate. *See* INDIA CONST. art. 21, § 2. However, the Constitution disallows this safeguard to "any person who is arrested or detained under any law providing for preventive detention." *Id.* at § 3.

[362] The period may be extended beyond three months if approved by an Advisory Board of judges or jurists, or if the Indian Parliament enacts a law prescribing a period beyond three months. *See* INDIA CONST. arts. 22 §§ 4, 7.

[363] *See generally* Reddy & Vinod, *Constitutionality of Preventing "Video Piracy," supra* note 140. The word Goonda is an Indian word that roughly equates to "thug" or "hoodlum."

[364] *See* Piracy Committee Report, *supra* note 170, at 5, 31, ¶¶ 1.9, 5.4.1.

Committee felt that it was "absolutely essential" that local police officials be "empowered to detain/arrest habitual offenders when there is information that they are about to commit which would result in production of pirated optical discs."[365] Presumably, the Committee envisaged the most inveterate pirates being detained for a month or so after a film's release, preventing them from camcording the film and replicating it in large quantities. The Committee probably recommended such a drastic measure to circumvent the difficulties of criminal prosecution, which can normally only be initiated after an act of piracy.

From a legal perspective, the Indian Supreme Court has expressed disapproval of the Constitution's sanctioning of preventive detention, but ceded to the supremacy of the Constitution and the legislature.[366] Thus, a sweeping objection to all Goonda Acts on the basis that preventive detention is outright unconstitutional would probably stand on weak footing. An alternative objection could posit that only the Goonda Act's anti-piracy provisions are unconstitutional, as piracy does not threaten public order.[367] However, the Madras High Court rejected such an argument. The judge delivering the decision—who would later become Chief Justice of India—held that piracy indeed "is prejudicial to the maintenance of public order" and ought to be dealt with an "iron hand," as "the prevalence of video piracy . . . results in audience[s] staying away from the theatres and loss of revenue to Government, producers, distributors and theatre owners."[368] Thus, the court seemingly interpreted a threat to public order to include economic harm or disruption of business.

In view of the above decision, the second recommendation of the Committee would not, for the moment, appear to face any serious legal obstacles (barring the possibility of a contrary order by the Supreme Court). However, there could be at least three practical objections to implementing the recommendation. First, despite their legality, preventive detention laws could be seen by some states as politically inexpedient. For example, in 2014, West Bengal enacted an anti-piracy

365 *Id.* at 5, ¶ 5.4.1.

366 *See* A.K. Gopalan v. Madras, (1950) 88 S.C.R. ¶ 206 (India) ("Detention in such form is unknown in America. It was resorted to in England only during war time but no country in the world that I am aware of has made this an integral part of their Constitution as has been done in India. This is undoubtedly unfortunate, but it is not our business to speculate on questions of policy or to attempt to explore the reasons which led the representatives of our people to make such a drastic provision in the Constitution itself, which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people.").

367 *See* Reddy & Vinod, *Constitutionality of Preventing "Video Piracy," supra* note 140, at 202–203; Gautam Bhatia, *Goondagiri of the Goonda Act*, OUTLOOK (Aug. 5, 2014), http://www.outlookindia.com/article/goondagiri-of-the-goonda-act/291593. The term "public order" has been interpreted as being "synonymous with public safety and tranquility." *See* Superintendent v. Ram Manohar Lohia, (1960) (2) 821 S.C.R. ¶¶ 24, 34 (India).

368 Siva v. Commissioner, (2005) Indlaw MAD 199 (Mad. H.C.) (June 24, 2005) (India) (Justice P. Sathasivam).

law that imposes stronger criminal penalties than those prescribed in Indian copyright legislation.[369] The law also declares piracy, and abetment to piracy, to be a "non-bailable" offence, in contrast to Indian copyright legislation.[370] However, the law does not permit preventive detention. Banerjee, who was then the state's Home Secretary and whose department had cleared the legislation, revealed to me that the legislation had been enacted after eminent artists and producers repeatedly complained to the West Bengal government about piracy.[371] Banerjee informed me that the West Bengal government is keen to improve the financial health of its local film industry, which has a rich arthouse tradition—unlike Bollywood. But Banerjee told me that the government did not go so far as to replicate the Goonda Acts of other states. Banerjee told me that the state had experienced violent political turmoil in the 1960s and 1970s, and the use of preventive detention laws against political agitators during that era still remains a sensitive subject.[372]

It is possible that other states might share the West Bengal government's antipathy towards preventive detention laws. For example, there are militant secessionist movements currently active in the state of Jammu and Kashmir, as well as certain states in northeast

369 The West Bengal legislation declares "Audio-Video Piracy" to be an offense "punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years . . . ." The West Bengal Prohibition of Audio-Video Piracy Act, No. 23 of 2013, INDIA CODE (2014), § 4(1). In cases of repeat offences, the legislation prescribes "imprisonment which shall not be less than five years but which may extend to ten years . . . ." *Id.* at § 5. In contrast, Indian copyright legislation prescribes for a first offense a prison term "which shall not be less than six months but which may extend to three years . . . ." For repeat offenses, the prison term prescribed "shall not be less than one year but . . . may extend to three years." *See* Copyright Act §§ 63, 63A.

370 *See* West Bengal Prohibition of Audio-Video Piracy Act *supra* note 369, at § 4(2). Indian criminal procedure laws classify offenses as bailable and non-bailable. Non-bailable offenses are generally regarded as more serious offences than bailable offenses. In the case of bailable offenses, the grant of bail is a matter of right and can be granted by the officer-in-charge of a police station. In the case of non-bailable offenses, the grant of bail is a matter left to the discretion of the court *See generally* JANAK RAJ JAI, BAIL: LAW AND PROCEDURES 19–42 (4th ed. 2009). There are conflicting judicial decisions from different Indian High Courts on whether copyright infringement is a bailable or non-bailable offense under the Copyright Act; *See also* Shivendra Singh & Aprajita, *Insight into the Nature of Offence of Copyright Infringement*, 13 J. INTELL. PROP. RTS. 583, 584–86 (2013); In one of the more recent cases on the subject, the Delhi High Court held copyright infringement to be a non-bailable offense. *See* State of Delhi v. Naresh Kumar Garg, (2013) 56 P.T.C. 282 (Del. H.C.), ¶ 13.

371 Interview with Basudeb Banerjee, *supra* note 123; *See also Law Against Piracy*, TELEGRAPH (Sep. 28, 2013), http://www.telegraphindia.com/1130928/jsp/calcutta/story_17399034.jsp (quoting Partha Chatterjee, then Minister for Commerce in the West Bengal government, saying, "[b]oth artists and investors had complained to the chief minister that piracy was eating up their income.").

372 *See* Nilanjan Dutta, *Democratic Rights in West Bengal—Issues and Approaches*, *in* EXPANDING GOVERNMENTAL LAWLESSNESS AND ORGANIZED STRUGGLES 236 (A.R. Desai ed., 1991) (discussing the historical use of preventive detention laws against political dissenters in West Bengal).

India. Human rights activists have criticized the use of preventive detention in these states.[373] These states, which are already grappling with serious security problems, might be hesitant to expand preventive detention laws to target film pirates. From the perspective of rights owners, a compromise could be the enactment of laws similar to the West Bengal legislation. Since the legislation declares piracy to be non-bailable, it could partly address the issue of pirates securing bail easily—which has been a major complaint of rights owners.[374] Yet, the West Bengal legislation, by virtue of being punitive rather than preventive, cannot circumvent the core problem of tardy criminal prosecution in the same way that the Goonda Acts perhaps can. [375]

The second practical objection to implementing the Committee's recommendation could be the possibility of Goonda Acts being misused to detain innocent individuals. At present, the wordings of all existing Goonda Acts (barring one) explicitly target habitual commercial pirates, as does the wording of West Bengal's anti-piracy law.[376] Yet, some

[373] *See, e.g.*, *A Lawless Law: Detentions under the Jammu & Kashmir Public Safety Act*, AMNESTY INTERNATIONAL (Dec. 20, 2011), https://www.amnesty.org/download/Documents/28000/asa200122011en.pdf; *India: Revoke Preventive Detention of Human Rights Defender in Manipur*, AMNESTY INTERNATIONAL (Oct. 14, 2009), https://www.amnesty.org/download/Documents/.../asa200192009en.pdf.

[374] *See I.I.P.A. Report*, *supra* note 285; Hammer, *Smooth Sailing*, *supra* note 14, at 168 (quoting Uday Singh, Managing Director, Motion Picture Dist. Ass'n. (India) Pvt. Ltd.).

[375] In this regard, Banerjee informed me that no one had been prosecuted under the West Bengal legislation, despite its being in force for over a year. *See* Interview with Basudeb Banerjee, *supra* note 123.

[376] Tamil Nadu's Goonda act defines a "video pirate" as "a person, who commits or attempts to commit or abets the commission of offences of infringement of copyright in relation to a cinematograph film or a record embodying any part of sound track associated with the film, punishable under the Copyright Act . . . ." *See* The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, No. 32 of 2004, INDIA CODE (1982) § (5)(2)(1)(j). This definition only appears overbroad to the extent that it does not specifically target habitual commercial pirates. Maharashtra's Goonda act defines a "video pirate" in a manner similar to Tamil Nadu's Goonda act, but with the rider that at least one criminal case under the Copyright Act must be pending against a person in order to be considered a video pirate. Thus, this definition appears to target habitual offenders. *See* The Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons and Video Pirates Act, No. 55 of 1981, INDIA CODE (1981), § 2(f-1). Kerala's Goonda act defines a "digital data and copyright pirate," in relevant part, as "any person who knowingly and deliberately violates, for *commercial purposes*, any copyright law in relation to any book, music, film, software, artistic or scientific work . . . ." The legislation further permits the detention of a "known goonda," roughly defined as someone with a prior criminal history of offences listed in the legislation. Thus, this definition also appears to cover habitual commercial pirates. *See* The Kerala Anti-Social Activities (Prevention) Act, No. 34 of 2007, §§ 2(h), (o) (emphasis added); the state of Karnataka's Goonda act appears to target habitual commercial pirates by defining a "Video or Audio pirate" as a person who infringes the copyright in a film or film soundtrack "habitually" for "commercial gain," and a "Digital Offender" as a person who, inter alia, "knowingly or deliberately violates, *for commercial purposes* any copyright law" in relation to protected works. *See* The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum-Grabbers and Video or Audio Pirates (Amendment) Act, Karnataka Legislative Assembly Act, No. 12 of 1985, § 2(k); West Bengal's anti-piracy law also appears to cover

human rights activists have protested against Goonda Acts on the basis that "sending a song to a friend or ripping a DVD" could make "middle class youth" vulnerable to preventive detention.[377] There is little evidence to suggest that Goonda acts have actually been misused in such a manner. On the contrary, a former High Court judge has opined that provisions requiring only habitual offenders to be targeted have "soften[ed]" the "otherwise draconian provisions" of Goonda acts.[378] Nevertheless, one way to address the concern of young individuals being arrested for infringing or non-infringing acts in their private lives—if at all this is a valid concern—could be for states with Goonda acts to issue notifications instructing police officials not to preventively detain individuals who do not commercially profit from piracy.

Unlike the dystopian specter of young Internet users being hounded Child-Catcher-style, a more legitimate human rights concern regarding Goonda acts could be the possible wrongful detention of pirates. Even the most prolific pirate could have no plans to pirate certain films, but could be detained on the basis of a misplaced suspicion of pirating those films merely on the basis of a past criminal record—a situation that would violate constitutional safeguards on liberty and not withstand judicial scrutiny.[379] Furthermore, although the Indian constitution gives persons detained under preventive detention laws the right to be informed of the grounds of detention "as soon as may be" and "the earliest opportunity of making a representation against the order,"[380] it is possible that the police might not implement this obligation perfectly. In this regard, there have been instances of

habitual commercial pirates, by defining "Audio-Video Piracy" to mean "duplicating the original work without authorization of the author in respect of cinematograph film and sound recording, with a view to trading, selling or hiring of those duplicate copies . . . ." *See* West Bengal Prohibition of Audio-Video Piracy Act, *supra* note 369, at § 2(c).

377 *See* Shyama Krishna Kumar, *Experts Slam Goonda Act Overreach*, NEW INDIAN EXPRESS (Dec. 16, 2014), http://www.newindianexpress.com/cities/bengaluru/Experts-Slam-Goonda-Act-Overreach/2014/12/16/article2572977.ece (quoting Prabir Purkayastha).

378 *See* Darshana Ramdev, *Goonda Act: When Prevention is Not Better Than Cure*, DECCAN CHRONICLE (Aug. 5, 2014, 9:36 AM), http://www.deccanchronicle.com/140805/nation-crime/article/goonda-act-when-prevention-not-better-cure (quoting Ravi Naik, a Senior Advocate and former judge of the Karnataka High Court).

379 The Indian Constitution states that "[n]o person shall be deprived of . . . life or personal liberty except according to procedure established by law." INDIA CONST. art. 21. In a case concerning the validity of preventive detention under Tamil Nadu's Goonda act, the Madras High Court referred to this provision as one that needed to be "zealously and vigilantly" protected by courts. The court held "[t]here must be a reasonable basis for the detention order and . . . material to support the same. The Court is entitled to scrutinize the material relied upon by the authority in coming to its conclusion and, accordingly, determine if there is an objective basis for the subjective satisfaction. The subjective satisfaction must be two-fold. The detaining authority must be satisfied that the person to be detained is likely to act in . . . any manner prejudicial to the maintenance of the public order and the authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting." *See* Thirupathy v. Commissioner of Police, (2014) 3 M.L.J. (Mad. H.C.) 690, ¶¶ 49, 52.

380 INDIA CONST. art. 22, § 5.

individuals detained under the Goonda act, with a prior criminal record of piracy, being released through habeas corpus petitions. The grounds for release have included the denial of information in connection with the detention,[381] disregarding of representations made by family members,[382] inaccuracies in the translation order of the detainee's copy of the detention order,[383] and discrepancies in the names of films alleged to be pirated in the detention order.[384] One way to rectify these lapses could be better training of police personnel, in areas such as preservation of evidence and proper compliance with constitutionally-mandated procedures after arrests. Another could be through the award of compensation by courts in egregious cases of wrongful detention.

The third practical objection to the Committee's recommendation could be that Goonda acts are not the most efficient way to deter pirates. There is anecdotal evidence that the Goonda acts have made it easier for the police to conduct anti-piracy operations,[385] and that this has resulted in a decline in the sale of pirated DVDs in certain states, such as Tamil Nadu.[386] However, the Goonda acts have still failed to paper over some deep-rooted law enforcement issues. According to a freedom of information application filed by a student of mine, seventy-two arrests for film and video piracy were made under Tamil Nadu's Goonda act between 2007 and September 2014.[387] According to news reports, some of these arrests were multiple arrests of the same person, and many detainees received bail within a few days of arrest and then resumed

381 *See* Habeas Corpus Petition, P. Rasul Beevi v. Secretary, (Mad. H.C.) (Apr. 27, 2015) (No. 511 of 2015), http://indiankanoon.org/doc/41842091.

382 *See* Habeas Corpus Petition, Saravanan v Secretary, (Mad. H.C.) (Aug. 21, 2007) (No. 444 of 2007), https://indiankanoon.org/doc/1609632/.

383 *See* Habeas Corpus Petition, Mumtaj v. Tamil Nadu, (Mad. H.C.) (June 9, 2014) (No. 2237 of 2013), http://indiankanoon.org/doc/94202405; Habeas Corpus Petition, N. Nawab v. State, 2014 Indlaw MAD. 1070 (Mad. H.C.) (Apr. 28, 2014) (No. 2379 of 2013), https://indiankanoon.org/doc/105709058/.

384 *See* Sikkander Eliyass v. Tamil Nadu, (2014) 2 M.L.J. (Mad. H.C.) 76.

385 *See* Vivek Narayanan, *7 Pirates of South Chennai Arrested, 30K DVDs Seized*, TIMES OF INDIA (Nov. 18, 2010, 12:36 AM), http://timesofindia.indiatimes.com/city/chennai/7-pirates-of-south-Chennai-arrested-30K-DVDs-seized/articleshow/6944185.cms; A. Selvaraj, *Registration of Video Piracy Cases Up by 110%*, TIMES OF INDIA (Feb. 16, 2015, 1:26 AM), http://timesofindia.indiatimes.com/city/chennai/Registration-of-video-piracy-cases-up-by-110/articleshow/46256784.cms; Selvaraj, *supra* note 237; *26 Lakh Compact Discs with Pirated Prints of Movies Seized*, HINDU (Jan. 15, 2013), http://www.thehindu.com/news/cities/chennai/26-lakh-pirated-dvds-seized-in-chennai/article4305047.ece; *Video Piracy Racket Busted in Chennai, 2 held*, TIMES OF INDIA (Jan. 10, 2015), http://timesofindia.indiatimes.com/city/chennai/Video-piracy-racket-busted-in-Chennai-2-held/articleshow/45829875.cms.

386 *See, e.g.*, Sangeetha Kandavel, *What is Hurting Chennai's Grey Market Burma Bazaar*, TIMES OF INDIA (Apr. 20, 2013, 10:12 AM), http://timesofindia.indiatimes.com/tech/tech-news/software-services/What-is-hurting-Chennais-grey-market-Burma-Bazaar/articleshow/19645144.cms; *See also I.I.P.A. Report*, *supra* note 285, at 42 (stating that Goonda Acts "have been helpful in addressing piracy.").

387 Letter from the Deputy Commissioner of Police, Central Crime Branch, Madras, to Navjyot Saluja (Dec. 31, 2014).

operations.[388] In this regard, Rajkumar informed me that released detainees had sometimes become "better pirates," learning how to cover their tracks.[389] Rajkumar also claimed that detainees were often the "least significant" members of piracy rings; the "big fish" frequently managed to evade arrest, and there existed sympathy in some quarters for detainees who were low-ranking, indigent members of piracy rings. Rajkumar thus felt that it would make sense for the industry to invite petty members of piracy rings to "join the mainstream" film business, and instead target the overlords of the piracy business. Here, it is significant to note that the Madras High Court has also emphasized the importance of reformatory measure for young Goonda act detainees, "to bring them to the mainstream of life" and prevent recidivism.[390]

Hence, although Goonda acts may have helped the film industry counter piracy to some degree, a more efficient and socially palatable strategy for the industry could be to target high-ranking members of pirate rings, rather than their minor underlings. This strategy could be executed, for example, by filing civil suits against wealthy pirate ringleaders and seeking large damages awards, perhaps preceded by asset-freezing Mareva injunctions.[391] The chances of such a strategy succeeding could increase if a large number of film companies join forces and institute civil suits as co-plaintiffs.

C. *Graduated Response Systems*

With respect to the third recommendation of the Committee, graduated response systems have been adopted in a number of developed countries.[392] Graduated response systems can be divided into

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388 *See* K. Praveen Kumar, *Goondas Act Fails to Curb Thriving Video Piracy in TN*, TIMES OF INDIA (Nov. 20, 2009), http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_TOI&Type=text/html&Locale=english-skin-custom&Path=TOICH/2009/11/20&ID=Ar00200; To cite an example, one of India's most prolific pirates, Khaja Mohideen, has been arrested on multiple occasions under Tamil Nadu's Goonda act, but resumed operations after being released. *See* Selvaraj, *supra* note 237; *2 Lakh Pirated DVDs, CDs Seized*, TIMES OF INDIA (Feb. 13, 2013), http://timesofindia.indiatimes.com/city/coimbatore/2-lakh-pirated-DVDs-CDs-seized/articleshow/18343079.cms.

389 Interview with Akella Rajkumar, *supra* note 177.

390 *See* Thirupathy v. Commissioner of Police, (2014) 3 M.L.J. (Mad. H.C.) 690, ¶¶ 57-62.

391 A Mareva injunction derives its name from an English case concerning a dispute over dues for chartering a ship. The court held, "[i]f it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets." Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., [1980] 1 All E.R. 213 [215] (Eng.). Such injunctions have been used in England against copyright infringers to freeze their assets. *See, e.g.*, CBS United Kingdom Ltd. v. Lambert [1983] Ch. 37 (Can.).

392 The countries with such a mechanism currently in place include the U.S., U.K., France, New Zealand, Ireland, South Korea and Taiwan. *See generally* Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J.L. & ARTS 147 (2014); *The Copyright Alert System Phase One and Beyond*, CENTRE FOR COPYRIGHT INFO. (May 8, 2014), http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And_Beyond.pdf.

the "publicly and privately arranged"; the former originating in statutes and the latter in agreements between ISPs and rights owners.[393] The common feature of these schemes is that they "generally require that the ISP take some action against users suspected of infringing copyright, ranging from issuing warnings, to collating allegations made against subscribers and reporting to copyright owners, to suspension and eventual termination of service."[394]

Arguments in favor of graduated response systems posit: a) that many internet users make a rational choice to violate copyright laws and need to be deterred from doing so[395]; b) that such schemes can act as "digital scarecrow[s]" and deter large numbers of internet users from infringing copyright[396] (an argument backed by some evidence[397]); and

393 *Id*. at 153.

394 *See* Nicolas Suzor & Brian Fitzgerald, *The Legitimacy of Graduated Response Schemes in Copyright Law*, 34 U. NEW. S. WALES L.J. 1 (2011). There is no specific Indian case law on the question of the extent to which infringing Internet users are liable for copyright infringement for downloading pirated content. If one were to reconcile U.S. and European law, the position would appear to be this: an Internet user does not infringe copyright by viewing unlicensed content on streaming websites where only a temporary cached copy is created in the user's hard disk, such as YouTube and DailyMotion. *See C-360/13*, Newspaper Licensing Agency v. Meltwater, [2011] EWCA (Civ) 890, [2014] E.C.J. 1438, ¶¶ [26], [27], [29], [30], [33]–[38], [46], [49]–[52] (Eng.). However, an Internet user does infringe copyright by downloading or uploading unlicensed content using peer-to-peer file-sharing software such as bit-torrent, since uploading amounts to communicating or making available the work and downloading results in the creation of a permanent copy. *See supra* note 237 and accompanying text. It has accordingly been argued that viewing unlicensed content on streaming websites such as Popcorn Time, which leads to Internet users uploading content, does result in user liability for copyright infringement *See* Christian Solmecke, *ECJ: Creating Cached Copies Does Not Infringe Copyright Law*, WILDE BEUGER SOLMECKE (June 11, 2014), https://www.wbs-law.de/eng/copyright-eng/ecj-creating-cached-copies-infringe-copyright-law-53556. Therefore, this section will proceed on the assumption that graduated response systems seek to target users using peer-to-peer file-sharing software and visiting streaming websites such as Popcorn Time, but not YouTube or DailyMotion.

395 An influential British government report described unlicensed file-sharing as "effectively a civil form of theft" that had caused losses to the entertainment industry. The report recommended that a "graduated response" be employed "to deter the hard core of users who willfully continue" to share files illegally. While a method of "persuasion and information" could be employed against "the lawfully inclined", it "should be combined with effective sanction against the small minority who believe that others should pay for their pleasure." *See* DEPARTMENT FOR CULTURE, MEDIA AND SPORT AND DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, DIGITAL BRITAIN: FINAL REPORT 17, 109–10 (2009); *see also* Charn Wing Wan, *Three Strikes Law: A Least Cost Solution to Rampant Online Piracy*, 5 J. INTELL. PROP. L. & PRAC. 232, 235–41 (2010) (referring to surveys conducted among internet users, and stating, "[gi]ven the chance of being caught and punished is very small because of high costs of litigation, the rational choice theory predicts that people will choose to be a free-rider and . . . ." infringe copyright online).

396 *See* Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1374, 1381–3 (2010) [hereinafter Yu, *Graduated Response*].

397 *See* Shira Perlmutter, Remarks at the Fordham University School of Law 17th Annual Conference on International Intellectual Property Law & Policy (Apr. 15-16, 2009), *in* 12 INT'L INTELL. PROP. L. & POL'Y 259–60 (Hugh Hansen ed., 2013) (citing studies showing that the majority of Internet users refrain from downloading pirated content after receiving warnings); Brett Danaher et al., *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, 62 J. INDUS. ECON. 541 (2014) (linking France's graduated response system with a growth in sales of legal digital music); *Three Strikes Rule Has*

c) that they represent a cheaper and fairer alternative to suing individual internet users.[398] At present, ISPs and other intermediaries in India are governed by a set of rules requiring them to inform users not to host or upload "any information" that "infringes any . . . copyright or other proprietary rights."[399] In case users breach this policy, the ISP or intermediary "has the right to immediately terminate the access or usage rights [sic] of the users . . . ."[400] Although uploading is a natural consequence of using file-sharing software, there is little evidence to suggest that in the absence of court orders, ISPs have voluntarily disconnected users who upload pirated content by using such software. A graduated response system would thus alter the existing status quo by placing stronger responsibilities on ISPs to warn or penalize users.

The issue of disconnection is perhaps the most contentious aspect of graduated response systems. In *Eircom*, the High Court of Ireland observed that while disconnection is a "serious sanction," it does not completely deprive persons of internet access, as they "have only to walk down to their local town center" and use a cybercafé.[401] However, France's highest court, the Constitutional Council, struck down as unconstitutional a provision in the first version of France's graduated response system, under which subscribers could be disconnected for up to one year and barred from entering into contracts with other ISPs during this period.[402] There is also a broad view among academicians that methods such as bandwidth reduction are preferable to disconnection, and that disconnection should only be used as a last resort.[403] Furthermore, a report by a United Nations Special Rapporteur

"Halved Piracy" in New Zealand, BBC NEWS (July 23, 2013), http://www.bbc.com/news/technology-18953353 (citing statistics showing a reduction in illegal downloads in New Zealand as a result of a graduated response system); *see also* Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers — Is the "Graduated Response" a Good Reply?*, W.I.P.O. J. 75, 85–6 (2009) [hereinafter Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers*] ("[W]e can expect that the warning system will deter some potential infringers. It is probably true that certain savvy users will find ways to remain online despite a ban; however, these users probably constitute a relatively small portion of internet users.")

398 Perlmutter, *supra* note 397, at 259 (stating that the "most important" aspect of graduated response system is that such schemes avoid litigation against infringers); Yu, *Graduated Response*, *supra* note 396, at 1382–3.

399 Information Technology (Intermediaries Guidelines) Rules, 2011, Gen. S. R. & O. 314(E) § 3(2)(d) (Apr. 11, 2011) (India).

400 *Id.* at § 3(5).

401 EMI Records & Ors. v. Eircom Ltd., [2010] I.E.H.C. 108, ¶ 9 (H. Ct.) (Ir.).

402 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580, June 10, 2009, J.O. 9675, ¶¶ 9–10, 19, 39 (Fr.), *translated in Décision n° 2009-580 of June 10th 2009*, CONSEIL CONSTITUTIONNEL (2009), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf.

403 *See, e.g.*, Yu, *Graduated Response*, *supra* note 396, at 1429 ("[I]nternet disconnection should only be used as a *last resort* . . . in the most egregious cases. [S]uch a draconian sanction can be easily replaced by other less draconian measures, such as bandwidth reduction, monitored access, or site, port, or protocol blocking."); *see also* Suzor & Fitzgerald, *supra* note 394, at 13 ("We

has opined that "measures to cut off access to the Internet entirely" to implement graduated response systems would be "disproportionate" and in violation of human rights.[404]

The suggestion for a graduated response system was made to the Committee by the Motion Picture Association (MPA)—the international counterpart of the MPAA.[405] In the U.S., the MPAA has suggested that "ISPs . . . work cooperatively with technology innovators and the creative community to implement the best available, commercially practicable graduated response policies."[406] The MPA was more specific in its representation to the Committee. The MPA recommended the adoption of a "three stage model," involving a notice to the concerned Internet subscriber at the first stage, followed by "some more vigorous action" at the second stage.[407] At the third stage, the MPA recommended that subscribers be disconnected, but only "for a few hours."[408] That the MPA did not go so far as to suggest permanent disconnection perhaps suggests recognition of the opposition that such a measure might face. The Committee eventually recommended a "three stage strike model" where "[a]t the first stage, the errant subscriber could be let off with a warning appearing on his screen; at the second stage, a more severe punishment could be given while the third time, the subscriber's services could be disrupted for a few hours or so."[409] Thus, the Committee effectively endorsed the MPA's suggestion but diluted it by advocating temporary disruption rather than temporary disconnection. Although the Committee did not suggest methods of temporary disruption, the most obvious method would probably be bandwidth reduction.

In the U.S., the MPAA represents the interests of Hollywood studios, and has traditionally advocated strong copyright laws.[410] It has been said that entertainment companies in the U.S. and Europe have initiated an "international lobbying campaign" to "globalize graduated

would suggest that lengthy periods of disconnection from the internet would impose very substantial penalties on entire households. It is not clear whether such a significant punishment is justified in response to the harm done by copyright infringement.").

404 *See* Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, 14, 21, ¶¶ 49, 78, U.N. Doc. A/HRC/17/27 (by Frank Larue).

405 Piracy Committee Report *supra* note 170, at 23, ¶ 4.2.9.

406 *Comments of the Motion Picture Association of America, Inc. in Response to the Workshop on the Role of Content in the Broadband Ecosystem* (Oct. 30. 2009), http://www.wired.com/images_blogs/threatlevel/2009/11/mpaafiltering.pdf.

407 *Id.*

408 *Id.*

409 *Id.* at 35–36, ¶ 5.8.1.

410 This has earned the MPAA criticism from scholars favoring a more fluid regime. Such scholars have cited various alarmist statements that were once made by Jack Valenti, former MPAA president. *See, e.g.*, LESSIG, *supra* note 69, at 76, 116–20, 253–4; WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS, xxi-xxii, 37, 52, 109–11, 136–57, 217 (2009).

response."[411] The MPA's submission to the Committee could, therefore, be viewed in this context. However, sometime after the Committee's recommendation, a leading Indian industry body independently called for the establishment of a "three-strike rule prevalent in certain parts of the world" in India.[412] The same body, in contrast, has supported India's patent laws and defended the decisions in *Novartis* and *Bayer*.[413] Thus, the Committee's concurrence with the MPA, along with the fact that Indian businesses have independently advocated a graduated response system, illustrates one of the main arguments that this paper has tried to make. Despite India's intense differences with developed nations on IP laws, film piracy is an area where, perhaps unwittingly, there appear to be significant common interests.[414] If Indian lawmakers seriously contemplate the establishment of a graduated response system, it will likely be because the Indian film industry—rather than Hollywood—has advocated it.

Like the other recommendations of the Committee, the establishment of a graduated response system is one that ought to be tested against possible legal and practical objections. In its submission to the Committee, the MPA was silent on whether it preferred the establishment of a publicly or privately arranged graduated response system. The Committee also did not comment on this while issuing its final recommendation. In India, the "fundamental rights" guaranteed by the constitution are enforceable against the "State."[415] Thus, a publicly arranged scheme, regulated through a statute or government order, could directly be challenged on constitutional grounds. However, it is difficult for a privately arranged scheme between ISPs and film companies to be similarly challenged, as most ISPs in India are privately owned. For this to happen, an ISP should either be under a significant degree of government control[416] or discharge "a public function" involving "duties towards the public" and the public interest.[417] It has been argued that the first test "dooms the ISP argument," as "[t]here is no way to argue that ISPs are under the

411 *See* Annemarie Bridy, *ACTA and the Spectre of Graduated Response*, 26 AM. U. INT'L L. REV. 559, 561 (2011).

412 FICCI, INDIAN MEDIA AND ENTERTAINMENT INDUSTRY REPORT 85 (2011).

413 *See* FICCI, RESPONSE TO HEARING TESTIMONY OF INDIA 10-20 (2013), http://www.ficci.com/sector/24/add_Docs/Response-to-Hearing-Testimony-on-India-ipr.pdf.

414 See also USTR 2016 REPORT, *supra* note 56 at 40 (identifying copyright piracy as "an area of substantial common interest between the United States and India, as both countries have vibrant content producers and distribution channels."

415 INDIA CONST. arts. 12, 13.

416 The Supreme Court has held that a body must be "financially, functionally and administratively dominated by or under the control of the Government" to "be considered to be a State." Such control must be "pervasive" and not "merely regulatory whether under statute or otherwise." *See* Biswas v. Indian Institute of Chemical Biology, (2002) 5 S.C.C. 111, ¶ 11 (India).

417 *See* Zee v. India, A.I.R., 2005 S.C. 2677, ¶ 221 (India).

pervasive financial, functional and administrative domination or control of the State."[418] However, the second test could allow the possibility or arguing that the supply of Internet services constitutes a public duty. If both publicly and privately arranged graduated response systems can be challenged on constitutional grounds, the most likely objections would perhaps revolve around three issues: a) access to information; b) privacy; and c) fairness and natural justice.

With reference to the first objection, a few countries—such as Finland, Estonia, and Greece—have expressly declared Internet access to be a constitutional right.[419] The French Constitutional Council has recognized that the right to freedom of speech "implies freedom to access" Internet services.[420] The Indian constitution grants all citizens the fundamental right to "freedom of speech and expression."[421] The Supreme Court has held that this right includes a "right to . . . information, knowledge and entertainment,"[422] and that the "content of the right . . . remains the same whatever the means of communication including internet communication."[423] Therefore, it could be argued that the right to access information and entertainment through the Internet is a fundamental right under Indian law. However, the Indian constitution permits "reasonable restrictions" to be imposed on this right "in the interests of . . . public order."[424] As discussed earlier, film piracy has been held to be a threat to public order.[425] Thus, it seems arguable that a graduated response system that temporarily disrupts an Internet connection by limiting bandwidth would count as a reasonable restriction on the (presumed) right of Internet access in India. Unlike temporary disconnection, temporary disruption would still enable Internet users to access information and entertainment. Hence, the Committee's recommendation would not be easy to challenge through an access-based argument. The fact that the more severe sanction of disconnection was upheld in *Eircom* could make such a challenge even more difficult.[426]

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418 Gautam Bhatia, *Net Neutrality, Free Speech and the Indian Constitution - I*, CENTER FOR INTERNET & SOC'Y (Apr. 14, 2014), http://cis-india.org/internet-governance/blog/net-neutrality-free-speech-and-the-indian-constitution-part-1.

419 *See* Suzor & Fitzgerald, *supra* note 394, at 9.

420 *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580, June 10, 2009, J.O. 9675, ¶ 12 (Fr.), *translated in Décision n° 2009-580 of June 10th, 2009*, CONSIEL CONSTITUTIONNEL (2009), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf.

421 INDIA CONST. art. 19 § 1(a).

422 *See* Secretary, Ministry of Information v. Cricket Association of Bengal, A.I.R. 1995 S.C. 1236, ¶ 67 (India).

423 *See* Singhal v. India, A.I.R. 2015 S.C. 1523, ¶ 86.

424 INDIA CONST. art. 19 § 2.

425 *Supra* note 368 and accompanying text.

426 *See* EMI Records & Ors. v. Eircom Ltd., [2010] I.E.H.C. 108, ¶ 30 (H. Ct.) (Ir.) (holding "[t]here is nothing disproportionate, and it is therefore not unwarranted, about cutting off internet

With reference to the second objection, privacy jurisprudence in India is somewhat underdeveloped. It has been argued that the scarce authority that exists suggests that India's privacy regime is "far more restrictive" compared with the West.[427] There is some uncertainty regarding whether the right to privacy is a constitutionally guaranteed right in India. Around fifty years ago, a six-judge bench of the Indian Supreme Court held that the Indian Constitution does not grant citizens a right to privacy.[428] In later cases, smaller benches of the court held the right to privacy to be implicit in the fundamental right to personal liberty under the Constitution, though still subject to reasonable restrictions.[429] The issue is currently pending before the Supreme Court, with the Attorney General taking the view that the six-judge bench decision is the correct view and that the smaller benches decided incorrectly.[430]

In one of the above cases—which might be of relevance in the context of graduated response—the court held telephone tapping to be "a serious invasion of an individual's privacy" that would violate fundamental rights.[431] However, the court still held that telephone tapping was permissible if "permitted under the procedure established by law" and in the event of a "public emergency" or in the "interest[s] of public safety."[432] The court accordingly authorized the Home Secretary of India and the Home Secretaries of states to tap telephone conversations, and laid down certain procedural safeguards.[433]

In the above case, the court had emphasized that phone-tapping often involved listening in on conversations of an "intimate and confidential character."[434] While snooping on a person's emails could easily be equated with phone tapping, a graduated response system would perhaps not be exactly the same. Nevertheless, if it is still

access because of three infringements of copyright.").

427 *See* Subhajit Basu, *Policy-Making, Technology and Privacy in India*, 6 INDIAN J.L. & TECH. 65, 81 (2010).

428 *See* Kharak Singh v. Uttar Pradesh, A.I.R. 1963 S.C. 1295, ¶¶ 21, 38 (a minority of judges observed that although the Constitution does "not expressly declare a right to privacy as a fundamental right," privacy is "an essential ingredient of personal liberty," which the Constitution guarantees all citizens as a fundamental right) (citing INDIA CONST. art. 21).

429 *See, e.g.*, Rajagopal v. Tamil Nadu, A.I.R. 1995 S.C. 264, ¶ 26 ("The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'."); People's Union for Civil Liberties v. India, A.I.R. 1997 S.C. 568, ¶ 23 ("We have . . . no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution . . . .The said right cannot be curtailed "except according to procedure established by law.").

430 *See* PTI, *Modi Govt Reiterates Claim that Citizens Don't Have Fundamental Right to Privacy*, WIRE (Aug. 5, 2015), http://thewire.in/2015/08/05/modi-govt-reiterates-claim-that-citizens-dont-have-fundamental-right-to-privacy-7895.

431 *See* People's Union for Civil Liberties v. India, A.I.R. 1997 S.C. 568, ¶¶ 1, 23.

432 *Id.* at ¶¶ 5, 23.

433 *Id.* at ¶¶ 47–55.

434 *Id*. at ¶ 165.

equated with phone tapping, graduated response systems would surely breach the right to privacy under the Indian Constitution (assuming such a right exists). Furthermore, it would be quite a stretch to equate piracy with a public emergency or a threat to public safety, justifying Home Secretary-level authorization. However, there is a fundamental flaw in using such an analogy. In *Eircom*, the court held that the technology being used to track uploads and downloads would only show "that a particular IP address has been involved."[435] The IP address would reveal the ISP whose connection was used to upload or download and the "the domicile of the computer," but not give "any clue as to the name of the main householder, or business, or café in which the computer is situated."[436] The court also pointed out that the purpose of determining the IP address was to tackle "the plague of copyright infringement."[437] In a later case, the same judge held that "[i]t is flying in the face of commonsense" to equate "illegal downloading of copyright material" with "interception, with tapping or with listening," and that "swarm participation for peer-to-peer downloading does not legitimately carry the expectation of privacy."[438] If a graduated response system in India employs technology where the identity of an infringer is similarly hidden, the phone-tapping analogy thus may not apply.

The Indian government is planning to remedy the lack of a comprehensive privacy law in India through a bill that seeks "to establish an effective regime to protect the privacy of all persons and their personal data from" public and private entities.[439] The bill states that "the right to privacy is recognized as a fundamental human right" and that "all persons shall have a right to privacy." [440] However, the bill's definition of "personal data" requires that "a *natural person* . . . can, whether directly or indirectly in conjunction with any other data, *be identified from it* . . . ."[441] If this version of the bill becomes law, it would still exclude the situation envisaged above. Hence, the foregoing shows that a privacy-based objection to the Committee's recommendation of a graduated response system could fail if the technology in use cannot, like in *Eircom*, reveal the identity of an Internet user.

The third likely objection to the Committee's recommendation of a graduated response system (fairness and natural justice) is arguably the strongest of the three. It has been argued that one of the "biggest

435 EMI Records & Ors. v. Eircom Ltd., [2010] 1.E.H.C. 108,,¶ 12 (H. Ct.) (Ir.).
436 *Id.* at ¶¶ 12, 20.
437 *Id.* at ¶12.
438 *See* EMI v. Data Protection Commissioner, [2012] I.E.H.C. 264, ¶¶ 7.2 (H. Ct.) (Ir.).
439 *Preamble, Privacy (Protection) Bill* (2013), http://cis-india.org/internet-governance/blog/privacy-protection-bill-2013.pdf.
440 *Id.* at §§ 3(c), 4.
441 *Id.* at § 2 (p) (emphasis added).

drawbacks" of graduated response systems is that they deny "end-users due process by subjecting them to unverified suspicion of infringing activities," and the technology used to identify infringing users is also not accurate.[442] In Ireland, for example, a technical glitch led to an ISP incorrectly sending almost 400 subscribers copyright infringement notifications.[443] It has also been pointed out that complying with due process "becomes prohibitively expensive due to the high numbers of" potential infringers, which provides "rational ISPs . . . a strong incentive to create a cheap system that preferences disconnection without significant investigation."[444] There also exists judicial support for the third objection. In France, the Constitutional Council held that by "reversing the burden of proof" and fixing "a presumption of guilt" on Internet users, the first version of France's graduated response system had contravened the French constitution.[445] Following the decision, the French government revised the law and allocated the power to disconnect users to a judicial authority.[446]

In India, the fundamental right to equality has been interpreted by the Supreme Court to include freedom from arbitrary state action.[447] It has also been held that the principle of *audi alteram partem* ("no one shall be condemned unheard") is an essential natural justice principle,[448] and that "human rights have but a verbal hollow if the protective armour of *audi alteram partem* is deleted . . . in the familiar name of pragmatism, public interest or national security . . . ."[449] It is thus arguable that even the lesser sanction of disruption could violate these rights, as it is debatable whether the technology to identify infringing IP addresses is perfect.

These problems could perhaps be overcome if, before disruption, a user is given the opportunity to be heard by a judicial or quasi-judicial authority, or even an industry-appointed ombudsman as envisaged by

442 Yu, *Graduated Response*, *supra* note 396, at 1394–6.

443 *See EMI*, [2012] I.E.H.C. 264, ¶¶ 1.1–1.3.

444 Suzor & Fitzgerald, *supra* note 394, at 26–7.

445 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580, June 10, 2009, J.O. 9675, ¶¶ 18, 39 (Fr.), *translated in Décision n° 2009-580 of June 10th, 2009*, CONSIEL CONSTITUTIONNEL (2009), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf.

446 *See* Giblin, *supra* note 392, at 154–9.

447 *See* INDIA CONST. art. 14 ("[T]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India . . . ."); E.P. Royappa v. Tamil Nadu, A.I.R. 1974 S.C. 555, ¶ 90 (Bhagwati, J., holding, "[w]here an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14"); Maneka Gandhi v. India, A.I.R. 1978 S.C. 597, ¶ 74 (Bhagwati, J., holding, "[a]rticle 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence . . . .").

448 *See Maneka Gandhi*, A.I.R. 1978 S.C. 597, ¶ 58.

449 *Id.* at ¶ 131 (Justice Iyer).

the Bombay High Court.[450] A user could submit a simple online form to make a representation. If necessary, safeguards can be put in place to protect the identity of the user from being leaked to rights owners. However, from the perspective of rights owners, these mechanisms will obviously add to the costs of a graduated response system, and make it less efficient. Furthermore, if the penalty after the third strike is going to be immediate disruption lasting a few hours, a pre-disruption hearing—which could take a few days to complete—will be pointless. A safe and inexpensive way to overcome this problem could be to dispense with the penalty of disruption altogether, and simply send users educational material on copyright law or warning letters. Such a model has been attempted in the U.K. However, the efficacy of such a model is yet to be determined. One critic has described the U.K. model as "toothless," and questioned its "assumption that people who engage in file-sharing don't know that what they are doing is illegal."[451]

A possible way out from the above obstacle could be this: if, over a period of time, research shows that the technology used to identify infringing IP addresses is near-perfect, a post-disruption redress mechanism could be considered an adequate safeguard against innocent users being disrupted. With near-perfect technology, the number of meritorious cases before the redress authority is likely to be very small. Since temporary disruption through bandwidth reduction does not disconnect a user, a post-disruption mechanism with the power to compensate users for wrongful disruption could be seen as unproblematic, especially if the quantum of compensation that can be awarded is high.

Judicial support for such a mechanism could lie in the fact that the Supreme Court has held that natural justice principles cannot "be elevated to the position of fundamental rights,"[452] and that they "do not supplant the law of the land but supplement it."[453] Furthermore, the "*audi alteram partem* rule is sufficiently flexible to permit modifications and variations" to suit "practical necessities."[454] Depending on circumstances, the rule may include a "very brief and minimal" hearing, and could also be accommodated through a "post-decisional remedial hearing."[455] Existing intermediary rules require intermediaries to appoint "grievance officers,"[456] but no minimum

450 *Supra* note 315.

451 *See* Olivia Solon, *ISPs Launch Toothless Four Strikes Anti-Piracy Initiative*, WIRED (July 21, 2014), http://www.wired.co.uk/news/archive/2014-07/21/four-strikes-copyright.

452 *See* India v. Sinha, A.I.R. 1971 S.C. 40, ¶ 8.

453 *See* Kraipak v. India, A.I.R. 1971 S.C. 150, ¶ 19.

454 *See Maneka Gandhi*, A.I.R. 1978 S.C. 597, ¶ 65 (Justice Bhagwati).

455 *Id.*

456 Information Technology (Intermediaries Guidelines) Rules, 2011, Gen. S. R. & O. 314(E) §11 (India).

qualification is listed for these officers.[457] If the rules are amended to require that such officers have legal expertise, or even prior judicial experience, courts are likely to be more favorably disposed towards such a mechanism.

Apart from the legal challenges mentioned above, a graduated response system is also likely to encounter major practical challenges. Eros' general counsel compared the relationship between online piracy and anti-piracy legislation as "akin to Tom and Jerry—one is always outrunning the other and [at] most times legislation is playing catch up."[458] It is thus entirely possible that technology that could evade graduated response systems could arise. Another practical challenge is likely to be opposition from stakeholders and pressure groups. The Indian government and ISPs both have an interest in increasing internet penetration. While the government still has an interest in helping the Indian film industry and could support a balanced graduated response system, ISPs could oppose even the slightest attempt to implement such a scheme. A greater challenge could lie in opposition from sections of the public, who are used to file-sharing and could view such a scheme as the ultimate killjoy. Strong public opposition could also influence the attitude of the government. To illustrate, a leading Indian ISP, Airtel, recently proposed a scheme that would allow users faster access to certain partner websites. This led to wave of online protests across India, with many claiming that this violated the principle of net neutrality. The protests gradually found support from politicians.[459] Similarly, Facebook's Free Basics scheme was recently met with fierce online protests in India, and the government eventually issued a set of regulations that effectively banned Free Basics.[460]

Prior to the Airtel and Free Basics incidents, the government had already established a DoT committee to look into the issue of net neutrality. The DoT committee submitted its report shortly after the Airtel incident. It "unhesitatingly" recommended that ISPs be made to observe the "core principles" of net neutrality, i.e. "no blocking, no throttling and no prioritization of any data or site."[461] However, it

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457 *See* Sooraj Abraham, *Guest Post: Grievance Officer in the IT Rules – An Invisible Man?*, SPICY IP (Nov. 12, 2012), http://spicyip.com/2012/11/guest-post-grievance-officer-in-it.html.

458 Interview with Aamod Gupte, *supra* note 212.

459 *See* Ketki Angre, *Net Neutrality: Support Pours in Across Party Lines*, NDTV (Apr. 14, 2015), http://www.ndtv.com/india-news/net-neutrality-support-pours-in-across-political-lines-754994.

460 *See* Aayush Soni, *India Deals Blow to Facebook in People-Powered 'Net Neutrality' Row*, GUARDIAN (Feb. 8, 2016), http://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row. *See also* Rahul Bhatia, *The Inside Story of Facebook's Biggest Setback*, THE GUARDIAN, May 12, 2016, https://www.theguardian.com/technology/2016/may/12/facebook-free-basics-india-zuckerberg.

461 *See Net Neutrality DoT Committee Report*, DEPT. OF TELECOMM. COMMITTEE ON NET NEUTRALITY ¶¶ 2.8, 4.2.1(c), ¶ 1, at 85 (2015), http://www.dot.gov.in/sites/default/files/u68/

balanced this by stating that the rights of users to send and receive content on the Internet only extended to "legal content" and "lawful" Internet use, and that "the arbiter of what constitutes legality . . . can only be determined by Government with scope for judicial adjudication in case of any dispute."[462] While the Department of Telecommunications committee did not comment on issues concerning copyright, it could easily be argued that a graduated response system would not contradict its recommendations, since pirated content is not legal. Nevertheless, the Airtel and Free Basics incidents illustrate that it could be difficult to implement a graduated response system in India if there is strong opposition from the public and activist groups, even if such a scheme withstands judicial scrutiny. As a lobbyist in the U.S. has remarked on online protests against anti-piracy laws:

> You didn't have thousands of people in the streets with big banners. It was people basically sending emails and websites going down or putting up particular points of view on their opening pages. What it is to be civil disobedient in the twenty-first century, I think is a really fascinating question, particularly because of this chasm between the folks who have now the tools of the Internet and the people, the audiences, we're trying to reach in Washington who oftentimes don't really get it.[463]

To conclude, there are fairly strong arguments (based on Indian law) that can be made to defend the legal sanctity of the three major recommendations by the Committee: a stronger anti-camcording law, preventive detention laws, and a graduated response system. Moreover, it must be remembered that the constitutionality of a privately arranged graduated response system might not even be subject to judicial review in the first place. If the Committee's recommendations eventually evolve into legislation, such laws could always be used by the film industry in addition to existing legal strategies like website-blocking civil suits. The use of some of the business strategies suggested in this paper, involving improving access to entertainment, could also assist the industry in its battle against piracy. Yet, practically speaking, all the Committee's recommendations, if carried forward, will face major social, commercial, and political challenges. Furthermore, it has been widely recognized that it is impossible to completely eliminate piracy; anti-piracy efforts should instead focus on significantly reducing the

Net_Neutrality_Committee_report.pdf.

462 *Id.* at ¶ 7.8, at 43, ¶ 5, at 85.

463 Symposium, *Spring Symposium: Critical Legal Studies & the Politicization of IntellectualProperty and Information Law*, 31 CARDOZO ARTS & ENT. L.J. 597, 661 (2013) (remarks by Rick Whitt). Whitt, currently Corporate Director for Strategic Initiatives at Google, describes himself as a "practicing policy advocate in D.C. . . . a fancy term for lobbyist . . . ." *Id.* at 651.

extent of piracy.[464] In such contexts, NLR research can provide rights owners and policymakers with valuable top-down and bottom-up insights and help in the framing of policies and strategies.

But this still leaves open some unresolved issues. Since the field of law "has close ties to the state and professes to serve primarily the public good," but also "has close ties to the market," NLR researchers "could potentially follow either path."[465] Furthermore, NLR researchers have to prepare themselves to face at least two strong criticisms. First, that NLR's focus on legal reform does "not bring the legal system itself into question, only its functional mechanisms."[466] Second, that NLR scholarship "represent[s] a withdrawal from theory."[467]

These fault lines are especially true for a field like IP law. For example, critics of this paper might point out that I have analyzed the reforms proposed by the Committee through a functionalist lens, rather than undertake a critical inquiry into the power structures that determine such copyright law reforms. In such a situation, what shape should NLR IP scholarship in developing countries like India take? Must NLR researchers necessarily align themselves with a "pro-market" or "anti-market" theoretical framework? Or, could Indian NLR researchers—to paraphrase Sen—reject "pure" theories in favor of or against markets, and instead borrow from an age-old Indian principle—the Buddha's "middle path"?[468]

CONCLUSION

The primary goal of this paper has been to advocate a shift in the discourse surrounding IPRs in India. In particular, I have attempted to make a case for a pragmatic, NLR-influenced approach to studying film piracy, and suggested a template for such research. The template could of course be suitably modified, and the methodology improved. For example, researchers could deepen the bottom-up aspects of the

464 *See* Daniel Castro, *Steal These Policies: Strategies for Reducing Digital Piracy*, INFO. TECH. & INNOVATION FOUND. (Dec. 2009), http://www.itif.org/files/2009-digital-piracy.pdf ("[C]ompletely eliminating" digital piracy is "impossible," but "it is possible and desirable to significantly reduce digital piracy."); Yu, *Graduated Response*, *supra* note 396, at 1382 ("[T]he goal of the graduated response system is not to eliminate once and for all massive online copyright infringement—a goal virtually impossible to achieve. Rather, the goal is to reduce leakage."); Strowel, *supra* note 397, at 86 ("Enforcement does not (and should not) aim at eliminating any infringement; a solution that would eliminate all piracy, if at all possible, would seem dangerous or at least dubious for both individual liberties and technological ."); Allowing a limited amount of piracy to occur could also be an example of tolerated use to save enforcement costs. *See* Wu, *Tolerated* Use, supra note 152.

465 *See* Suchman & Mertz, *supra* note 1, at 577.

466 *See* EVE DARIAN-SMITH, LAWS AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES 18–19 (2013).

467 *See* Hanoch Dagan et al., *Legal Theory for Legal Empiricists*, L. & SOC. INQUIRY (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626335 (forthcoming).

468 AMARTYA SEN, DEVELOPMENT AS FREEDOM 111-12 (1999).

template and conduct research on how people living in poverty, rather than middle class university students, consume entertainment.[469] Or, how the most marginalized members of the film industry, such as low-wage workers, feel about piracy, or the treatment of individuals arrested under Goonda Acts in police custody. Similarly, researchers could improve the top-down aspects of the template and conduct better research on losses faced by rights owners due to piracy, focusing on specific case studies, or perhaps better analyze the parleys between India and other countries on film piracy, or examine the technology behind graduated response laws more closely. At a broader level, it is hoped that the paper will make at least three contributions. First, that it will better inform Indian academicians, policymakers and industry. Second, that it will encourage scholars in India, and other developing countries, to steer away from moralistic assumptions while researching on film piracy and IPRs in general, instead recognizing developing countries and rational maximizers of wealth. Third, that it will enrich existing literature on NLR, which has generally been dominated by U.S. scholars, with a developing-country perspective. That it will provoke discussion on the shape that NLR ought to take in developing countries, and the challenges of resolving conflicts in top-down and bottom-up perspectives.

[469] The famous left-wing writer and activist, Arundhati Roy once described JGLS as "a Stanford campus in the midst of the most unbelievable squalor you can imagine." Arundhati Roy, *We Call This Progress*, GUERNICA (Dec. 17, 2012), https://www.guernicamag.com/features/we-call-this-progress. Thus, my use of students of JGLS (as well as NUJS) as a sample to understand the view of Indian youth could be open to criticism. While surveying university students could be seen as a "bottom up" approach to studying issues in a country like the U.S., the same may not necessarily be true in India, where a large section of the population is not even literate.