Chapter 1
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The importance of Copyright lies in its role as an instrument to ensure authors and creators of artistic works receive adequate incentives from the market. This instrument of Copyright seeks to provide an opportunity to the creators to transact their works in a market for such creations, by creating such a market. The need to create such a market comes about due to market failure that would be the result of undifferentiated products of knowledge industries. Absent the incentives to create differentiated products, there would only be similar types of books, music, films and other such works. The creation of this market is brought about by allowing the creators of copyright works legal monopolies over their works. The monopolies give them a set of rights; to prevent use of their works in any manner without their permission, as well as to permit use on their condition.

These legal monopolies need to be circumscribed by ‘limitations and exceptions’\(^1\) which would ensure that access to such knowledge products is not unduly restricted by those who hold such rights over them. However, since these rights are created by statute, the law also provides for such limitations and exceptions to balance two opposing intents\(^2\). These ‘limitations and exceptions’ are also bound by certain principles so as to ensure they do not cause market failure.

The legal use of copyright works, therefore, can be with the permission of the rightholders or without such permission as an exception permitted under the law\(^3\).

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\(^1\) Both these terms apply to the Law of Copyrights albeit with different intents. The concept of ‘limitation’ is used to determine the boundaries of the law. Thus, limitations lay down the exact domain of Copyright Law beyond which it does not apply. If the duration of copyright is fixed at ‘n’ number of years, that is the limitation of the law. ‘Exceptions’ are specific category of ‘limitations’ which state that certain uses of copyrighted works would not be considered infringements.

\(^2\) Landes and Posner (1989) say, “Copyright protection … trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.”

\(^3\) The 3-step Test prescribed under Article 9 (2) of the Berne Convention of 1886 stipulates certain conditions which any exception provided in the laws of the member states should meet.
There are known forms of uses which do not fall under these two legally acceptable categories. These forms of copying are proscribed under law because they seek to limit scope of the market creation intent behind the law and may potentially lead to market failure. One such proscribed form is generally known as ‘piracy.’

The current research analyses the Economics of Copyright in the Indian context. The focus of the research shall be in attempting to understand the main determinants of consumer attitudes towards piracy and examine the effectiveness of current policy tools in tackling the issue. An attempt would be made in Chapter 3 to describe what constitutes ‘piracy’ and also to state what piracy does not mean.

The discussion in this chapter shall attempt to introduce the background in which the research was conducted.

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**Article 9**


(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

[Underlined portions constitute the 3-Step test.]

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

This test has been reiterated in the TRIPS Agreement as well under Article 13, giving it international enforceability.

**Article 13**

**Limitations and Exceptions**

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

[The main distinction here is that such exceptions would extend to protection of the legitimate interests of the rightholder and not just the author as the Berne Convention stated.

Another distinction relates to the prohibition imposed on the member states under the TRIPS formulation as compared to the permission given under Berne, though it can be argued that the legal impact would remain the same.]
Intellectual Property Rights

Intellectual Property Rights have come to occupy considerable attention not only in international discourse on economic development, access to knowledge and international trade but also in the domestic discourse on monopolistic exploitation, economic development, and access to technology and consequential earnings through trade. As the name itself suggests, Intellectual Property Rights (IPRs) contain within themselves elements of both Economics and Law.

While the legal connotation pertains specifically to the rights guaranteed to the rightholders, the economic connotation emanates from the word ‘Property’ which has been the matter for economic research and study for centuries. However, IPRs have been legislated upon for centuries. Some of these provisions also found specific mention in the constitutions of nation states. At the time of the German Unification in 1845, in which it was stated "only in this way can we protect intellectual property, the labors of the mind, productions and interests are as much a man's own...as the wheat he cultivates, or the flocks he rears." (1 Woodb. & M. 53, 3 West.L.J. 151, 7 F.Cas. 197, No. 3662, 2 Robb.Pat.Cas. 303, Merw.Pat.Inv. 414)

For an exposition on the subject, see Maskus (2000).

The movement for Access to Knowledge or A2K banks on the Universal Declaration of Human Rights which in Article 27 links such access to human rights:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

May (2010) states

“Societies have developed and changed property laws in order to protect and promote individual interests under changing technological, social, and economic conditions. In Medieval Europe, feudalism was the dominant political economy, and the land was the most important type of object that people would possess, use, rent, buy or sell. Property laws recognised and protected economic interests in land and defined rights with respect to real property. During the Renaissance, the feudal system broke down and created a class of merchants who were able to trade their goods and services on the market. To protect economic interests in harvested crops, livestock, and other goods and services, laws were developed to recognise moveable property. During the scientific and industrial revolutions, the political economy came to depend more on the application of information and ideas, and the legal system gave more extensive recognition to IP.”

Two British laws, viz. Statute of Anne 1710 and the Statute of Monopolies 1623 are seen as the origins of copyright and patent law respectively.
the latter half of the 19th Century, the new constitution carried specific provisions to this effect.9

The nature of property involved in the context of Intellectual Property Rights has two features. The first feature is that the property is intangible. This means that while the property may be vested in the object or ideas or method or work, it is the specific characteristic of that entity which is the intellectual property.10 Thus, in the case of modern medicine the intellectual property would be in the formulation of the effective ingredient molecule and not in the pill itself. Similarly, in the case of a book, it is not the paper, the binding, the ink or the embossing that carries value of the intellect. It is the words arranged in a specific manner to convey a set of meanings that can be appreciated by the reader that constitute the intellectual property. This renders the intellectual property to being used simultaneously by multiple users11 and to that extent approximates the non-exclusive nature normally associated with public goods12.

9 The Constitution of the North German Confederation of 1867 sought to protect Patents and literary works:

<table>
<thead>
<tr>
<th>Article 4</th>
</tr>
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<tbody>
<tr>
<td>The following matters shall be under the supervision of the Empire and its Legislature:-</td>
</tr>
<tr>
<td>5. Patents for inventions.</td>
</tr>
<tr>
<td>6. The protection of literary property…</td>
</tr>
</tbody>
</table>

10 Bentley and Sherman (2001), pp. 1, state:

“While there are number of important differences between the various forms of intellectual property, one factor they share in common is that they establish property protection over intangible things such as ideas, inventions, signs, and information. While there is a close relationship between intangible property and the tangible objects in which they are embodied intellectual property rights are distinct from property rights in tangible goods.”

11 It is possible for many people to enjoy the same music listening to it at the same time from the same broadcast, albeit at different places, even while the same disc plays in the studio of the radio station.

12 Landes and Posner (1989) state

“A distinguishing characteristic of intellectual property is its "public good" aspect. While the cost of creating a work subject to copyright protection—for example, a book, movie, song, ballet, lithograph, map, business directory, or computer software program—is often high, the cost of reproducing the work, whether by the creator or by those to whom he has made it available, is often low. And once copies are available to others, it is often inexpensive for these users to make additional copies. If the copies made by the creator of the work are priced at or close to marginal cost, others may be discouraged from making copies, but the creator’s total revenues may not be sufficient to cover the cost of creating the work.”
Bainbridge (1999) suggests taxonomy of rights under this umbrella term as follows:

<table>
<thead>
<tr>
<th>Basic Nature of the Right</th>
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<tbody>
<tr>
<td>Creative</td>
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<tr>
<td>Artistic</td>
</tr>
<tr>
<td>Commercial reputation and Goodwill</td>
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<table>
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<tr>
<th>Formalities required</th>
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</thead>
<tbody>
<tr>
<td>Registered Designs</td>
</tr>
<tr>
<td>Patents Plant Varieties</td>
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<tr>
<td>Trade marks</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Formalities not required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright Rights in performances</td>
</tr>
<tr>
<td>Design Right</td>
</tr>
<tr>
<td>Passing off Trade Libel</td>
</tr>
</tbody>
</table>

The law of confidence

Fig 1.1

Copyrights

Copyrights are conventionally recognized as one form of IPRs. The subject matter of Copyright is the expectation of an idea and, therefore, it does not subsist in the idea itself. The Indian Law does not insist on the expression being tangible. In the legal context, this idea-expression dichotomy is a subject matter of a lot of informed opinion, research and litigation. However, this dichotomy does not seem to have attracted too much of attention from economic analysts, perhaps because of its nebulous nature.

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13 Bentley and Sherman (2001), op. cit. pp. 27 quote Goldstein P. while stating: “In British legal parlance, ‘copyright’ is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such books, songs, films, and computer programs.”

14 Gopalakrishnan and Agitha (2009), pp. 144

15 The best example of this dichotomy in real life was in the case of Baker vs. Selden of 1880 (101 US 99 (1880)), in which blank forms for accounts were denied protection by the US Supreme Court as being only ideas. This theme has been repeated ad infinitum in many jurisdictions including India where the most famous case was R.G. Anand v. Delux Films, (1978) 4 SCC 118: AIR 1978 SC 1613

16 Landes and Posner (1989) have, however, provided a detailed economic justification for protecting the expression and not the idea. This refrain does not find much repetition by other authors in later works.
Raskind (1998)\textsuperscript{17} defines the term as “Copyright, derived from the Latin copia, plenty of to make plenty, now defines a bundle of legal prerogatives granted by national legislatures that includes the right to make copies, to prepare derivative works, to distribute protected works, as well as the right to display or perform them.”

Copyrights are essentially economic rights. The history of Copyrights as a legal right to copy traces back to a decision taken by the Irish King Diarmid in the year 561CE when he stated ‘to every cow her calf and to every bishop his psalter’.\textsuperscript{18} However, vesting the right in the copy actually gained prominence on the invention of Guttenberg’s printing press. With this invention it was possible for one printer to make multiple copies with one single fixed cost investment but at low marginal cost of reproduction\textsuperscript{19}. This feature has remained the dominating economic rationale for protecting the economic returns on the investments made in copying technology. Till the year 1709 in most legal jurisdictions statutory protection was available only to the printers against illegal copying, though in Europe the author was recognized as the fountainhead of creative works, and was granted rights in her work. The French Copyright law came to be distinguished from British and American Copyright law by the French judicial recognition of an autonomous set of non-transferable prerogatives identified as ‘moral rights’, distinct from and independent of the ‘economic rights’ granted by the statutes of common law jurisdictions\textsuperscript{20}. He finds the same thread to have been followed in Germany as well. However, in most jurisdictions, it was still the printer who had the right to prevent copying of such works that he had bought from the others.

In England, in 1709-10 a new law was promulgated which for the first time recognising that the author possessed economic rights in the work also. Additionally, this law, now popularly known as the Statute of Anne, recognized that these rights of the author were limited in time. Further, the Statute of Anne also provided an opportunity to the author to trade in her rights. These two features of

\textsuperscript{18} Hadfield (1992)
\textsuperscript{19} Landes and Posner (1989), op.cit.
\textsuperscript{20} Raskind, op.cit.
modern law combined with the cost function faced by the copier form the basis for the entire discipline called Economics of Copyright.

Before protection is made available, two conditions were to be met by the claimant in the right to copy: the first was the meeting of a modest threshold of creative intellectual activity and as required in many statutes, fixation of the expression in a tangible form; and second that there was no need to establish novelty but originality was a presumption under the claim. This claim of originality *sans* novelty allows for independent creation which is not visible in other IP laws. Three limitations were also placed on the protection: one that only the class of works identified for protection were to be protected, i.e. there was a positive inclusion list; two that certain subjects were not covered for protection even while they were included in the list otherwise, such as slogans, mottos, etc. (literary works); and last that certain uses of protected works were possible without seeking the permission of the rightholder. In order to allow for revenues to be realised from such works, most statutes allowed for use of the works under agreements of licensing and assignment. Finally, these rights were made enforceable under law by a system of civil and criminal remedies.\(^\text{21}\)

The interesting feature about Copyrights is that it is not a single right but a bundle of rights\(^\text{22}\) in an entire hierarchy starting from the creator and ending in the form of enjoyment by the consumer. Thus, while a poem written by a poet would reach the public on being reproduced in multiple copies (right of reproduction) and being distributed through sale at shops (right of distribution), if converted into a song which is set to some music, would be intertwined with the musical work, which has separate right by itself. To complicate the matter further if this song is now sung by a singer, she has her own independent right in the performance of the song. For the song to be recorded in any medium, it has to be done legally through the right of fixation in that medium. The sound recording would now have its own downstream rights of reproduction and distribution. The song recording is likely to be enjoyed by the public either through direct purchase of the copies of the recording or through the

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21 Paraphrased from Raskind (1998), *ibid.*

22 Gopalakrishnan and Agitha (2009), *op. cit.* pp. 223-224
medium of broadcasts or public performances, both of which emanate from the right of communication to the public.

These rights are economic\cite{23} in nature in the sense that each possesses the ability to generate a stream of revenues that can accrue to the persons in the value chain of the work starting from the first point of creation. ‘Moral rights’\cite{24}, on the other hand, are normally distinguished from the economic rights on the grounds that they do not directly result in a flow of revenues. That these rights seek to protect the reputation of the author and allow her to claim authorship\cite{25} can also have ramifications on the economic returns from the work; if the author is able to claim authorship without threat of being dispossessed and is also able to ensure that the work remains correctly represented and free of distortions allows her to be able to realise the best economic remuneration for her expressive abilities.

Placed below is a simple abstract depiction of the scheme of rights that exist under copyrights.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
\textbf{Classes of Works} & \textbf{Rights} & \textbf{Literary} & \textbf{Computer programs} & \textbf{Dramatic} & \textbf{Musical} & \textbf{Artistic} & \textbf{Sound Recordings} & \textbf{Cinematographic films} & \textbf{Broadcasts} & \textbf{Performances} \\
\hline
Reproduction & & & & & & & & & & \\
Distribution & & & & & & & & & & \\
Adaptation & & & & & & & & & & \\
Translation & & & & & & & & & & \\
Communication to the Public & & & & & & & & & & \\
Performing & & & & & & & & & & \\
Cinema & & & & & & & & & & \\
Recording/fixation & & & & & & & & & & \\
Broadcasting & & & & & & & & & & \\
Sell or hire & & & & & & & & & & \\
Commercial Rental & & & & & & & & & & \\
\hline
\end{tabular}
\caption{Fig. 1.2}
\end{table}

\textsuperscript{23} Ibid.
\textsuperscript{24} These are called ‘Author’s Special Right’ under Section 57 of the Copyright Act, 1957.
\textsuperscript{25} These rights have been called right of integrity and paternity rights, respectively.
As the abstract shown in figure above clearly shows that there are many classes of work which are protected by Copyright. In India, this protection is granted by the Copyright Act, 1957. Under Section 13 of the Act, six different classes are recognized as protected by the law. These are literary, dramatic, musical and artistic works, sound recordings and cinematograph films. Further, under Section 37 and 38 of the Act, two other rights are recognized called broadcasting reproduction rights and performers’ rights. These rights have been recognized as related rights or neighbouring rights in legal literature since they emanate from the right to communicate a work to the public and since they do so without distributing physical or digital copies, they need to be provided a same kind of protection as the main subject matter of Copyright mentioned under Section 13 of the Act. It would be necessary to point out that the Indian law protects only such literary, dramatic, musical and artistic works which are original 26. However, it protects independently created identical works with a separate Copyright27.

After, coming into the existence of the Agreement on Trade Related Intellectual Property Rights in 1995 as Annex I-C of Marrakesh Agreement of 1994, that created the World Trade Organization, computer programs28 found separate protection as Copyright work under the chapeau of literary works. In a manner of speaking this provides an opportunity for computer programs to be protected under

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26 Section 13, Copyright Act, 1957

Works in which copyright subsists

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

(a) original literary, dramatic, musical and artistic works;
(b) cinematograph films; and
(c) [sound recording].

27 Singh(2010): “If it could be shown that two precisely similar works were in fact produced wholly, independently from one another, the author of work that was published first would have no right to restrain the publication of the other author’s independent and original work.”

28 TRIPS Agreement:

\begin{align}
\text{Article 10} \\
\text{Computer Programs and Compilations of Data} \\
1. \text{Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)...}
\end{align}
both Patents Act, 1970\textsuperscript{29} and the Copyright Act 1957. The legal aspects of this possibility are still evolving under current jurisprudence\textsuperscript{30}.

\textit{Economics of Copyright}

In modern economic theory Copyright as seen in the context of the economics of copying has attracted attention of a large number of scholars. However, the economics of copyright is much more than the economics of copying. While the focus of the current research is essentially on the latter aspect of the discipline, economics of copyright starts from the context of market failure in the case of information goods which can be produced at very low marginal cost despite there being a large fixed cost component. If the information goods in the market were indistinguishable on the basis of any intrinsic characteristic, there would be no difference in the price they would command from the market owing to differences. As such, there would be no incentive to introduce differentiated products in the market, leading to market failure. That such a market needs to be created to ensure a steady flow of information goods therein would be possible only if differentiation in the goods was protected and an incentive structure were to be developed to continue the production of differentiated goods. The discipline of Economics of Copyright seeks to understand the conditions of market failure and, therefore as a corollary, the conditions that would recreate the market.

\textsuperscript{29} Patents Act 1970:

\begin{quote}
\textbf{Inventions Not Patentable}

3. What are not inventions

The following are not inventions within the meaning of this Act, - …

(k) a mathematical or business method or a computer programme \textit{per se} or algorithms; …(Emphasis added)
\end{quote}

\textsuperscript{30} Works are enjoyed by the public either directly like reading a book or listening to music being played on a disc or watching a movie in a cinema hall; or through indirect communication of the work by either being able to watch the broadcast of the work or the performance of the same. With the advent of the Internet third method of communication to the public has developed which mixes both distribution of copies as well as indirect enjoyment. Every time a work is viewed on the computer via the internet, a temporary file is created on the computer. To this extent this temporary file containing the work is a copy. However, this temporary file is ephemeral. Its main purpose is to leave a reference address that opens a Copyright work the copy of which would be stored on the Internet server. This particular mechanism can have major legal and economically important ramifications which are not the subject matter of the current research.
In the succeeding chapter this literature would be surveyed extensively. Suffice it to say at present that despite intermittent works by Plant (1934), Arrow (1962), Breyer (1970) and Johnson (1985) the discipline actually gained theoretical strength with the work of Landes and Posner (1989)\(^{31}\). These analyses have enriched the discourse on the Law of Copyright as well. These issues would be deliberated at length in Chapter 3 where an attempt shall be made to develop the conceptual framework for current research.

The focus of current research would be on the context of the violation of rights, granted by law to incentivise creativity, by large scale infringement and how such infringement, also known as piracy, purportedly comprises the economic interests of the rightholders. In doing so, the attempt would be identify the agents and the mechanisms through which such violation of the rights takes place. The remit of the current research would be limited to understanding these issues in the context of piracy of physical copies of the legitimate medium of films and music.

**Enforcement of Copyright**

The rights given by statute are effective only if there are provisions to enforce them. The enforcement of rights under Copyright Law in most countries is possible under both Civil and Criminal procedures. In the Copyright Act, 1957, Chapters XII and XIII lay down the enforcement provisions under Civil Remedies and Offences headings respectively. The recourse available to the rightholder or the claimant under both the procedures makes for a tactical approach towards enforcement by the rightholder or claimant. The decision to pursue a matter in one or the other procedure depends crucially on upon the nature of the infringement and speed of redressal needed. Civil suits seeking injunctions\(^{32}\) against known as well as

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\(^{32}\) Copyright Law has evolved a series of injunctions over a period of time which include but are not limited to ‘Anton Piller Orders’, ‘Mareva Injunctions’, ‘John Doe Orders’, etc. Each class of orders is adopted according to specific situations. Once the jurisprudence in this area develops, courts in many jurisdictions grant them in situations more or less similar to each other. However, injunctive relief is always prone to misuse if courts do not lay down strict principles for application and even stricter penalties for misuse. By its nature, injunctive relief can be given on the strength of a single party’s representation and thus carries all the risks that ex parte judicial orders carry.
unknown infringers may be needed where there is an apprehension of loss of first mover advantage owing to infringement. At the same time, a criminal case might be necessary at times where a specific type of infringement is being repeated against works of many authors or against latest works of the same author on successive occasions.

These enforcement provisions are made available to foreign nationals as well under the provisions of various international treaties on Intellectual Property Rights. Cross-border protection of rights is the cornerstone of the principles of non-discrimination used in international instruments. In the case of Copyrights, the relevant principle is that of ‘National Treatment’.

These provisions that exist in all Copyright-specific international legal instruments flow from the provisions on national treatment laid down in the Berne Convention. The same principle of non-discrimination finds reiteration under the TRIPS Agreement albeit with a difference in that such a provision under TRIPS becomes legally enforceable.

There is an entire set of mechanisms and initiatives for protection of IPRs including Copyrights in an international setting through a multiplicity of agencies such as the World Intellectual Property Organisation (WIPO), the World Trade Organisation (WTO), the World Customs Organisation (WCO), the International Telecom Union (ITU), the International Police Organisation (Interpol), the World Health Organisation (WHO), the United Nations Educational Scientific Cultural

33 There are two principles of non-discrimination in international instruments in the field of IPRs:
 i. National Treatment (NT) – the need for member state to treat nationals from other members to the relevant instruments as it would treat its own nationals, subject to degrees of reciprocity; and
 ii. Most Favoured Nation (MFN) – the need to treat all member states no different from any other member who might be given any special privileges, subject to specific exceptions allowed under the relevant instrument.

Thus, the NT principle applies to the persons who might want to seek protection in the country of operation and the MFN principle applies at the level of the country. Under the TRIPS Agreement, both these principles become enforceable and have actually seen disputes being raised at the WTO, e.g. DS 362 between the US and China had a point of dispute related to Article 3.1 of TRIPS.

34 Article 5 of the Berne Convention 1886
35 Article 3 (1) of the TRIPS Agreement
Organisation (UNESCO), etc. These organisations have often worked in cooperation with each other.

**WIPO and the WTO**

The WIPO, an arm of the United Nations, was mandated to set the standards for protection of Intellectual Property Rights among its member states. This mandate flows from the Stockholm Convention\(^{36}\) and the Agreement between the UN and the WIPO\(^{37}\). Though the WIPO monitors and maintains most of the international instruments on Intellectual Property Rights, the enforceability of these instruments has not been easy because there are no powers available with the WIPO to force compliance. In this respect, the WIPO does not have ‘teeth’ the way the WTO has through its ability to enforce the agreements overseen by it.

The WTO is a multilateral organisation mandated to develop rule-based international trading system. One of the multilateral agreements that form part of the overarching Marrakech Agreement that set up the WTO in 1994, is the Agreement on Trade Related Aspects of Intellectual Property Rights or the TRIPS Agreement which is Annex 1 C of the main agreement. The TRIPS Agreement is an omnibus multilateral agreement dealing with trade in IPRs. It subsumes within itself many of the pre-existing standards on IP protection laid down in other international instruments. In addition, the TRIPS Agreement also has elaborate enforcement provisions which are also enforceable internationally under the Dispute Settlement Understanding\(^{38}\) of the WTO.

WIPO and WTO entered into an agreement on 22 December 1995, on cooperation and jurisdictional arrangements\(^{39}\). The TRIPS Agreement has effectively locked-in the enforceable standards of protection of IPRs at 1995 levels. However, the

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\(^{36}\) Convention Establishing the World Intellectual Property Organization Signed at Stockholm on 14 July 1967 and as amended on 28 September 1979


\(^{38}\) The Dispute Settlement Understanding is a legal text of the WTO and forms Annex 2 of the Marrakech Agreement, 1994.

WIPO has seen many new instruments brought into effect since then including two on the subject matter of Copyrights and Related Rights, viz. the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

**WIPO and Interpol working in tandem**

The INTERPOL is the world’s largest international police organization, with 188 member countries. Created in 1923, it aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries.

The WIPO has been engaged in evolving standards on enforcement both on its own platform as well as in association with other multilateral and plurilateral institutions. Scanning the reports of the various committees of the WIPO helps understand the evolution of the ideas related to enforcement against Copyright piracy. The Enforcement and Special Projects Division of the WIPO, which started functioning since 2002 is the focal point entrusted with the task of enforcement against piracy of Copyright products.40

Similarly, the Interpol has a separate programme for Intellectual Property which seeks “to identify, disrupt and dismantle transnational organized IP Crime groups.” In this context, it has been the considered view of the organisation that cross-border IP crimes have a direct link to other forms of organised crime.41

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40 This division convenes meetings of the Advisory Committee on Enforcement since 2003 to fulfil its mandate of co-ordination among intergovernmental and member states. Prior to this there were committees like Advisory Committee on Enforcement of Industrial Property Rights and Advisory Committee on Management and Enforcement of Copyright and Related Rights in global information networks. Before the establishment of the Enforcement and Special Projects Division the ideas regarding enforcement used to hover around – identification of problems and requirements for efficient enforcement and possibilities of better co-ordination. To have better co-ordination the Enforcement and Special Projects Division was created as a single focal point.

41 Extract from the speech of the Secretary General of the Interpol on the opening of the 6th Global Congress on Combating Counterfeiting and Piracy:

“It is worth reminding ourselves that transnational organized criminals manufacture and distribute counterfeit and pirated goods on a regional and increasingly global scale. **This generates significant illicit profits which lead to the proliferation of these crimes and are also invested in a wide range of other organized and often deadly transnational crimes.**” [Emphasis added]
The Advisory Committee on Enforcement, whose mandate excludes norm-setting and focuses on the implementation of agreed obligations, in its first meeting, in 2003, suggested inclusion of widest possible number of stakeholders and to have co-ordination with all concerned agencies governmental, intergovernmental and non-governmental. It sought help from the concerned stakeholders to know their experiences of the national enforcement regimes and further expressed desire to know the functioning of the various judicial and quasi-judicial institutions in different member states.

In May 2004, WIPO organised a conference of attorneys and judges working in the area of Copyright infringement. The conference agreed on that both industrial property and Copyright are rights under civil laws. This means that the law grants certain categories of persons/beneficiaries certain time-limited rights to authorise or prohibit various types of exploitation of the protected subject matter. Violations of the rights which are thus granted entail various sanctions. Those may be either civil sanctions, such as damages or seizure and destruction of infringing material or they may be criminal sanctions, generally fines or imprisonment. Intellectual property rights have a considerable economic value. The conference identified the consequences of counterfeiting and piracy as-denying royalties to right-owners, preventing the establishment of domestic markets, resulting in loss of taxes for the government and being attractive to organised crime.

The Advisory Committee on Enforcement in its second meeting, in June 2004, recognised the specialisation of the judiciary to be achieved by concentrating intellectual property litigation within existing judicial structures. The Committee agreed on the global importance of continued judicial training in the field of intellectual property and on the sensitization of the judiciary at the different judicial levels. The Committee emphasised the role of the judiciary in balancing private rights and the public interest in enforcement.

At around the same time, the WIPO organised the first Global Congress on Combating Counterfeiting which highlighted the need of awareness raising among the stakeholders, coordination and cooperation among different parties, establishing good practices for improving administrative and criminal enforcement measures,
implementing appropriate penalties and augmenting more enforcement resources, better trained and more knowledgeable about the issue, need to be devoted to combat counterfeiting.

The second Global Congress on Combating Counterfeiting and Piracy in 2005 stressed the need for firm and effective action in the four key focus areas as emphasised during the first conference for dealing with the counterfeiting and piracy issue. This Congress also recognised the role of private participation and the transnational nature of the problem of piracy and infringement.

The Advisory Committee on Enforcement (ACE) in its third session, in May 2006, the Committee reiterated that the Committee will focus on coordinating with certain organizations and the private sector to combat counterfeiting and piracy activities; public education; assistance; coordination to undertake national and regional training programs for all relevant stakeholders and the exchange of information on enforcement issues through the establishment of an Electronic Forum.

The third Global Congress on Combating Counterfeiting in January 2007 focused on specific zones or countries where counterfeiting and piracy are particularly acute and suggested assistance to such areas in the preparation of tailor-made technical assistance. This Congress also stressed on public-private partnership based on mutual commitment and a recognition that both sectors must work together to find solutions to the problems of counterfeiting and piracy.

The fourth session of the ACE in November 2007 agreed to discuss the ‘Contribution of, and Cost to, rightholders in enforcement’. This was based on the Recommendation No 45 of the WIPO Development Agenda. At its fourth session, the ACE took note of the considerable number of WIPO expert missions, training and study visits, seminars and workshops, as well as other enforcement related training and awareness activities. The WIPO Secretariat has been providing legal advice on legislative reform projects in all areas of intellectual property law, upon request by Member States. The service includes the advice on IP enforcement-related legislation, for instance with a view to effective civil procedures and remedies, criminal sanctions and border measures. It was decided that the Case studies of different countries would be updated in WIPO Publications.
The recommendations of the fourth Global Congress on Combating Counterfeiting and Piracy in February 2008 were almost the same as the recommendations of the third Congress and the fourth session of the ACE. The issues resemble each other and found to be reemphasised.

The fifth session of the ACE in November 2009 reiterated the importance of the role of WIPO and identification of different types of infractions and motivations for IPR infringements, taking into account social, economic and technological variables and different levels of development.

The fifth Global Congress on Combating Counterfeiting and Piracy in December 2009 focused on the need to promote industry stakeholders to collaborate more closely with one another and with the enforcement authorities around the world to find creative and practical ways to tackle the problem of piracy. The Congress reiterated the need to increase public awareness and engagement on the issue.

The sixth session of the ACE in December 2010 agreed to the WIPO Development Agenda which focuses on the co-ordination among Member states and international agencies along with awareness raising activities. The recommendations of the fifth session were reaffirmed and more efficient monitoring equipped with advanced technological measures was recommended.

The sixth Global Congress on Combating Counterfeiting and Piracy in February 2011 agreed to the point that there is a continuing need for further consumer education and training of law enforcement officials. The Congress explored innovative tools being developed by the Global Congress partners, including the INTERPOL International IP Crime Investigators College (IIPCIC), an interactive online IP crime training facility, and the WCO Interface Public Members (IPM), a tool for in-service training of frontline Customs officers to facilitate the identification of counterfeits. The Congress felt that creating and refining the means for efficient enforcement through stronger and better inter-agency coordination, and cooperation between public and private sector, remained crucial to further improve the efficiency of IP rights enforcement. Such cooperation was to be built on three key elements to have sustainable effects, namely trust, liability, transparency. There was a need for further engagement in improving communication between the public and the private
sector and IPM was seen as a response from the WCO to this need. Continuing awareness-raising for all stakeholders involved was felt to be the key. In addition to educating consumers, more emphasis was to be put on campaigns directed at supporting the efforts of law enforcement authorities.

In addition to these efforts, there are other anti-piracy efforts that have been acknowledged internationally albeit not always positively. The IMPACT\textsuperscript{42} which was located at the World Health Organisation (WHO) and was subsequently moved out due to mounting pressure from developing countries, sought to examine the impact of trade in counterfeit medicines on public health. Similarly the World Customs Organisation (WCO) has developed a set of provisional standards called SECURE\textsuperscript{43} which it has been trying to encourage its members to adopt.

Plurilateral Initiatives

Recently, a series of negotiations have taken place between groups of like-minded countries on trade related enforcement standards pertaining to IPRs. These negotiations have been stated to be conducted in utmost secrecy and have been stated to have looked at upwardly revise the international standards on enforcement of IPRs. Two of the major instruments have been the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership.

The Anti-Counterfeiting Trade Agreement (ACTA) is a plurilateral agreement between a group of countries comprising the United States, Japan, the European Union, Australia, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore, Canada and Switzerland. The agreement focuses on enforcement of Intellectual Property Rights in the jurisdictions of the parties of the agreement and was criticised for having been negotiated in a great deal of secrecy with only the negotiating countries and a select few stakeholders in those countries being aware of the exact contours of the agreement. It was only in April 2010 that for the first time an authentic draft was made public by the parties though there had been ‘leaks’ ever since the first draft had emerged. The final draft dated 3 December 2010 was finally

\textsuperscript{42} International Medical Products Anti-Counterfeiting Taskforce.

\textsuperscript{43} Provisional Standards Employed by Customs for Uniform Rights Enforcement
made available on 6 December 2010. It has strong enforcement standards proposed against infringing IPs by providing for strong border measures including wide powers of *ex officio* action by Customs authorities. Overall, major enhancement of criminal liability of infringement has been proposed in the Agreement.

The Trans-Pacific Partnership (TPP), also known as the Trans-Pacific Strategic Economic Partnership Agreement was an agreement initially between four countries only, viz. Singapore, New Zealand, Brunei and Chile which sought to create a free trade regime among themselves. Subsequently, five more countries, Australia, Malaysia, Peru, United States and Vietnam entered into negotiations to join the Agreement. While the Agreement is stated to be focused on enhancing trade between the current and aspiring members, what has been of interest to many stakeholders in the field of IP, are the supposedly higher standards of protection and enforcement proposed by the US\(^44\). Higher standards of IP protection for American IPRs in the TP was strongly advocated by the Committee on Judiciary of the US House of Representatives of the US Congress in its letter to the President of the US\(^45\).

**Bilateral pressures**

In addition to the multilateral aspect of enforcement, a lot of bilateral action is also seen in this context. There are stringent provisions on enforcement of all IPRs including Copyrights, in many of the Bilateral Trade Agreement between countries especially those between developed countries with developing countries\(^46\).

The United States has another mode of bilateral pressure to create effective enforcement mechanism through the Special 301 Report that the United States Trade Representative furnishes to the US Congress on conditions of safety of American IPRs in all countries of the world.


\(^45\) Available at [http://image.exct.net/lib/fee913797d6303/m/1/021411+Signed+TPP+Letter.pdf](http://image.exct.net/lib/fee913797d6303/m/1/021411+Signed+TPP+Letter.pdf) accessed on 14 March 2011.

\(^46\) For example, the EU has many trade agreements with developing countries such as with South Korea, Chile, the Andean Community, CARIFORUM, etc. in each of these agreements there are separate chapters on Intellectual Property protection.
Special 301 is a provision of the Omnibus Trade and Competitiveness Act of 1988 that authorizes the USTR to use trade sanctions or other limits on market access to retaliate against inadequate protection of intellectual property rights. Under Special 301, the USTR must prepare an annual list of Priority Foreign Countries that deny effective protection of U.S. intellectual property or deny equitable market access to U.S. persons who rely upon intellectual property protection.

Although not required by statute, the USTR also prepares a Priority Watch List and a Watch List to alert offending countries that their practices are being monitored by the USTR. The Priority Foreign Country list contains those countries that have the most onerous or egregious practices that deny protection or equitable market access, countries whose practices have the greatest adverse impact, either actual or potential, on the relevant U.S. products, and countries that are not engaging in good faith negotiations to provide effective protection of intellectual property rights.

After the USTR identifies a Priority Foreign Country, the USTR must within 30 days initiate an investigation of the country and its offending practices and must take action if no substantial progress has been taken by the Priority Foreign Country within the period of the investigation. The USTR has broad discretionary authority in deciding what actions to take, but the three main tools include the suspension of trade benefits, the imposition of duties or other import restrictions, and the entering into of binding agreements to stop the offending practices.

India figures on the priority watch list of this Report not only in 2011 but year after year since 1999. It is a measure of the possible threats to American IP that India finds such a consistent mention whereas some other countries in Asia which are known to have major capabilities in producing infringing material do not attract as much American interest, possibly because of less threat posed to American IP as well as not being markets that are large enough to inhibit American commerce in them. Malaysia and the United Arab Emirates have been cited as source of pirated Indian IP goods and entering into commerce in India. Yet, these two locations do not attract American attention in the 301 Report with as much opprobrium as India does. The entry on India in the report of 2011 makes a wide sweep of concerns that India elicits
from the American Government. The entry on India in the 2011 Report was as shown in the narrative given below:

India

India remains on the Priority Watch List. India continued to make incremental progress in 2010 to address its IPR legislative, administrative, and enforcement issues. Improvements in 2010 included the introduction of a Copyright Amendment Bill, which may assist in addressing some aspects of the widespread piracy of Copyrighted materials on the Internet. However, the bill may not fully implement the WIPO Internet Treaties. The United States encourages India to revise and enact these amendments, and to thereby bring India’s Copyright law into line with international standards. India has also developed a national IPR policy which should help focus the government’s efforts to address widespread piracy and counterfeiting, including counterfeit medicines, effectively. Some industries also report improved cooperation with enforcement officials of certain state governments. Nevertheless, India continues to have a weak legal framework, and ineffective overall IPR enforcement persists. The United States encourages India to take action on its draft optical disc law and generally to combat widespread optical disc piracy.

The United States also recommends that India improve its IPR regime by providing for stronger patent protection. Particular concerns have been raised regarding provisions of India’s Patent Law that prohibit patents on certain chemical forms absent a showing of increased efficacy, thereby possibly limiting the patentability of potentially beneficial innovations, such as temperature-stable forms of a drug or new means of drug delivery. India should also take additional steps to address its patent application backlog and to streamline its patent opposition proceedings. The United States encourages India to provide an effective system for protecting against unfair commercial use, as well as unauthorized disclosure, of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. Finally, the United States recommends that India take steps to improve the efficiency of judicial proceedings, and strengthen its criminal enforcement regime, by encouraging the imposition of deterrent-level sentences for IPR violations and by giving prosecution of IPR offenses greater priority. The United States looks forward to increased engagement with India to address these and other matters in the coming year.

Similar observations appear in the report against many of the trading partners of the United States. In fact, Malaysia is known to have implemented a separate Optical Disc Law possibly in response to the criticisms levelled against it for failing to prevent large-scale optical disc based piracy.

While the Special 301 Report does not have any enforceability lest it fall foul with WTO multilateralism, it creates a moral pressure on the trading partners of

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47 Malaysia was regularly mentioned as a Priority Watch List country and one of the points mentioned against it was the absence of an Optical Disc Law. It enacted a legislation called the ‘Optical Disc Act of 2000’ to address the problem. It also followed it up in 2003 with proposals to extend price controls on optical discs under an existing law called the ‘Price Control Act of 1946.’
the US that figure in that list. Also, to reiterate an earlier point, the purpose of this report is to bring to the notice of the US Congress as well as to the trading partners that the US Government is aware of the threats to its IP in those countries. Further, the mechanism seeks to keep abreast with the latest developments in the field of IP, e.g. digital piracy gets a separate and detailed mention.

What is evident from the foregoing issues on enforcement is that the developed countries have been advocating the implementation of a strong enforcement regime in all countries to protect their own IPRs, including Copyrights. It

48 Special 301 section on

“Piracy Over the Internet and Digital Piracy
The increased availability of broadband Internet connections around the world is generating many benefits, from increased economic activity and new online business models to greater access to and exchange of information. However, this phenomenon has also made the Internet an extremely efficient vehicle for disseminating Copyright-infringing products. Piracy over the Internet is a significant concern with respect to a number of trading partners, including Brazil, Canada, China, India, Italy, Russia, Spain, and Ukraine. Unauthorized retransmission of live sports telecasts over the Internet continues to be a growing problem for many trading partners... U.S. Copyright industries also report growing problems with piracy using mobile telephones, tablets, flash drives, and other mobile technologies. In some countries, these devices are being pre-loaded with illegal content before they are sold. In addition to piracy of music and films using these new technologies, piracy of ring tones, “apps”, games, and scanned books also occurs. Recent developments include the creation of “hybrid” websites that offer counterfeit goods in addition to pirated Copyrighted works, in an effort to create a “one-stop-shop” for users looking for cheap or free content or goods...

To encourage strong action against piracy over the Internet, the United States will seek to work with the following trading partners to strengthen legal regimes and enhance enforcement: Argentina, Belarus, Brazil, Brunei, Canada, Colombia, India, Italy, Malaysia, Mexico, Philippines, Romania, Russia, Spain, Thailand, Turkey, Ukraine, Venezuela, and Vietnam. In particular, the United States will encourage trading partners implement the WIPO Internet Treaties, including by providing protection against the circumvention of technological protection measures... In addition, the United States will encourage trading partners to enhance enforcement efforts including, for example, through the following: strengthening enforcement against major channels of piracy over the Internet, including notorious markets; creating specialized enforcement units or undertaking special initiatives against piracy over the Internet; and undertaking training to strengthen capacity to fight piracy over the Internet.

Although piracy over the Internet is rapidly supplanting physical piracy in many markets around the world, the production of, and trade in, pirated optical discs remain major problems in many regions... Other trading partners still need to adopt and implement legislation or improve existing measures to combat illegal optical disc production and distribution, including China, India, Paraguay, Thailand, and Vietnam...”
has been often alleged that towards this end they have been indulging in ‘forum shopping’\(^49\) to ensure an all-round enhanced protection international regime of IPRs\(^50\).

The discussion so far would logically require an understanding about what is the current status of the discourse on Copyright and its related economic manifestations. These issues would be taken up in the ensuing chapters.

*Scheme of Chapters*

The succeeding chapters shall seek to discuss the issue of Economics of Copyright Piracy in the Indian context:

Chapter 2. shall have a survey of representative literature on the subject;

Chapter 3. shall be an effort to lay down the conceptual framework within which the research was conducted;

Chapter 4. shall develop appropriate methodology for the stated objectives of research;

Chapter 5. will take up the outcome of statistical examination and attempt to provide a framework of explanations for the same;

Chapter 6. will recall the results in a manner amenable to understanding patterns; and

Chapter 7. shall lead with conclusions from the research and make certain recommendations. It shall also try and identify areas for future research.

\(^{49}\) The term ‘forum shopping’ is used extensively in the context of a firm’s endeavour to find a friendly certifier of its new IPR. See Lerner and Tirole (2004).

\(^{50}\) As pointed out earlier there are multiple agencies in the international arena working towards enforcement of IPRs. What is interesting is that none of the proposals in these forums for enhancing enforcement standards came from the developing countries. The other interesting feature which would require more detailed analysis relates to the sequencing of the proposals in different forums.