

Fallacies, Lies, and Video Pirates

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Pranesh Prakash

At a recent conference on counterfeiting and piracy, industry representatives variously pushed for stiffer laws for IP violation, more stringent enforcement of existing IP laws, and championed IP as the most important thing for businesses today. This blog post tries to show how their arguments are flawed.

The Confederation of Indian Industry (CII) organized its third annual conference on counterfeiting and piracy, with support from the United States Embassy and the Quality Brands Protection Committee of China (a body comprising more than 80 multinational companies). Last week we criticised the conference in an open letter. This week, we examine a few of the recurring themes that came up at the conference.

Something being substandard is not the same as something being counterfeit.

This was a mistake made by many whenever they invoked 'counterfeit' in the sense of something that is violative of one's patent and trademark rights. The Indian Drugs and Cosmetics Act itself distinguishes between 'misbranded', 'adulterated', and 'spurious' drugs, thus recognizing that something that is made without proper authorization from rights owners isn't necessarily of a bad quality. Indeed, this was substantiated by an audience member, a lawyer from Dr. Reddy's Lab. She spoke of a *mandi* in Agra where they seized medicines being sold under the Dr. Reddy's name, but produced by local manufacturers. Upon lab testing, it turned out, much to their surprise, that the medicines were of the highest quality and were not substandard. Similarly, many large companies including trusted FMCG companies like Hindustan Unilever and ITC are upbraided by authorities for violations of the Drugs and Cosmetics Act (for the cosmetics they produce) as well as the Prevention of Food Adulteration Act. Thus, even legitimate businesses can produce substandard products. Thus, a product can be unauthorized but not substandard, just as a product can be substandard but not counterfeit.

This distinction becomes very important when we talk about patents, and especially drug patents. A generic drug is by definition identical or within an acceptable bio-equivalent range to the brand name counterpart with respect to pharmacokinetic and pharmacodynamic properties. Thus, this entire category of high-quality drugs is often sought to be made illegal or counterfeit by large pharma companies. Some countries like Kenya have capitulated. But so far

the World Health Assembly has been forced by developing countries to keep the issue of substandard medicines separate from patent-bypassing medicines.

The industry, for all their talk about "out of the box" thinking on the issue, still only consider metrics such the number of piracy raids conducted as measures of success. A question was put forth by Manisha Shridhar of the Intellectual Property & Trade Unit of the World Health Organization upon learning of the quality of the drugs seized at the Agra *mandi*: Why not cut a licensing deal with those manufacturers, who obviously have excellent production facilities? That kind of thinking, which helped HMV in India in the 1980s, and copying innovative features from video pirates and pricing their products competitively has helped an Indian company, Moserbaer, do extremely well.

Counterfeiters and pirates are not always seeking to fool consumers.

Only lawyers hired by the industry would think that a consumer aspiring towards a Rolex watch would actually think that the one he purchased off the streets for one-hundredth the original's price was in fact original. Street-side DVD hawkers are not thought by the general public to be selling original wares. Still, despite knowing the difference between the original and the fake, consumers many times opt for the latter.

Having said that, counterfeiting, by using someone else's trademark and trying to pass off fake goods as real ones, is quite obviously wrong. It harms customers, and it harms the manufacturers. Thus, a distinction deserves to be made here between the counterfeiters who try to deceive consumers (for instance by copying authenticity marks, like holograms, etc.) and those who are just providing them with highly cheaper alternatives (pirated DVDs, etc.). In this light, it is also important here to distinguish between counterfeiting, traditionally taken to be trademark violation, and piracy, traditionally taken to be a violation of international law, but now generally meaning a large-scale violation of copyright law. While the former can lead to consumer confusion, the latter scarcely ever does. This is ignored by industry people who evoke the image of the consumer quite often, but only when it helps them, and not in any meaningful manner. They negate consumer choice when it comes to consciously purchasing pirated goods, and consumer freedoms when it comes to usage of copyrighted materials.

While commercial film piracy funds terrorists, so does pretty much every business activity.

A favourite of the MPAA (and by association, the MPA) is the RAND report on Film Piracy and its Connection to Organized Crime and Terrorism. This report, which was funded by the MPAA, predictably concludes that film piracy funds organized crime and terrorism. Even if we are to believe its findings

wholesale, it leaves us wondering whether all business activities from which terrorists derive funds should be banned.

In India, there is a substantiated link between organized crime and film and music production, and terrorists have been said to make money off the stock market. If the MPA's arguments are taken to their logical conclusions, then film production and equity trading should also be prosecuted. Furthermore, while the mafia and terrorists are the ostensible targets, the laws that are brought about to tackle it affect poor roadside vendors and non-commercial online file sharers. To tackle the funding of terrorists, roadside piracy shouldn't become the target just as film production *per se* shouldn't. The invocation of the RAND report is thus only meant for rhetorical effect, as it is hard to find logic in there.

"To copy without authorization is to steal", the death penalty, and drug peddling.

At the conference, Dominic Keating of the US Embassy pointed out that "to copy without authorization is to steal" and David Brener of US Customs and Border Protection kept emphasising, on at least two occasions, that "drug peddling merits an automatic death sentence in many countries". There are numerous arguments one can make to show the lack of thought in the former. One could point out that 'stealing' and 'theft' are things that happen to tangible property, and that not only is copyright not tangible, but it is barely property. Copying without authorization creates one more of what existed, without depriving the authorizer (usually a corporation) of its original. This goes against our notion of 'stealing'. If the argument is to be shifted to the terrain of control over one's property/copyright, Mark Lemley in an illuminative article shows how the economic theories behind externalities in property and copyright are vastly different, and that complete control over either has never been, nor should it ever be, an aim of the law. Simply put, someone free riding on your property leaves you worse off than earlier, while someone free riding on your copyright *usually* doesn't.

One could also point out that 'stealing' is endemic in activities involving human creativity. T.S. Eliot notes that "Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different". He does not even consider the possibility that artistic borrowing, whether by imitation or by 'stealing' does not happen. Even Y.S. Rajan, Principal Adviser to CII recognized this when during the conference he noted that "imitation and innovation have an interesting and intertwining philosophical history". If we are to take Mr. Keating's admonishment seriously, we would indeed have a very illustrious list of thieves on our hands, including the Walt Disney Corporation, William Shakespeare, Vladimir Nabokov, Public Enemy, and pretty much every creative person who has ever lived. Books can be written about this (and indeed, numerous books have been), so we shall not dwell on this issue.

Mr. Brener's repeatedly spoke of how drug peddling attracts death penalty in many countries (though in neither the US nor in India has anyone ever received capital punishment for drug peddling), but he also clarified that he is not advocating for the death penalty for copyright violations. That made one wonder why he was bringing up the death penalty at all. He also made the dubious, non-substantiated claim (noting it as "true fact") that pirating movies is more profitable than selling heroin. This claim appears in an article about a report produced by the Australian Federation Against Counterfeit Theft (AFACT), but the original report is nowhere to be found. The article about the AFACT report also claims that the pirates are using their illicit profits promote drug smuggling. The seeming contradiction of film pirates investing in something that is riskier and less profitable doesn't seem to have caught the eye of the writers. One version of the 'drugs are less profitable than pirated DVDs' claim (with marijuana taking heroin's place) was debunked on the Commons Law mailing list. Pirated DVDs are sold for a fraction of the cost of the original. It would be obvious to anyone that DVDs that are typically sold for Rs.30-50, where the cost of manufacture alone may be estimable to be around Rs. 10, cannot be more profitable than heroin peddling. That apart, most online file sharing (deemed to be "piracy") is non-commercial. Thus the question of profit does not really arise. Still, for the industry, absence of a profit is equal to a loss.

Thus, the rhetoric of crime, and that too heinous crime, is continually used, despite its being completely inapposite. Why does used to try to make IP enforcement a matter of state concern, rather than a matter of private, and civil, interest. This way, illegitimate statistics and factoids are used to make individual file-sharers who earn no money get lengthy prison sentences. This and other ways in which IP enforcement has expanded are carefully documented in this paper by Susan Sell.

Repeating false 'statistics' does not make them true.

Again, we were subjected to a number of dubious claims during the conference: If only counterfeiting and piracy were eliminated, India's fiscal deficit would disappear; the Indian entertainment industry loses 16000 crore (USD 4 billion) yearly to piracy; 820,000 direct jobs are lost due to film piracy; software piracy costs the industry USD 2.7 billion annually, etc. These reports' methodologies have been thoroughly discredited. Even The Economist, a very conservative and pro-industry newspaper, believes that the BSA-IDC annual reports on software piracy are utterly distorted. Similarly, in the U.S., the figure of 750,000 jobs (around 8% of the U.S. unemployed in 2008) being lost due to piracy were touted by everyone from the Department of Commerce, the Chamber of Commerce, U.S. Border and Customs Protection, and the MPAA, RIAA, and BSA. The amount of money lost each year in the U.S. due to IP infringement has been estimated to be between USD 200-250 billion (that's more than the *combined* 2005 gross domestic revenues of the movie, music, software, and video game industries). In a lengthy piece in Ars Technica, Julian Sanchez traces back the

history of both these figures, and shows how they are just large numbers used for lobbying, and are not based on actual studies. The industry-commissioned Ernst & Young report ("The Effects of Counterfeiting and Piracy on India's Entertainment Industry") was never made available to the public at large, thereby making it impossible to judge the methodological soundness of the survey and the veracity of the figures.

IP expansion and more stringent enforcement is counter-productive.

Chander Mohan Lall, copyright lawyer to various film studios (including Warner Bros.) in India, used a number of short film clips in presentation during the conference. Upon being questioned about it, he admitted that he did not have permissions of the copyright holders, but claimed that his use fell under "the education exception" in Indian copyright law. While I wish he were correct (because what he was doing was indeed educational use), as per the law he is wrong. Section 52(1)(i) of the Copyright Act only exempts educational usage of cinematograph film recordings when "audience is limited to such staff and students [of an educational institution], the parents and guardians of the students and persons directly connected with the activities of the institution". While there are other arguments he could seek to use to make his usage of the film clips non-infringing, being excepted by the educational fair dealings clauses isn't one of them. Thus, more stringent enforcement of IP rights actually engenders such unauthorized, but perfectly legitimate copying and communication to the public such as that done by Mr. Lall.

Another way in which IP enforcement is being sought to be increased is by way of the so-called Goonda Acts. These are generally statutes aimed at criminals and lumpen elements in society. The Maharashtra version, the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981, just became the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons and Video Pirates Act. The term "video pirate" is very widely defined, to include any copyright infringement-chargesheeter who is "engaged or is making preparations for engaging in any of his activities as a video pirates, which affect adversely or likely to affect adversely, the maintenance of public order". Public order is deemed to be disturbed by "producing and distributing pirated copies of music or film products, thereby resulting in a loss of confidence in administration". Thus video pirates can possibly be interpreted to include individual sitting at home and using P2P networks to share films. The only requirement is that they should have had a chargesheet lodged against them previously – they needn't even have been convicted; being chargesheeted suffices. Thus, non-commercial activities of file-sharing are equated to bootleggers and drug smugglers, and preventive detention (an anti-civil rights relic of India's colonial past) is applicable to them.

IP expansion is happening without the ostensible justifications for IP being kept in mind. That Tirupathi ladoos are going to get GI (geographical indicator) protection was announced at the conference with great pride. Geographical indicators are used to protect consumer interests, to ensure that no one outside a particular region (Champagne) can lay claim to be producing that product (Champagne) if the production of that product is intrinsically linked to special features found in that region (climate, etc.). However, no devout person would want to purchase anything advertised as "Tirupathi laddoo" if it were produced outside the Venkateswara temple at Tirupathi, thus the question of consumer confusion does not arise. What if someone malignantly advertises something as Tirupathi laddoo and claims it was made in Tirupathi (and not just that it tastes like the laddoo made there)? Such a person can be taken to task for deceptive advertising, and there is no need for something to have IP protection to do so. This represents a senseless expansionism of IP. It is now IP for IP's sake.

One of the speakers, Mr. V.N. Deshmukh, who though pro-stringent IP enforcement, astutely noted that, "When local demand is not met, they [consumers] turn to counterfeiters and pirates." Local demand can be unsatisfied because of lack of supply, or because the supply is overpriced, or because the supply is not easy to access, or because what is supplied is inferior to what is demanded. At the end of the day, as William Patry, Google's lead counsel, has noted, what companies sell to the public are products and services, and not IP. It would thus be wise for businesses to be innovative and compete rather than trying to extend their monopolies and engaging in rent-seeking behaviour that is economical harmful to consumers. They would also do well to remember that IP is not only a product but an input as well, so they are ultimately consumers themselves. All the harsher laws and enforcement mechanisms that they push for right now will have unintended consequences, and come to affect them adversely.