Curbing Counterfeiting and Piracy in On-line Marketplace

E-Commerce in India has seen a phenomenal growth over the years. From USD 39 billion in 2017, it is projected to rise to USD 200 billion approximately by the year 2026. This comes on the shoulders of digital development in India, mainly the internet penetration and mobile phones where India has taken a leadership role and is propelling the growth of e-Commerce- the virtual marketplace in India. Last year the leaders in on-line space were electronics and apparels but now there are many more offerings such as travels, movies, medicines, hotel reservations, books, matrimonial services, electronic gadgets, cosmetics, footwears, fashion accessories and even groceries. The liberal FDI policy of Government of India, where 100% B2B in FDI has been allowed, is also fuelling the growth of this market.

This growth however comes in with a set of challenges. The menace of counterfeiting and pirated goods has remained the same if not more in the virtual marketplace. Online counterfeiting and piracy are IP crimes which affect most areas of IPR. E-Commerce sites are regularly being used as a common platform for sale of counterfeit goods; increasingly the same is also happening on social media platforms. Whether it is online or offline, the dangers to society remain legitimate market loss and occupation of economic space by unauthorised and grey market operators, causing loss of revenue to government, payment of extra taxes by common man, loss of jobs, threat to safety of consumers and also fuelling organised crime.

It was with the above perspective that I recently chaired a session in FICCI's annual convention MASCRADE (Movement Against Smuggled and Counterfeit Trade). The session deliberated on the need for Policy and Regulatory framework to Stop Counterfeiting, Smuggling & Piracy from Entering the Virtual Marketplace with participation from key market leaders from industry, e-commerce platform owners and technology providers.

Sale of fake products on E-Commerce platform is rampant. While technology offers several solutions to authenticate the original product, the same technological tools particularly artificial intelligence aid to create a look-alike which makes it more difficult to distinguish between the original and its fake. Moreover, when e-Commerce players and brand owners get embroiled in on-going disputes, it is the counterfeiters who reap the benefits from the blame game between industry and e-commerce players. What is needed is constant upgradation and innovation to stay ahead of the counterfeiters. As far as government initiative is concerned, it is important that we have regulations for e-commerce.

A big step has been taken by government of India by bringing the draft e-Commerce policy which has indicated clear guidelines on the expectations from band owners and e-Commerce players. It is for the first time that a government document has listed concrete steps for combating counterfeiting which categorically states that that the seller detail should be made available on marketplace website for all products and the sellers must provide an undertaking to the platforms about the genuineness of products. Also, trademarks owners should be given the option to register with e-Commerce platform and that wherever a trademark product is uploaded for sale on the platform, it should notify the respective trademark owner. If he desires e-Commerce platform shall not list or offer for sale any of the owner's products without prior concurrence. In case of a complaint - within 12 hrs, it should be conveyed to the trademark owner and as soon as possible the product shall be withdrawn, and the site will be blocked. Additionally, in case of a customer making a complaint of counterfeiting post sale –return or compensation will be paid and financial disincentives for sellers if found to be selling counterfeit shall be prescribed.

Unlike the problem of physical piracy and counterfeiting, the piracy of content is easiest and the most damaging. It is easiest because the content of the original product is retransmitted and therefore there is no new creation, no infrastructure is required, no money is invested in creating content and the same content of the same quality is made available to everyone for free.

The extent of piracy varies across different segments of copyright like literary, sound recordings cinematographic and computer software. The majority of copyright infringement is done through illegal re-production of journals, magazines and books, video piracy, cable piracy, imitation and distribution of computer programs without the permission of original copyright holders, illegal downloading, file sharing and selling of pirated DVDs etc. There also has been an increase in external and mirror websites providing unauthorized content through third party applications.

Leading industries in on-line space have taken a host of measures such as 24*7 content monitoring and take downs, taking John Doe orders from courts, filling criminal cases etc. But this is not enough. For example, the film and television industry contributed a total of Rs. 33.3 billion to the Indian economy and supported over 2.36 million jobs in 2017. However, piracy remains a persistent and growing threat to this industry. Online copyright theft is a criminal enterprise which also affects consumers, and is susceptible to malware, identity theft and ransomware.

A 2016 study analysing 1143 pirating sites popular in India, found that large and medium pirate sites earned revenues of about 4 million and 2 million respectively and 361 advertisers in such sites were found to be in the high-risk category. The piracy of content is done on various popular social media platforms and internet websites, app stores and illegal streaming devices. Recently it was also found that a Wi-Fi enabled box is available in the market for about Rs. 1000-5000 which uses keys of a distribution platform to transmit all the television channels of all Indian broadcasters. Unfortunately, there is no mechanism in India where one can track down and block the last-mile subscriber whose box is being used for doing piracy.

One of the greatest difficulties in tackling content theft and piracy is the jurisdictional challenge. While laws have national boundaries, piracy is a global beast. One can sit on a non-compliant jurisdiction, upload content and make it available throughout the world. The laws of India will not be applicable; therefore, nothing can be done against the pirate. There is also a lack of an infringing website list. There is no mechanism in our country which prepares a list of infringing websites which are infringing content or physical goods- counterfeit products. There is a dire need for stakeholders (advertisers, brands, advertising agencies, content owner) to come together and create a list of infringing websites. This list can be made available to the advertisers, payment gateways and can be used for sensitizing people at large.

With the increase of online copyright theft in India, and the increasing losses of copyright holders, the Indian courts have started taking strong cognizance of this offence. Recently the Delhi High Court in the case of UTV Software Communications & Ors. vs. 1337xTO and Ors. held that there is a need to prevent the cumbersome exercise of piracy by the subscribers which is the younger section of the society who are unaware of pirated content. The case was filed for violation of copyrighted work of film production companies. The court decided to ban the websites responsible for hosting, streaming, reproducing and distributing movies, music and other cinematographic works and directed Department of Telecommunication (DoT) and Ministry of Electronics and Information Technology (MEITY) to frame stringent policy and guidelines for ISP (Internet Service Providers) such as Reliance, Bharati Airtel etc in order to block the infringing websites.

A regular clean-up of key marketplaces and social media is also important. Strategies to efficiently use data and different technological tools available to figure out the key players and nip the problem

at the source should be made. High value targets both manufacturers and whole sellers of counterfeit products must be identified on all e-Commerce platforms, whether it is B2B or B2C marketplaces, social media or mobile apps.

The government's draft e-commerce policy also addresses the issue of piracy stating that intermediaries shall put in place measures to prevent online dissemination of pirated content and shall identify trusted entities whose complaints are resolved on priority. Moreover, upon being notified by the owner of copyright regarding piracy of his content, the website or platform shall expeditiously remove or disable access to the alleged content. The guidelines also suggest that a body of industry stakeholders should be created that identify rogue websites and upon identifying the internet providers shall remove or disable access to the website within a set time limit.

Though the government guidelines list out steps for online counterfeiting and anti-piracy, it is evident that there is a need for greater collaboration both between the stakeholders as well as better regulation from the government. The Indian IP policy, which was released in 2016, emphasised on strengthening, enforcement and adjudication to combat piracy and counterfeiting. It further stated that that best practices need to be followed, technological tools and training of enforcement agencies needs to be done, judiciary needs to be strengthened, both for training as far as for strengthening their competence by opening more commercial courts to understand the intricacies of IPRs, tools and methodologies needs to be developed to find the extent of counterfeiting and piracy.

The focus must remain on creating an environment where we can continuously innovate, develop technologies to proactively prevent infringement within the marketplace, foster greater partnerships, have robust feedback mechanism, monitor the gaps and processes - all together build an eco-system to fight this hydra headed monster of counterfeiting and piracy.

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