

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2018.¹

Executive Summary: In December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “if tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double.”² Today, India remains a market with significant concerns for the copyright industries, but one with great potential. India is currently the second largest Internet market in the world after China, and the second largest smartphone market in the world.³ India should undertake some necessary legal reforms to make it suitable for the digital age and better aligned with international best practices. The lack of effective enforcement and legislation; high number of online pirate services—dominated by torrent and linking sites; the existence of illegal textbook copying businesses; problematic regulations; illegal camcording networks; pirate mobile applications (apps) and chat apps; Illicit Streaming Devices (ISDs) (e.g., set-top boxes); and infringing cable operators—all are undermining the Indian marketplace.

India’s laws make available temporary injunctions to disable access to infringing sites, which is a more advanced approach to online enforcement than in some countries, but needs better enforcement measures in place. Additionally, while India is attempting to choke ad revenue going to pirate sites by implementing an Infringing Website List (IWL), it still needs to consider stronger measures to encourage cooperation and meaningful engagement between rights holders and intermediaries. The Department of Industrial Policy and Promotion (DIPP) is doing more to coordinate and improve India’s state-level enforcement to address copyright piracy, and certain states such as Telegu and Maharashtra have taken the lead in tackling piracy issues. That said, India’s current judicial system does not provide effective or efficient relief against online piracy. Moreover, India has a massive backlog of civil IPR infringement cases awaiting a hearing before Indian courts. Thus, judicial procedure reforms should be adopted to reduce onerous documentary burdens (such as the requirement to sign every page of an affidavit, which can number in the tens of thousands) and speed up the processing of court cases. Additionally, improvements to India’s administrative and criminal enforcement regimes are essential, as is increased cooperation between rights holders and law enforcement agencies to combat hosting of unauthorized content online.

India made a public commitment to improve its IPR regime when the government released its long-awaited “National Intellectual Property Rights Policy” in May 2016. The stated goal of the National IPR Policy is to protect India’s large and vibrant creative sector; this will also benefit foreign (i.e., U.S.) creators and producers. A potentially significant development in the National IPR Policy is the decision to relocate copyright jurisdiction to DIPP. This change has already resulted in improving the visibility of, and resources available for, better copyright protection and enforcement. The National IPR Policy outlines the government’s long-term plans to improve IPR with seven key objectives. The plan, if successfully implemented, will improve the legal regime for copyright owners in India, strengthen enforcement (especially in the online environment), and modernize the government’s management and services related to IPR. Unfortunately, the plan lacks details regarding concrete steps for timely implementation.

¹For more details on India’s Special 301 history, see previous years’ reports at <https://iipa.org/reports/reports-by-country/>. For the history of India’s Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.

²USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at <http://www.usitc.gov/publications/332/pub4501.pdf>.

³<http://www.thehindu.com/sci-tech/technology/india-now-second-largest-smartphone-market-in-world/article19926744.ece>.



PRIORITY ACTIONS REQUESTED IN 2018

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2018:

Enforcement

- Establish a National Copyright Enforcement Task Force, including Enforcement Directorate and the Central Bureau of Investigation (CBI), that is overseen by DIPP and directed at online and mobile copyright infringements. Currently, India has the Cell for IP Promotion and Management (CIPAM), but should focus on engaging Digital Crime Units in copyright enforcement actions, beyond activities directed at raising awareness of IP.
- Establish a uniform, state-level cybercrime law and enforcement procedures and a state level, centralized IP crime unit, similar to the enforcement initiatives started in Maharashtra (Maharashtra Cyber Digital Crime Unit (MCDU)) and Telangana (Telangana Intellectual Property Crime Unit (TIPCU)), across all Indian states to ensure proper investigation of IP crimes, including Internet piracy.
- Reform the judicial processes to speed up the handling of cases.

Legislation

- Accede to and fully implement the WIPO Internet treaties, by amending the Copyright Act and Criminal Procedure Codes, as follows: (i) adopt definitions and provisions on technological protection measures (TPMs), including civil and criminal penalties, which should apply to acts of circumvention, and trafficking in devices, components and services; (ii) adopt definitions and sanctions for unauthorized removal of rights management information (RMI); (iii) adopt legislation and procedures for fair, efficient, and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India and “copycat websites”; (iv) repeal the statutory license for broadcasters under section 31D of the Copyright Act, or at minimum amend the provision so it is compatible with TRIPS by withdrawing the September 2016 administrative memorandum, that places all digital music services under a statutory license for traditional broadcasters, in contravention to treaty obligations and international norms; (v) ensure the private use exception is compatible with the three-step test; and (vi) amend Section 52c of the Copyright Act to bring it in line with the existing safe harbor provisions in the Information Technology Act and with international standards relating to the temporary copying exception.
- Other key legislative reforms include: (i) amend the Information Technology Act to expressly include infringement of IPR as grounds for administrative site blocking under Section 69A and make copyright infringement a predicate offense; (ii) revise the safe harbor provisions under Section 79 to only apply to truly neutral services and to ensure ISPs engage in take down measures that have been demonstrated to be effective in preventing or restraining infringement; (iii) enact the Cinematograph Bill to make it unlawful to possess an audiovisual recording device to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility; (iv) adopt enhanced penalties for “pre-release” piracy and appropriate statutory damages for copyright piracy generally; and (v) amend state organized crime laws (e.g., Tamil Nadu’s Goonda Act) to include book, music, video and videogame piracy.

Market Access

- Eliminate market access barriers, including: (i) the “must provide” rules in the pay-TV sector; and (ii) high tariffs on video game software and hardware.
- Implement new Goods and Services Tax (GST) rules to remove Local body entertainment Tax (LBET) and other related taxes for motion pictures and music; restrict differential tax rates for foreign films; and simplify compliance rules.
- Encourage a single window mechanism for cinema construction that simplifies the approval process and encourages private operators to build cinemas across all states in India.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Digital Marketplace: India is the second largest Internet market in the world and the second largest country in mobile app downloads.⁴ Under the government's "Digital India" initiative to speed up Internet accessibility in India, the current growth rate of Internet is 7-8% with over 450 million Internet users in India.⁵ In January 2018, the Telecom Regulatory Authority of India (TRAI) reported 350.7 million broadband subscribers, a number that continues to grow exponentially, offering a great opportunity for the creative industries from both domestic and foreign sources to thrive in the market. According to the 2017 IFPI Global Music Report, the music market in India grew by 26.2% to US\$111.6 million in 2016. Total music streaming revenues grew by 52.9% in 2016 and made up 47.5% of the total recorded music market in India; however, legitimate platforms in India's online marketplace such as Netflix, iTunes, and Wynk face stiff and unfair competition from illegal offerings that continue due to a weak IPR legal and enforcement regime.⁶ Internet piracy continues to remain the greatest threat to the music, film, and television industries in India because the launch of 4G services, cheaper data rates, and increased smartphone penetration has made digital piracy easier and more common. A September 2017 consumer survey of active Internet users in India showed that 94% of those surveyed downloaded pirated music content in the last six months. Google was used by 87% of Internet users to find free music, most of whom searched explicitly for pirated music. Video piracy also continues to dominate data consumption and is expected to grow in the future, significantly impacting the revenue stream of the entertainment industry.⁷ In a one-month period, the motion picture industry estimates that 63 million visitors accessed the top five piracy websites (mostly torrent sites) in India for motion picture and television content, accounting for 440 million page views.

Video streaming websites, such as *fmovies.is* (which was mentioned in USTR's 2017 Notorious Markets Report),⁸ and linking websites are the most popular types of pirate sites, and largely depend on advertising and subscription revenue. Torrent sites such as *thepiratebay.org* and *yts.ag* still dominate the marketplace. Stream-ripping websites, which offer Internet users the ability to make free permanent downloads of music from streaming video services, are also a major problem. Use of many of these platforms adds to the continued presence of pre-release piracy of music and film. Additionally, Indian ISPs are often involved in hosting pirate services. *Hostpalace* lists that its head office is in India. Many piracy sites use *Hostpalace* with little to no recourse for rights holders. Law enforcement contact with *Hostpalace* would be helpful to ensure cooperation in investigations into pirate services hosted on its servers. Other forms of piracy include mobile phone downloading on memory cards, SIM card pre-loading, and mobile apps. In the Badvertising Report by Verisite, forty mobile application marketplaces were scanned to identify piracy apps, and fifty-three mobile apps were found to distribute pirated content, including Hollywood and regional films and TV series.⁹ Twenty-five mobile apps were supported by ad networks and advertisers. The video game industry reports that India placed fifth in the world in 2017 (down from fourth in 2016) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks. India remains second in the world when it comes to mobile infringement of games.

Unauthorized Camcording: A significant percentage of infringing copies of new release titles in India originate from illegal camcording at cinemas, appearing online within a few hours of a film's release. This affects the economic performance of the film, the distribution cycle and jobs. Video camcording incidents in India have been on a decline since 2015, with 32 video camcording incidents reported between 2015 and 2017, compared to 113 video camcording incidents between 2011 and 2014. There has been a significant shift to audio camcording in the last three years. In 2017, so far there have been 32 incidents of camcording out of which 24 are audio camcords in

⁴App Annie's 2017 Retrospective Report: <https://tech.economictimes.indiatimes.com/news/internet/etech-morning-briefing-india-app-downloads-whatsapp-business-microsoft-kaizala-more/62563153>.

⁵Internet Users by Country available at <http://www.internetlivestats.com>.

⁶IFPI, *Global Music Report 2017*, p. 96, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

⁷KPMG LAIFC FICCI Report: The 'Digital First' journey: http://www.laindiafilmcouncil.org/og-content/uploads/documents/1507100573The%20Digital%20First%20journey_Print.pdf

⁸For the most recent report, see USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

⁹http://verisiteglobal.com/Badvertising_Report.pdf.

various languages including English, Tamil, Hindi, and Telugu. Camcording in India is largely a sophisticated criminal operation that requires an effective criminal enforcement response. Arrests resulting from enforcement operations in 2013, 2015, 2016 and 2017, show some willingness on the part of state authorities to tackle this pervasive problem. Despite these arrests, India remains a major source of unauthorized camcorded material, because of the absence of clear anti-camcording legislation, and the lack of enforcement action on copyright cases by local authorities. In 2016, the Central Board of Film Certification's (CBFC) decision to accept digital cinema packs (DCPs) instead of the DVDs has been a deterrent to source piracy. However, camcorded copies of new releases sourced from Indian theaters continue to leak online during the films' opening weekend, resulting in losses for content owners. In addition, unauthorized camcords are often retransmitted by rogue cable or pay-TV systems.

Signal Theft: The audiovisual industry continues to experience rampant signal theft by cable operators, and under-reportage of actual subscribers where digitization has been completed. Local cable operators often steal and redistribute content signals. The approximately 40,000 cable systems in India often transmit Motion Picture Association of America (MPAA) member company products and other audiovisual content without authorization. These cable systems seriously affect legitimate businesses in India. In 2016, Star India filed over 100 complaints across various Indian states, which led to law enforcement raids of cable operators that resulted in arrests and seizure of equipment. Restraining orders issued by the Delhi High Court against entire networks as a result of civil actions brought by industry have proven to be a deterrent. However, the constant monitoring and initiation of new criminal prosecutions for copyright violation and contempt of court proceedings is costly and time consuming.

Illicit Streaming Device Piracy: Separately, the motion picture industry urges the Government of India to work with the private sector to effectively enforce against the use of illicit streaming devices (ISDs). These devices have emerged as a significant means of accessing pirated motion picture and television content in homes around the world. ISDs are either pre-loaded with apps that allow users to access infringing content, or users can easily obtain the apps themselves. Enforcement against ISDs is either through the use of anti-circumvention sanctions, via third party liability, or any other effective means. The focus should be aimed at key distribution points, piracy app producers, or vendors who preload the devices with apps to facilitate infringement.

Circumvention Services: Circumvention services and activities, which enable users to gain unlawful access to or unlawfully copy (or otherwise utilize) copyright materials, are flourishing in India. Unfortunately, the Copyright Act as amended fails to adequately address such services or activities with proper TPM provisions consistent with the WIPO Internet Treaties. The gap in the law—which essentially requires proof of a nexus between the circumvention and copyright infringement—should be addressed, so that those enabling users to obtain access to copyright materials without permission can be halted. Access controls are a key enabling technology for digital content delivery services, so innovative legal protections for their integrity are crucial.

Unauthorized Book Copying: Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books (some destined for the export market) remain significant piracy problems for the publishing industry in India. To combat rampant piracy, publishers long ago established practices to create market-specific, lower-priced editions of textbooks to meet domestic demand. Unfortunately, these lower-priced editions are often exported to more developed markets—such as the Middle East, Africa, Europe (including the United Kingdom), and the United States—and disrupt publisher sales in those markets. The longstanding system of providing less expensive reprints exclusively for the Indian market is also jeopardized by the increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into the U.S. market. The Government of India should take more robust action to protect continued access by its students to textbooks by empowering Customs officials to take *ex officio* actions with respect to illegal exports just as it has done with imports at the border. Doing so will send a positive signal to all publishers, including printers and distributors who rely on copyright in the India-only editions for their livelihoods.

In a case that commenced in 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the University premises. The suit was intended to draw

the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the commercial production of course packs, which Delhi University outsourced to a commercial, for-profit, copy shop. On September 16, 2016, the Delhi High Court ruled that the reproduction and distribution for students fell within an exception of the Copyright Act of 1957. The court further held that the photocopy shop was allowed to make these copies of excerpts, with no limit on the number of copies, because each student would have been similarly allowed to make copies for themselves. The court did not enjoin the copy shop and Delhi University from commercial acts of unauthorized photocopying and distribution of course packs. The ruling exceeds the well-established three-step test to which India has acceded under the TRIPS Agreement and Berne Convention.¹⁰ The publisher plaintiffs appealed the Delhi High Court determination, but the appeal was denied. In 2017, the Indian Reprographic Rights Organization (IRRO), an intervenor in the first appeal court, filed an appeal with the Supreme Court challenging the 2016 judgment, but this appeal was also dismissed.

Fraud of print subscription orders for peer-reviewed scientific, technical, and medical journals continues to cause significant harm to publishers. Ordinarily, subscription agents are retained by institutional customers to place journal orders. In India, instead of ordering subscriptions at the applicable institutional customer rate, the agents fraudulently order subscriptions at deeply discounted individual rates intended for students, retirees, members of learned societies, and individual practitioners, for illegal resale to the institutional customers. This unlawful arbitrage (“subscription fraud”) deprives publishers of significant revenues, and threatens the continued sustainability of scholarly communication of important scientific, technical, and medical research. IIPA urges the Government of India to work with the publishing industry in India to expel agent members engaged in this fraud, and to increase transparency on the orders placed by government agencies through subscription agents.

Retail Piracy: Although the main threat is online piracy, retail piracy continues and takes many forms such as infringing content on optical discs, mobile devices, and flash or pen drives; unauthorized rental of motion pictures; and the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles. India should establish enhanced penalties for such pre-release piracy.

Domain Registry Outreach: In June 2017, Motion Picture Association (MPA) and Motion Picture Distributors Association (MPDA) representatives held a joint meeting with the National Internet Exchange of India (NIXI) and DIPP’s CIPAM. NIXI, in charge of the .in domain registrations, agreed to take action on whois information with fake addresses as a quick and easy way to suspend a domain that is also involved in piracy. This strategy focused on domains that are in breach of their legal obligations to maintain accurate and complete whois info. Since June 2017, MPDA has reported 44 website names containing infringing content to NIXI. NIXI has suspended 15 out of the 44 domains with the help of Registrars. The websites were inaccessible after suspension, thereby proving that this process can be an effective disruptor to combat online content theft.

Standardizing State and National Enforcement Strategies: Now that the Government of India has revealed its National IPR Policy, it needs to fully and properly implement it in a timely manner. Implementation should include: (i) a focus on inter-state operations of organized crime units engaged in piracy; (ii) the establishment of a National Copyright Enforcement Task Force, including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at online and mobile copyright infringements; and (iii) enforcement task forces at the state level to work together in a coordinated, systematic, and efficient manner. Currently, India has the CIPAM, but should focus on engaging Digital Crime Units in copyright enforcement actions, beyond activities directed at raising awareness of IP. The task force should be unencumbered by the usual jurisdictional enforcement boundaries and permitted to collaborate across state lines to ensure protection of intellectual property. Thus far, two state-level crime units (the TIPCU in Telangana State in 2016, followed by the MCDCU in Maharashtra State in 2017) were established to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, in order to address digital piracy problems. Because enforcement is a state issue, these

¹⁰See Article 13 of the TRIPS Agreement.

initiatives taken by Telangana and Maharashtra should be replicated across other Indian states. Many states also have laws against organized or immoral crimes, including the Maharashtra Prevention of Dangerous Activities Act of 1981, and the Goonda Act in Tamil Nadu. IIPA recommends that films, television and OTT content, books, music, and video games should be clearly covered under these laws, or new laws, to protect these industries at a State level, should be enacted. As stated above in the digital marketplace enforcement section, a more coordinated and synchronized effort across all states must be taken to ensure proper IPR protection throughout India.

There is no enforcement coordination or standard operating procedures at the national level for IPR criminal cases. Rights holders often face varying capabilities of enforcement officials and divergent outcomes on cases throughout the country, and there is often no clear delineation of the proper office to approach with respect to online piracy or hard goods and source piracy. Also, the police do not take *ex officio* actions, and there are usually no dedicated police or prosecutors for copyright infringements. Response to a "First Information Report" (an initial criminal complaint made by a rights holder) is often too slow for effective enforcement, sometimes taking four days or more (with one filing relating to online infringement taking two months for the enforcing agency to respond). Additionally, it can take police up to a year to prepare a charge sheet after an arrest. Moreover, post-arrest investigations are often cursory, and many times high-risk targets receive tips about forthcoming raids. Publishers report that district police departments have different requirements for pre-raid documentation to lodge complaints, as well as for gathering evidence during raids, safeguards during raids, and post-raid recordation. These divergent procedures invariably lead to different results, often a duplication of efforts and low conviction rates. Defendants can often resume business shortly after the initial arrest. If and when charge sheets are finally presented in court, cases are routinely dismissed. The Commerce and Industry Minister developed a toolkit to help resolve issues resulting from the lack of standardization (see Training and Public Awareness section below for more information).

Despite these issues, Hyderabad Cyber Crime Cell officials in the State of Telangana, with assistance from the Telugu Film Chamber of Commerce (TFCC), carried out a successful enforcement operation that resulted in the arrest of a major piracy syndicate head. TFCC worked in close coordination with the MPDA in India for this operation. According to the forensic data, the piracy syndicate head was associated with pirate releases of MPAA Member Company content from India at least six times in 2016 alone. On April 29th, 2017, TFCC launched an enforcement operation to protect a regional Telugu language film, *Baahubali: The Conclusion*, released that same week. During the operation, investigations by TFCC and Cyber Crime Cell confirmed the connection between the piracy syndicate head and piracy of that film. As a result of these successful investigations, six people have been arrested to date.

Criminal and Civil Enforcement Reforms: Given the scope of the piracy challenges discussed above, the Government of India should prioritize online and mobile piracy cases and ensure proper tools are in place to address hosted and non-hosted infringements of domestic and foreign sites. Because online copyright infringements in India are often large-scale commercial operations tied to organized cybercrime activity, the most proper approach is criminal enforcement. However, IPR enforcement has been a low priority for India's law enforcement. Criminal copyright cases in India have generally not yielded effective and deterrent results. While copyright piracy is a non-bailable offense, bail is often secured on the first day after arrest. Also, there are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be seized. Criminal prosecutions often take years, and during this time relevant witnesses become untraceable and secured evidence is compromised, leading to acquittals. In plea bargains or even convictions, fines remain low and non-deterrent, with most falling under INR1500 (approximately US\$22). India also lacks enhanced penalties for pre-release piracy. The experiences of the copyright industries with criminal cases differs by region, but overall, further training of prosecutors and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful. Recommendations include training and retaining a cadre of police officers for cybercrime, as well as dedicated IP expert prosecutors and investigators. Last, IIPA recommends that the Government of India appoint special IP judges or panels in courts throughout the country and that these judges be properly trained (the copyright industries are willing to assist with training).

In general, the High Courts in Delhi, Mumbai, Chennai, and Kolkata have developed good civil law jurisprudence for copyright infringement.¹¹ Innovative approaches have included Anton Piller orders, John Doe orders, Norwich Pharmacal orders, and Mareva injunctions, all of which have assisted IP owners in securing infringing goods, as well as assisting with police raids, sealing evidence, securing bank account details of defendants, and requiring the disclosure of passwords for IT resources. Additionally, civil claims are dismissed frequently enough to deter rights holders from initiating cases even in these courts. Some cases can take up to twelve years in the overburdened Indian court system, with endemic factors that prevent effective judicial enforcement of copyright, including, clogged dockets; problems and delays especially with respect to retaining electronic evidence (and a lack of familiarity with the related evidentiary requirements); and difficulty with enforcing civil court orders. Civil awards are most often wholly inadequate to compensate the rights holder for the harm or deter further infringing activity.

While typically injunctions against rogue infringing websites are inconsistent and rarely successful given the complex, time-consuming, and expensive court procedures called for under the Copyright Act and the Information Technology Act, the motion picture industry experienced a victory when the Delhi High Court ordered ISPs to block two piracy websites, *1337x.to* and *torrentz2.eu*, in response to an injunction filed by the MPDA on behalf of all the studios, in October 2017. The Delhi High Court also issued an order for the Department of Telecommunications to ensure proper implementation of the block order. The court order applied to the entire websites, as opposed to only specific titles or events. Additionally, it allowed studios to seek leave to add variants (redirects or proxies) of the two sites after the order is in force. This is the first site blocking case in India involving multiple plaintiffs and where a court directed the Government of India to facilitate compliance. As a result of this action, 78% of ISPs have complied with the order, and there has been an 89% reduction in the total traffic to the blocked sites. Unfortunately, another recent case on third party liability may make it more difficult for rights holders to get cooperation from ISPs (at least in Delhi). On December 23, 2016, a Delhi High Court appeals court bench overturned an earlier decision involving the liability of the social networking site MySpace, ruling that MySpace had no liability for users' posts of plaintiff's copyrighted content absent "actual knowledge" and a failure upon actual knowledge to remove the infringing posts. Super Cassettes India Ltd. (SCIL) was ordered to provide MySpace with a "specific" list of copyrighted material, and MySpace had 36 hours to remove the content in accordance with existing notice and takedown guidelines.

COMPLIANCE WITH EXISTING TREATY OBLIGATIONS

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. India is neither a signatory to, nor has it acceded to, either of the WIPO Internet Treaties. For accession to the treaties, India needs to: (i) adopt definitions and provisions on technological protection measures (TPMs), including civil and criminal penalties, which should apply to acts of circumvention and to trafficking in circumvention devices, components and services; (ii) adopt definitions and sanctions for unauthorized removal of rights management information (RMI); (iii) adopt legislation and procedures for fair, efficient, and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India and "copycat websites"; (iv) repeal the statutory license for broadcasters under section 31D of the Copyright Act, or at minimum amend the provision so it is compatible with TRIPS and WPPT obligations by withdrawing the September 2016 administrative memorandum, which opines that Section 31D applies to all online transmissions, placing all digital music services under a statutory license for traditional broadcasters, in contravention to treaty obligations and international norms; (v) ensure the private use exception is compatible with the three-step test; and (vi) amend Section 52c of the Copyright Act to bring it in line with the existing safe harbor provisions in the Information Technology Act and with international standards relating to the temporary copying exception. Additionally, the extension of new compulsory licenses to foreign works, in favor of local broadcasters, and the extension of such licenses to the Internet, is of concern. These compulsory licenses appear inconsistent with India's commitments in the Berne and TRIPS agreements.

¹¹One exception is the Delhi High Court course pack case, which effectively broadened the scope of third party safe harbors (at least pertaining to the facts of that case discussed above).

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Act of 1957 was last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013). The Act and Rules have been subject to constitutional challenges and fall short of adequately granting and protecting IPR. Policy proposals on the digitization of the Indian broadcast sector are expected, with TRAI running a public consultation in 2017. Also, DIPP has indicated that the recently announced Copyright Board under the Intellectual Property Appellate Board (IPAB) should have become functional by the end of 2017. While these are steps in the right direction, more changes are needed.

Statutory license for broadcasting under Section 31D of the Copyright Act: The 2012 amendments to the Copyright Act of 1957 introduced (in a new Section 31D) a statutory legal license to use musical works and sound recordings in broadcasting. Section 13 of the Copyright Act treats sound recordings as objects of copyright protection and grants to copyright holders exclusive rights to control a number of acts with respect to the work. Under Section 14, an exclusive copyright will apply to the act of “communicating the sound recording to the public.” However, Section 31D has effectively downgraded the exclusive nature of the broadcasting right to a mere remuneration right, since no prior authorization is needed from the right holder for broadcasting, and the license rate is not determined by the right holder, but rather by the Copyright Board. This legal license scheme is inherently incompatible with Sections 13 and 14, and undermines the value of rights holders’ broadcast rights. Furthermore, the September 2016 DIPP memorandum, which opines that Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations,” should be withdrawn, as it creates a misperception that the provisions could apply to online transmissions of recorded music. Some prospective licensees have sought to rely on the DIPP Memorandum to influence licensing negotiations and mischaracterize the relevant uses as “broadcasting.” The DIPP Memorandum, while not legally binding, is harmful to the industry and creates confusion in the market; it should be withdrawn, and the definition of “broadcast” should be clarified to delineate from “making available” and other online uses. IFPI has written to DIPP to point out these problems, and that Section 31D and the DIPP Memorandum are incompatible with international treaties. As of January 2018, DIPP has not formally replied, nor has it withdrawn the DIPP Memorandum.

As written, any broadcasting organization (radio or television) could apply to the Copyright Board for a statutory license, affecting the negotiating power of right owners. Additionally, the rate fixed by the Copyright Board may not (and does not) reflect the market rate, as illustrated by India’s global ranking as 35th for producer and performer revenues from broadcast music.¹² According to IFPI’s data, the new regime for broadcast licensing has led to a decline in broadcast licensing revenues by 50%, from €3.2 million (US\$4.0 million) in 2011, to €1.6 million (US\$2.0 million) in 2014. This happened despite the fact that the Indian broadcasting industry continued to grow during this period. According to PwC Media Outlook, India’s FM broadcasting sector grew by 50% from US\$200 to US\$300 million over the same period. Under Section 31D, rights holders have no choice but to allow broadcasters to use their works, even though they have the exclusive property rights. Thus, Section 31D should be removed, and the pre-existing status (negotiations between sound recordings copyright owners and broadcasting organizations based on exclusive rights and equal footing) should be restored. The Copyright Board jurisdiction should be limited to situations where (i) rights are licensed collectively, and (ii) the collective management organization’s tariffs are challenged by the users.

Camcording: The 2012 Amendments to the 1957 Copyright Act fell short on anti-camcording provisions. The legislative “fix” would require a new amendment to the 1952 Cinematograph Act, to include a clear prohibition against unauthorized camcording. The 2013 Draft Cinematograph Bill should have provisions which make it unlawful to possess an audiovisual recording device (such as a video camera, audio recording device, or other device) to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility. In addition, it is important for theater owners to augment the ongoing public information campaign

¹²IFPI 2017.

by using slides with anti-camcording messaging before screenings, messages on theater tickets and the like. Such efforts have been undertaken and have raised awareness, but more needs to be done.

Technological Protection Measures: Section 65A of the Copyright Act provides protection against circumvention of effective technological measures. However, the 2012 amendments intended to meet the minimum threshold requirements of the 1996 WIPO Internet Treaties were inadequate. The use of the phrase “effective technological measure” is undefined and, thus, does not expressly cover common measures such as access controls. The section also fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices, which would allow legal action against all persons in the piracy chain, and does not distinguish between access control TPMs and copy control TPMs. Additionally, Section 65A makes circumvention a criminal offense, but excludes a civil cause of action and consequently civil remedies. We would suggest that the provision include civil causes of action, as well. Lastly, the exception provided under Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act,” is overly broad and vague. In 2017, the MPA made a submission to DIPP, Ministry of Commerce and Industry seeking such amendments.

Term of protection: Under Section 27 of the Copyright Act, the term of copyright for sound recordings is 60 years from the beginning of the calendar year following that in which the sound recording is published. This is shorter than the 70 year term in the UK (and the EU), which is the recent international minimum standard.

Clarification of the safe harbor provisions: Safe harbor provisions can be found in the Copyright Act and the IT Act. Section 79 of the IT Act exempts liability of an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. The conditions are that, amongst others, the intermediary does not initiate or modify the transmission and observes due diligence while discharging its duties (as set out in the Information Technology (Intermediaries Guidelines) Rules, 2011). Section 79 does not apply if: (i) the intermediary has conspired, aided, abetted, or induced the commission of an unlawful act; and (ii) upon receiving actual knowledge or notice of copyright infringement, the intermediary fails to expeditiously remove or disable access to that material. These principles in Section 79 of the IT Act are reasonable to some industries, but more effective remedies should also be part of the system. The provisions in Section 52 of the Copyright Act should be amended to align with these.

India should strengthen statutory provisions regarding online infringements to permit effective enforcement against businesses actively engaged in (or inducing) unlicensed content distribution, as well as expeditious takedowns to address hosted and non-hosted infringing activities and services within and outside India. As noted, the Copyright Act currently includes a safe harbor provision for ISPs engaged in the transient or incidental storage of works, with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51(1)(c)). The rules provide for takedown within 36 hours of a notice, but are problematic and interpreted broadly, which is itself a concern. While Rule 75(3) provides that the person responsible for the storage of the copy shall take measures to refrain from facilitating such access within 36 hours, this shifts the responsibility to rights holders to comply with burdensome rules and requirements that may not be possible to meet in practice. Those rules allowing 36 hours, are too long of a period for some forms of piracy such as pre-release piracy. The ISP liability framework should be improved to require timely and effective means for preventing or restraining online infringement. India should also provide authority for injunctive relief orders that would direct service providers to take measures to combat online piracy such as disabling access to specifically identified infringing materials.

Administrative website blocking: Under Section 69A of the IT Act, intermediaries may be required to block public access to any information generated, transmitted, received, stored, or hosted in any computer resource if the government is satisfied that blocking is necessary to the interest of sovereignty and integrity of India, defense of India, security of the state, friendly relations with foreign states, public order, or to preventing incitement to the commission of any cognizable offence relating to above. Section 69A does not expressly cover intellectual property infringement as a predicate offense. The express inclusion of intellectual property infringement as a ground to direct

website blocking is important. Currently, website blocking requested by the sound recording industry mostly goes through the judiciary route, i.e. the court, but there is a very serious backlog in the courts in India and an injunctive order may take years to be granted. Some cases are pending now for hearing in 2022. The industry therefore needs a faster and less costly way to curb online piracy, which can be through Section 69A of the IT Act. India should further amend this provision to permit administrative *suo moto* action by the Ministry of Communication and Information Technology (MeitY), enabling MeitY to act without judicial orders to disable access to structurally infringing websites. Such a provision is especially needed in light of the Section 65A amendment, which fell short of effective provisions on technological protection measures and to tackle the issue of structurally infringing websites. Fortunately, preparatory work on the possible revision or clarification of Section 69A of the Information Technology Act, 2000 (the "IT Act") is beginning.

Internet Service Providers (ISPs): ISPs are cooperating with takedown notices for hosted content, but have not been as cooperative regarding non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. Also, ISPs have been unable to limit the reemergence of the blocked websites through proxy domains that use redirection; sites that were blocked for years on court orders, like songs.pk, have reemerged, meaning the implementation of block orders by ISPs is not effective. To our knowledge, there are no applicable MOUs between government agencies and ISPs for site blocking. John Doe court ordered injunctions against named and unknown infringers are issued to the government agency, who, in turn, instruct the ISPs to block access to the sites or order the ISP to take down the infringing content. The enforcement of court-mandated take downs is left to the claimant to serve orders on the ISP, who can usually be relied upon to comply for a short period, after which compliance tends to fall off.

MARKET ACCESS ISSUES

Market access barriers imposed on the motion picture and video game industries result in an unfair playing field for all rights holders. In a high level US-India trade meeting in October of 2017, USTR urged India to liberalize the economy to facilitate US exports, noting market access restrictions and issues with IPR protection and enforcement. Addressing market access barriers is also critical to reducing piracy, since their removal permits the advancement of legitimate business models, bringing greater content to the marketplace with a diversity of prices and terms. Market access barriers (most noted in prior submissions) include:

- TRAI and government rules banning exclusivity and imposing "must provide" rules in the pay-TV sector.
- Localization requirements and per-channel fees beaming into India.
- TRAI price caps for pay channels in areas with set-top-boxes and price bands for firms that offer bouquets (to ensure that the price per individual channels is not much higher than the price of a bouquet), which stifles the growth of the industry. TRAI says it will relax the price controls once other television platforms are widely adopted (satellite TV, Internet TV). TRAI should make a strong commitment to "adopt targets" for when it will relax price controls as the U.S. Federal Communications Commission did when the U.S. deregulated cable TV rates. This matter is currently under consideration in the Chennai High Court.
- Foreign direct investment caps for radio/up-linking of news and current affairs TV channels, and pre-approval requirements for most other broadcasters to invest.
- Local Body Entertainment Tax (LBET): In September 2016, the Indian Parliament passed the GST Constitutional Amendment Bill, paving the way for the much-awaited introduction of a new GST to unify India's complex tax system. On July 1, 2017, India rolled out the GST nationwide based on a four tier structure: 5%, 12%, 18% and 28%, with different rates applying to different parts of the film value chain. All indirect taxes (including entertainment tax, service tax and VAT) were subsumed into the GST with the exception of LBET at the state level, which remains outside the scope of the GST. Thus, state governments are empowered to tax entertainment over and above GST. In 2017, in the State of Tamil Nadu, LBET was introduced with differential tax rates for foreign films versus local language. The GST legislation should reduce the regulatory burden imposed upon the copyright industries in India with a uniform rate.

- The rate of GST applicable on physical and digital formats of music, i.e. 18% on physical (GSTN Code HSN 8523) and 12% on digital (GSTN Code HSN 00 44 0613), which are too high and have an adverse effect on the sales of music products and the development of the music industry.
- Price fixing on tickets in South India, as well as quotas on the number of screenings per title per day.
- Onerous regulations on uplink and downlink of satellite signals beaming into India.
- High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement which will reduce tariffs on goods that enhance digital trade in India.
- Cinema Licensing Laws: For years, the construction of cinemas in India has been hampered by numerous impractical and outdated regulations, contributing ultimately to India's low screen density. To obtain approval for cinema construction, an exhibitor has to go through approximately 70 different clearances for approval of a single theater/multiplex. Furthermore, India's 29 states have different regulations on cinema construction. There is a need for a single mechanism that simplifies the approval process and encourages private operators to build cinemas. For example, in 2016, the State of Andhra Pradesh introduced a mechanism that provided for a deemed clearance for cinema construction after 21 days, if approvals were delayed.
- Primacy of Copyright: Pertinent to Broadcasters as they are subjected to orders from the TRAI in contravention to the Copyright Act.

TRAINING AND PUBLIC AWARENESS

Enforcement of IP related crimes continues to be a low priority for law enforcement officials. This is likely due to the need for sensitization and training of enforcement officials, and the lack of a uniform enforcement structure for IP crimes. Cybercrime officers and the centralized units should receive training on IPR enforcement, including a focus on online transactions, cybercrime, and evidentiary requirements in relation to electronic evidence. Some effort has been made on this, but it must be consistently applied throughout the country.

In January 2017, the Commerce and Industry Minister, Nirmala Sitharaman, launched India's first Copyright Enforcement Toolkit for Police. MPDA—in association with the Federation of Indian Chambers of Commerce and Industry (FICCI), Star India and local counsel—worked with CIPAM DIPP to develop the toolkit, which aids police officials across India in dealing with copyright, trademark and counterfeiting crimes. It will be utilized during training programs conducted for police officers across the country. In addition to detailed explanations of various offenses, it provides a checklist for registering a complaint and conducting search and seizures, outlining general guidelines for search and seizure protocols in criminal IP cases. The initiative attempts to solve the biggest challenge facing IP enforcement—the lack of uniform procedures and awareness of relevant statutes across the country. CIPAM has disseminated the Toolkit to all State Police Departments and major industry associations across the nation. Going forward, the Toolkit will be an effective tool to assist enforcement agencies in dealing with the cases relating to Trademarks and Copyright infringement.

CIPAM carried out several IPR awareness workshops in schools and colleges as a part of their campaign, using the hashtag #LetsTalkIP. CIPAM has also held several IPR training programs for law enforcement officers (with cooperation from the industry, including the MPA). These programs have been held at Police Training Academies in Kolkata, Bhopal, Shillong (North East Police Academy), and Telangana. In August 2017, CIPAM DIPP organized the First National Workshop on IPR, which saw participation from Ministers from the Government of India and industry associations. The workshop used awareness videos—featuring popular animated characters created by MPA member company Viacom 18's flagship kids' channel, Nickelodeon—to raise awareness that content piracy is equivalent to stealing. MPA also participated in several copyright forums in association with the USPTO, FICCI, and other industry bodies.