

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2019.<sup>1</sup>

**Executive Summary:** India plays an important role in the future growth of the U.S. creative industries, thanks to its growing population of consumers and its status as the second largest market for Internet services and smartphones.<sup>2</sup> The promise of growth, however, is threatened by copyright piracy and a legal system that is sometimes difficult to employ to handle the problem. The effects of this cannot be underestimated: 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.”<sup>3</sup>

Unfortunately, piracy problems still abound in India and take many forms—such as torrent, linking, streaming, and stream-ripping websites and services; businesses manufacturing and distributing illegal textbooks; illegal camcording syndicates; pirate mobile applications (apps) and chat apps; signal theft; and infringing broadcasts or retransmission services—all of which undermine the growth of the Indian marketplace for creative materials. To address the known challenges, the Government of India has taken significant steps in the past two years. Despite the size of the country and the enormous challenges of a somewhat decentralized federal system with 29 states, enforcement has significantly improved due to a combination of initiatives taken by both government and industry. IIPA is encouraged by the shift of copyright administration to the Department of Industrial Policy and Promotion (DIPP). Other positive developments include ongoing actions undertaken by the recently-formed Maharashtra Cyber Digital Crime Unit (MCDU), Telangana Intellectual Property Crime Unit (TIPCU), and the National Internet Exchange of India (NIXI), in addition to favorable orders by the Delhi High Court to permanently disable access to ten major piracy sites in India (under laws allowing for temporary and permanent injunctions to disable access to infringing sites). However, the country does not yet provide for administrative site blocking. To further improve enforcement, 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. Efforts in this regard have begun, but must be consistently applied throughout the country. Training programs by industry experts have also yielded encouraging results.

Beginning on December 25, 2018, the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (the WIPO Internet Treaties) went into force in India, signaling the country's commitment to properly protect and enforce copyright in the digital age. Though the Government of India claims that current laws are fully compliant with the treaties, further reform in key areas is necessary. For example, the current technological protection measures fall short of treaty requirements. Additionally, in May 2016, the government released its National IPR Policy, a promising first step towards a national IPR strategy, but it needs to follow up with concrete steps to improve both the legal and enforcement regimes.

Some significant market access challenges also remain, including: impractical and outdated regulations related to cinema construction, contributing to India's appallingly low screen density; local body tax issues in the states of Tamil Nadu and Madhya Pradesh over and above the new Goods and Services Tax (GST) rolled out on July 1,

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<sup>1</sup>For 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/2019/02/2019SPEC301HISTORICALCHART.pdf>.

<sup>2</sup><http://www.thehindu.com/sci-tech/technology/india-now-second-largest-smartphone-market-in-world/article19926744.ece>.

<sup>3</sup>USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at [https://www.usitc.gov/publications/332/pub4501\\_2.pdf](https://www.usitc.gov/publications/332/pub4501_2.pdf).



2017; mandated rates for pay-TV providers that inhibit the ability of rights holders to properly exercise their exclusive rights; pesky “must provide” requirements, which further hinder rights holders’ ability to exercise their exclusive rights with respect to how the pay-TV market operates; and a problematic 2016 DIPP Office Memorandum concerning the scope of the existing statutory license for broadcasting organizations broadcasting literary or musical works and sound recordings.

## **PRIORITY ACTIONS REQUESTED IN 2019**

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2019:

### **Enforcement**

- Ensure that site blocking court orders at the Delhi High Court are being fully and properly implemented by all Internet Service Providers (ISPs) nationwide, and encourage cooperation with ISPs to combat infringing activities occurring over their services.
- Encourage MCDCU and NIXI to continue in their excellent work suspending domains engaged in infringing activities.
- Strengthen and standardize the national IP enforcement regime and establish a uniform, state-level cybercrime law and enforcement procedures and a state-level, centralized IP crime unit (similar to the enforcement initiatives started by the TIPCU and MCDCU) across the country to ensure proper investigation of IP crimes, including Internet piracy. Some priority states are Tamil Nadu, Punjab, Andhra Pradesh, Karnataka, and Kerala.
- Establish a national Infringing Website List (IWL) and focus on engaging Digital Crime Units in copyright enforcement actions according to the IWL.
- Reform the judicial processes to: (i) decrease court costs, especially in the Delhi High Court; (ii) allow electronic filings and evidence sharing (and dispense with the signing requirements); and (iii) encourage courts to expedite the final adjudication.

### **Legislation**

- Having acceded to WCT and WPPT, India must amend the Copyright Act and Criminal Procedure Codes to fully comply with the Internet Treaties by: (i) defining technological protection measures (TPMs) and providing civil and criminal penalties, ensuring sanctions apply to both acts of circumvention and trafficking in devices, components, and services that circumvent; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Amend the law to permit administrative *suo moto* actions to block infringing websites (i.e., allowing these actions at the instigation of government agencies based on rights holder complaints) without costly and time-consuming judicial actions.
- Enact the Cinematograph Bill making it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording). Public comments on the bill were due February 2, 2019.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at minimum withdraw the September 2016 DIPP administrative Office Memorandum, which interprets the statutory license as extending to internet transmissions.
- Ensure the private use exception is compatible with the three-step test.
- Amend Section 52(1)(c) of the Copyright Act to ensure that only neutral service providers are eligible for the safe harbor provisions, and to ensure ISPs engage in takedown measures that have been demonstrated to be effective in preventing or restraining infringement.
- Ensure that the proposed draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018: (i) clarify that safe harbors apply only to services whose activities are of a technical, automatic and passive nature;

and (ii) do not, as currently proposed in the draft 2018 Rules, delete Rule 3(4) of the 2011 Rules, which provides for notice and takedown.

### 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.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national GST, and simplify compliance rules.
- Simplify the rules and procedures for cinema construction to encourage private operators to build cinemas nationwide.

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

**Digital Marketplace:** India is the second largest Internet market in the world. Under the government’s initiative (*Digital India*) to speed up Internet accessibility across the country, the current annual rate of growth is 8% to 9% with 512.26 million current users.<sup>4</sup> Increased Internet speeds and accessibility open opportunities for the creative industries to provide consumers in India with online access to even more copyrightable content. The shift to online consumption of content, and notably, the leap-frogging of Indian consumers to mobile (as opposed to fixed Internet access) has resulted in hundreds of unauthorized websites and services that offer unlicensed content, generating revenue from advertisements and subscriptions. Until blocked recently, torrent sites such as *thepiratebay.org* were among the most popular in India because torrents can be accessed without the need for higher speed Internet connections needed for streaming sites. Services offering higher Internet speed have resulted in the proliferation of illegal linking and video streaming sites, as well as stream-ripping websites such as *youtube-mp3*, which offer Internet users the ability to make free permanent downloads of music from streaming video services. The increased Internet speeds have also resulted in the growth of pre-release piracy of copyrighted content that is especially harmful to rights holders. Other means of accessing pirated motion picture and television content have also emerged around the world. Once such example, which has been an issue in India over the past several years, is Piracy Devices (PDs). PDs are devices that come pre-loaded with apps that allow users to access infringing content without authorization by circumventing subscription services and by other means.

Hosting sites, such as *Hostpalace* (whose main office is in India), are particularly problematic and, to date, have been immune from any law enforcement activity, even after rights holder complaints. *Hostpalace* should be a target for enforcement, which would also allow further investigations into the pirate services hosted on its servers. Other forms of piracy include mobile phone downloading on memory cards; SIM card pre-loading; and mobile apps. Some websites advertise a variety of apps to access infringing content. In 2018, 29 mobile apps were found to be distributing pirated content (which included U.S. and regional films and TV series), and 15 of these were found on unauthorized platforms such as *9apps*, *apkpure*, and *rawapk*. No action was taken against the apps. The video game industry reports that India remained fifth in the world in 2018 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 also placed first in the world when it comes to mobile infringement of games (up from second in 2017) and fifth when it comes to infringement of games for PCs.

**Unauthorized Camcording:** Video camcording incidents in India have declined since 2015. In 2018, there were two camcorded videos sourced to Indian theaters, down from ten in 2017. There were 23 illicit audio recordings sourced to Indian theaters last year, down from 36 in 2017. Most of the camcording in India is part of criminal operations and thus needs a criminal enforcement response. There have been arrests by some state enforcement authorities, but illegally camcorded copies of new releases sourced from Indian theaters continue to leak online, especially during opening weekends, which is very damaging to rights holders. This is why it is critical that the Government of India

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<sup>4</sup><https://traf.gov.in/sites/default/files/PIRJune03102018.pdf>.

follow through on its announced plans to pass the Cinematograph Bill, which will provide a new, welcomed remedy against the unauthorized camcording of movies. The Cinematograph Bill draft has been issued by the Government of India, and public comments were due February 2, 2019.

**Signal Theft:** The audiovisual industry continues to experience signal theft by cable operators, namely, illegal transmission/retransmission of broadcast signals by cable operators. Local industry stakeholders have filed several complaints across various Indian states, which led to several raids on the premises of cable operators and 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, initiation of new criminal prosecutions for copyright violations, and contempt of court proceedings are costly and time consuming.

**Unauthorized Book Copying:** Unauthorized commercial-scale photocopying<sup>5</sup> and unauthorized reprints of academic textbooks and professional books (for both the domestic and export markets) remain the primary piracy problems for the publishing industry in India. Market-specific, lower-priced editions of textbooks continue to be available in the domestic market and are also exported to more developed 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. Customs officials should be empowered to take *ex officio* actions with respect to illegal exports of lower priced textbooks (similar to how imports are addressed).

**Physical and Retail Piracy:** Although the growing focus of the copyright industries is on online piracy, physical and retail piracy continue in India in many forms, including: (i) on optical discs, mobile devices, and flash or pen drives (the “side loading” issue for the recording industry); (ii) unauthorized rental of motion pictures; and (iii) 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 piracy.

**Domain Registry Outreach:** Many of the pirate sites in India have *.in* country code domains. The NIXI, the agency in charge of the *.in* domain registrations and state-based enforcement units, can either suspend the *.in* domains, or cancel their registrations. The music and film industries have good cooperation with NIXI and MCDCU on this issue. In 2017, the Motion Picture Association (MPA) agreed to a voluntary arrangement with DIPP and NIXI to suspend infringing websites based on false *whois* information; it focused on domains in breach of statutory and contractual obligations to maintain accurate and complete *whois* information. This has led to disruption of dozens of websites in India and should be considered an additional enforcement tool to traditional enforcement or site blocking.<sup>6</sup> In addition, since 2017, the MCDCU has suspended 203 domains impacting approximately 160 million users accessing these sites per month. In conjunction with fighting to suspend these domains, convicting those involved in content theft is also under the MCDCU’s jurisdiction. The most notable case was that of *Game of Thrones*, Season 7, Episode 4, which leaked in India two days prior to its U.S. release. The unit promptly took action and made four arrests.

**Producers’ Rights:** The collection of public performance royalties by Phonographic Performance Ltd (PPL) had been problematic, as highlighted in a recent government report. Following PPL’s reorganization and application for an operating license, DIPP should re-register PPL as a collecting society to license public performance and broadcasting rights.

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<sup>5</sup>Unfortunately, the decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

<sup>6</sup>Since July 2017, MPA has reported 44 domains containing infringing content to NIXI. NIXI has so far suspended 36 out of the 44 domains with the help of registrars. Further, 26 domains reported by MCDCU have been suspended so far by NIXI. MCDCU’s actions are based on a state-level infringing website list (IWL); it sent an advisory to the 34 top Indian brands to refrain from advertising their services and products on these infringing websites. In 2018, the MCDCU set up an enforcement program. Actions include: (i) disrupting piracy operations by issuing notifications to domain registrars, web hosts, advertisers, and payment gateways; (ii) working with the Central Government on outreach to ISPs to encourage voluntarily blocking of infringing websites; and (iii) registering criminal cases against infringing websites. Because enforcement is a state issue, these initiatives should be replicated across other Indian states, including creating a national IWL list, and state laws against organized crimes should clearly cover films, television and over-the-top content, books, music, and video games.

**Standardizing State and National Enforcement Strategies:** In 2016, a National IPR Policy was announced by the DIPP, Ministry of Commerce and Industry, intending to provide a comprehensive federal plan for copyright protection and enforcement. While receiving support from rights holders (and the WIPO) for its plan, without proper implementation, no significant improvements will take place in the market and discrepancies in the handling of enforcement cases in India will continue.<sup>7</sup>

IIPA recommends the following implementation steps: (i) a focus on inter-state operations of organized crime units engaged in piracy and establishment of state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) the establishment of a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at online and mobile copyright infringements; (iii) the establishment of a centralized IP crime unit within the CBI Cyber Crime Detective Unit; and (iv) training prosecutors and police officers on the seriousness of IP offences, linkages to organized crime, and the importance of investigating up the chain.

India's Cell for IPR Promotion and Management (CIPAM) has done a noteworthy job thus far, but needs additional resources to expand its activities beyond educational programs and, in particular, to give CIPAM backing for broader interaction with state governments. Moreover, the NCETF should be unencumbered by usual jurisdictional enforcement boundaries, and instead permitted to collaborate across state lines to ensure proper enforcement. Thus far, two state-level crime units (the TIPCU in 2016 and the MCDCU in 2017) have been established to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, to address digital piracy problems.

**Criminal and Civil Enforcement Reforms:** In the past couple of years, the motion picture industry has brought cases against piracy websites, seeking no-fault injunctions against ISPs to disable access to such sites. In October 2017 and April 2018, the Delhi High Court ordered ISPs to block ten major piracy websites, including *thepiratebay*, *bmovies/fmovies*, *rarbg*, *yts*, *yify*, *extratorrent*, *1337x.to* and *torrentz2.eu*. The industry also impleaded the Department of Telecommunications (and the Ministry of Electronics and Information Technology (MeitY)) to ensure proper implementation of the blocking orders. The court orders apply to the entire websites, as opposed to only specific titles or events. Additionally, the orders allow the addition of variants (new domains directing to the same piracy websites, redirects or proxies or mirror sites) of the sites. These cases represent a positive precedent in India, and stand in sharp contrast to prior court decisions that ordered sites blocked temporarily to protect specific titles.

In other instances, unfortunately, some rights holders have had their civil claims dismissed, so as to deter them from initiating cases. Those rights holders report that some cases can take many years in the Indian court system, and they further report that there are problems with respect to retaining electronic evidence (and a lack of familiarity with the related evidentiary requirements). Additionally, they experience difficulty with enforcing civil court orders. Those industries also report that civil awards are most often wholly inadequate to compensate the rights holder for the harm or deter further infringing activity. Two ways Indian courts have tried to deal with backlogs are imposing high damage claim requirements and charging exorbitant court filing fees. This may have led to some relief in backlogs, but places huge burdens on rights holders who have legitimate claims; indeed, it is inappropriate for courts such as the Delhi High Court to charge excessive court filing fees when the relief sought is injunctive only. Finally, the Indian courts have not yet come to terms with electronic filing, thus archaically requiring thousands of pages of physical filings to be made, duplicated, and filed with the courts in person, with each page being individually signed. For copyright cases that may contain thousands of pages of evidence, the process of signing and filing the cases can take days. The Indian

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<sup>7</sup>For example, 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. A more detailed explanation of the enforcement issues some of our members face because of the lack of a national IPR policy can be found in the 2018 India report: <https://iipa.org/files/uploads/2018/02/2018SPEC301INDIA.pdf>.

courts should reform their requirements to 1) lower court filing fees; and 2) allow for electronic filings while dispensing with the need to sign each page.

Additionally, given the scope of the piracy challenges discussed above, the Government of India should prioritize online and mobile piracy cases and ensure appropriate 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 and organized cybercrime, commercial operations, the most proper approach is criminal enforcement. However, some rights holders find that criminal copyright cases in India generally do not yield effective and deterrent results. Further, 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 pirated 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 seized evidence is compromised, leading to acquittals. In plea bargains or even convictions, fines remain low and non-deterrent, and India lacks enhanced penalties for pre-release piracy. These experiences differ by region and across copyright industries, but overall, training and retaining a cadre of police officers for cybercrime investigations, as well as appointing properly trained IP judges and dedicated IP expert prosecutors and investigators, would be helpful.

## **TREATY OBLIGATIONS AND COPYRIGHT LAW REFORM**

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO TRIPS Agreement, and last year India acceded to the WIPO Internet Treaties. This is a very positive development that demonstrates the Government of India's willingness to make the political commitment needed to better protect copyright in the online space, but the priority now is for the government to make changes to the existing law to bring it into full compliance with the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, rights holders (including IIPA members) believe the current law falls short of full compliance in some respects, so efforts should be made to further strengthen the law. To fully implement the WIPO Internet Treaties, key changes to the Copyright Act of 1957, last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013) are needed, including: (i) clarifying the TPM circumvention provisions, plus implementing civil and criminal penalties applicable to acts of circumvention and trafficking in circumvention devices, components and services; and (ii) adopting definitions and sanctions for the unauthorized removal of RMI. Additionally, the extension of new compulsory licenses for foreign audiovisual works, favoring local broadcasters, as well as the extension of such licenses to the Internet, is of concern and is inconsistent with India's treaty obligations.

Regarding technological protection measures, Section 65A of the Copyright Act provides protection against circumvention of effective technological measures. The 2012 amendments intended to meet the minimum threshold requirements of the Internet Treaties were inadequate. Under current law, the phrase "effective technological measure" is undefined and, thus, does not expressly cover common technological protection measures, such as access controls. Moreover, the section fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices. This is a necessary enforcement measure against piracy organizations whether applicable to access or copy controls. Also, the current requirement of proof of a nexus between the circumvention and copyright infringement needs to be revised—it makes technological protection measures ineffective (and superfluous to infringement actions), which is inconsistent with the Internet Treaties. Section 65A makes circumvention a criminal offense, but excludes a civil cause of action and civil remedies. We suggest that civil causes of action also be included in the provision. 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 addition to the specific changes above related to compliance with the WIPO Internet Treaties, the Government of India should also: (i) repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum, withdraw the September 2016 Office Memorandum opining that Section 31D applies to all online transmissions; (ii) amend the term of protection to be consistent with international minimum standards; (iii) amend Section 52(1)(c) of the Copyright Act to bring it in line with international standards pertaining to transient copies and to clarify that the services eligible for "safe harbor" protection are those services whose activities are of a merely technical,

automatic and passive nature; and (iv) revise its law to ensure the private use exception is compatible with the Berne and WTO TRIPS three-step test.

**Administrative Website Blocking:** Currently, the industries have sought website blocking through the courts, with good successes to date, particularly, blocking ten major piracy websites in 2017 and 2018. A more expeditious and less-costly remedy may be possible if the Copyright Act is amended to allow for administrative blocking orders. Such a provision would allow the government to commence administrative actions based only on complaints by rights holders. To date, the federal government has been reluctant to take on this role. Currently, the recording industry has sought website blocking through the courts, but delays and backlogs have made this an ineffective remedy (injunctions can take years to obtain—current cases are scheduled for initial hearings in 2022). A more expeditious and less-costly remedy is needed. India is considering further amendments to the Copyright Act or the Information Technology Act (IT Act) (Section 69A) in order to obtain administrative *suo moto* action by the Government of India. Such a provision would allow the government to commence administrative actions based only on complaints by rights holders, which would include actions by various enforcement units (e.g., TPCU and MCDCU) without the need for costly and time-consuming judicial orders. To date, the federal government has been reluctant to take on this role; in its place, rights holders have to seek web-blocking orders from the courts. Unfortunately, ISPs have been unable to limit the reemergence of the blocked websites through proxy domains that use redirection, and some sites that were blocked for years on court orders, like *songs.pk*, have re-emerged, meaning the implementation of block orders by ISPs is ineffective.

**Statutory License for Broadcasting Under Section 31D of the Copyright Act and 2016 DIPP Office Memorandum:** Section 31D was enacted as part of the 2012 amendments to the Copyright Act. It created a statutory license for the use of musical works and sound recordings by broadcasting organizations “desirous of communicating to the public by way of a broadcast or by way of performance.” Section 13 of the Copyright Act treats sound recordings as objects of copyright protection and grants rights holders a number of exclusive rights, including in Section 14, for the act of “communicating the sound recording to the public.” However, Section 31D has reduced this exclusive nature of the broadcasting right to a remuneration right (requiring no authorization from a rights holder for a broadcast). The licensing rate for such activities is not determined by the rights holder, but instead 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.

As written, any broadcasting organization (radio or television) could apply to the Copyright Board for a statutory license, affecting the negotiating power of rights holders. Additionally, the rate fixed by the Copyright Board may not (and does not) reflect the market rate. India is globally ranked as the IFPI’s 19<sup>th</sup> market, but falls short on producer and performer revenues from broadcast music (for example, 32<sup>nd</sup> if judged by performance rights revenue). According to IFPI’s 2018 Global Music Report, the new regime for broadcast licensing has led to significant declines in broadcast licensing revenues. This happened despite the fact that the Indian broadcasting industry continued to grow during this period. Section 31D, gives rights holders no choice but to allow broadcasters to use their works, even though they have the exclusive property rights, and for very low revenue returns. Section 31D should be deleted and replaced with an exclusive right allowing for negotiations between rights holders and broadcasting organizations, and the Copyright Board’s jurisdiction should be limited to collective administration (and tariff challenges for such uses).

In 2016, the DIPP issued an Office Memorandum providing an interpretation of the Section 31D statutory licence that would seem to extend it, contrary to WCT and WPPT, and contrary to the express wording of Section 31D, to apply also to all internet transmissions of literary or musical works and sound recordings by any type of service provider. The Office Memorandum states that the statutory license in Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations.” Not only is this Office Memorandum incompatible with the legislative provision it seeks to interpret and with the treaties recently acceded to by India, but it also poses a major threat to the growth and sustainability of India’s digital music industry.

The Office Memorandum, while not legally binding, is harmful to the music industry and has created confusion in the market. As such, it should be withdrawn. It implies that this broad exception applicable to the exclusive broadcast



right also applies to any online transmissions of “literary or musical work[s] and sound recording[s].” Some prospective licensees have already sought to rely on the Office Memorandum to influence licensing negotiations and mischaracterize the relevant uses as “broadcasting.” It is also claimed that the Office Memorandum means interactive transmissions fall within the Section 31D statutory licence, which would contravene WCT and WPPT. India’s accession to the WCT and WPPT underlines the urgent need to withdraw the Office Memorandum.

**Term of Protection:** Under Section 27 of the Copyright Act, the term of copyright for sound recordings is 60 years from first publication for sound recordings. This is shorter than the U.S. term, or the 70 year term in the UK and the EU—which should serve as an international minimum standard.

**Clarification of the Safe Harbor Provisions:** There are safe harbor provisions in both the Copyright Act and the IT Act. Section 79 of the IT Act exempts from liability an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. Applicable conditions include that 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). At the time of writing, MeitY has released amendments to the IT Rules that give effect to the “due diligence” requirement for intermediaries under Section 79(2)(c) of the IT Act. 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. Section 79 of the IT Act is sufficient for some of the copyright industries. Others seek additional remedies and recommend the following amendments: (i) clarify that safe harbors apply only to services whose activities are of a technical, automatic and passive nature; and (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown but which is deleted in the present draft.

India should strengthen statutory provisions addressing online infringements to facilitate timely and effective enforcement against unlicensed content distribution, including requiring expeditious take down or disabling access to infringing content. 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, which is too long a period when dealing with online infringement, especially in cases of pre-release piracy. Additionally, the takedown mechanism in Section 52 of the Copyright Act essentially requires the rights holders to obtain an injunction, and Rule 75 of the Copyright Rules sets out cumbersome requirements for rights holders to comply with complaint notices. ISPs are generally cooperative 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. The Copyright Act should be amended to resolve these issues, but no amendments are currently pending.

**Data Protection White Paper:** In 2017, the MeitY issued a “White Paper on Data Protection framework for India.”<sup>8</sup> The stated objective of the review was to “ensure growth of the digital economy while keeping personal data of citizens secure and protected.” IIPA recommends that any data protection legislation arising from this consultation contain exceptions to allow IP rights holders to exercise their rights and to enforce their rights (in criminal and administrative actions), where retention of certain data of infringements is important for enforcement authorities. No known legislation is pending as a result of the white paper.

## **MARKET ACCESS ISSUES**

Market access barriers, especially in the motion picture and video game industries, have been a focus of attention, including during high level U.S. Government and Government of India meetings in October 2017. Those meetings were intended to highlight the need for India to liberalize its economy to facilitate foreign (U.S.) exports and focus on IPR protection, enforcement, and market access restrictions. Reducing these barriers allows for more

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<sup>8</sup><http://meity.gov.in/white-paper-data-protection-framework-india-public-comments-invited>.



legitimate material to be available to consumers, with a diversity of pricing and other terms. Some of the more egregious market access barriers in India include:

- The TRAI “must provide” rules in the pay-TV sector: These rules prohibit broadcasters from granting exclusive contracts to certain distributors and impose “must provide” channel programming requirements for any distributor who requests them on a non-discriminatory basis, thereby eliminating competition among distributors and defeating incentives to develop exclusive programming. A recent Supreme Court ruling confirmed that TRAI can direct what packages of channels are available, which is an impingement of rights holders’ abilities to fully exercise their commercial rights.
- Rate regulations: The TRAI tariffs mandate that broadcasters offer their pay channels on a stand-alone or a-la-carte basis, and specify that no pay channel, which is part of a package, be priced above INR 19 (US\$.27). The discount on a package of channels is capped at not less than 85% of the sum total of the individual channel prices.
- Foreign direct investment caps for radio and news and current affairs TV channels, as well as pre-approval requirements for investments in other broadcasters.
- Local body entertainment tax (LBET): In 2017, India rolled out a unified GST nationwide, applicable to the film value chain in different parts, based on a four-tier structure (5%, 12%, 18% and 28%). On December 22, 2018, the GST Council decided to cut the GST rate on cinema tickets effective January 1, 2019. All indirect taxes (including entertainment tax, service tax, and VAT) were subsumed into the GST—with one exception, the LBET. In 2018, two states—Madhya Pradesh and Tamil Nadu—introduced the LBET on top of the national GST, and accorded different rates of LBET depending on the language of the film, which is discriminatory and has significantly increased the costs of cinema tickets. India should eliminate the longstanding discriminatory ticket pricing for regional films versus films in other languages.
- 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), is too high and is harming sales of musical works and the development of the music industry.
- Price fixing on motion picture theater tickets in South India, as well as quotas on the number of screenings per title per day.
- Onerous regulations on the uplinks and downlinks 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 to 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 impractical and outdated regulations, contributing 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. In addition, India’s 29 states each have different regulations for cinema construction. This needs to be simplified to encourage private sector cinema construction.
- Conflicting jurisdiction: Broadcasters have been subjected to orders from the TRAI which conflict with the Copyright Act; the latter should supersede any TRAI or other agency rules.