

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** India plays an important role in the ongoing and future growth of the content creation and dissemination sectors, with its large population of consumers and its status as the second largest market worldwide for Internet services and smartphones. For both Indian and foreign based creative industries, however, the promise of continued growth is threatened by piracy, market access barriers, censorship of video game content, overbroad interpretations of statutory licenses for broadcasting musical works and sound recordings, criminal enforcement difficulties, inadequate term of protection, undue regulation of transfers of rights, overly broad exceptions as well as unclear exceptions which could undermine digital markets, and legal requirements that are out-of-step with technological developments. Strong copyright protection that is fully compliant with international standards and best practices is key to addressing many of these challenges and would transform India into a more engaging business environment for the creation and dissemination of content.

At this time, India's copyright legal framework is missing key provisions to comply with international treaties to which India has acceded, including, the Berne Convention, the Geneva Phonograms Convention, the World Trade Organization TRIPS Agreement, and the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties). IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties, including amendment of its existing provisions and remedies on technological protection measures which fall short of treaty requirements. IIPA also urges the Government of India to withdraw a problematic 2016 Department for the Promotion of Industry and Internal Trade (DPIIT) Office Memorandum concerning the scope of the existing statutory license for broadcasting literary or musical works and sound recordings in Section 31D of the Copyright Act.

In October 2020, the Indian government announced a review changes to potentially amend the Copyright Act of 1957, in part to take into account the COVID-19 pandemic. IIPA and its members submitted comments to the Registrar of Copyrights with specific recommendations based on India's international commitments to copyright protection and best practices. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that weaken copyright protection, purportedly, to respond to the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations on copyright protection. IIPA respectfully requests that USTR monitor this process closely and encourage India to pursue changes to its Copyright Act that comply with the country's international commitments and align the law with international good practices.

The Government of India, in combination with industry, continued to take significant steps in 2020 to improve judicial enforcement, notwithstanding ongoing piracy problems and remaining shortcomings in the criminal enforcement apparatus. In 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India in *UTV Software Communication Ltd. v. 1337x.TO et ors*. In a slate of follow-on cases in 2019 to present, including *Warner Bros. Entertainment Inc. v. Tamilrockers*, the courts have significantly improved upon this initial positive precedent. The Court's decision to issue "dynamic" orders that allow for the inclusion of additional domains accessing the site already blocked, and then to issue "doubly dynamic" orders to block additional domains even while the case is still being adjudicated, are examples of judicial measures that effectively address rapidly evolving

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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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



forms of piracy. The excellent results in the courts in 2019 and 2020 have resulted in disabling access to 155 sites and over 1,300 domains in India.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement**

- Strengthen and standardize the national IP enforcement regime through a central authority/ombudsman to coordinate with state-level enforcement units. Establish uniform, state-level cybercrime law and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.

### **Legislation**

- Ensure the recently announced open-ended review of copyright laws is used as an opportunity to shore up stronger protections for the online environment and does not result in the weakening of existing protections.
- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining technological protection measures (TPMs), ensuring sanctions apply to both acts of circumvention and trafficking in devices, software, components, and services that circumvent, and providing civil and criminal penalties; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Reject DPIIT's draft amendments to the Copyright Rules which would appear to broaden the Section 31D statutory license to all Internet transmissions of sound recordings and musical works in breach of India's obligations under WCT, WPPT and WTO TRIPS Agreement (TRIPS).
- Amend Section 52(1)(c) of the Copyright Act to clarify that: (i) service providers will attract secondary liability for copyright infringement if they have actual or constructive knowledge that they were facilitating copyright infringement and/or if they fail to remove the copyright infringing content expeditiously; (ii) only neutral and passive service providers are eligible for safe harbor protection; and (iii) Internet service providers (ISPs) are required to employ measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content.
- Ensure the private use exception is compatible with the three-step test.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, amend the definition of "broadcast" in the Copyright Act to align it with the WPPT definition and, at a minimum, withdraw the September 2016 administrative Office Memorandum from the DPIIT, which interprets the statutory license as extending to Internet transmissions.
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Repeal the exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers' and other rights holders' right of public performance in respect of "social festivities associated with a marriage".
- Enact the proposed Cinematograph Bill amendments that make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Ensure that copyright infringement offences in the Copyrights Act 1957 are not decriminalized as recommended in a June 2020 proposal.

### **Market Access**

- Simplify the rules and procedures for cinema construction.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national Good and Services Tax (GST), and simplify compliance rules.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.

- Eliminate the Telecom Regulatory Authority (TRAI) mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle, and therefore properly exercise their exclusive rights.
- Eliminate the proposed mandate on non-personal data sharing with government and business competitors that undermines content owners' ability to maintain high standards of data security and intellectual property rights, and severely disadvantages competition in the Indian market.
- Eliminate "must provide" requirements, which further hinder rights holders' ability to exercise their exclusive rights.
- Ease the prohibition on direct-to-home (DTH) operators from entering into exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.

## **THE DIGITAL MARKETPLACE IN INDIA**

By the end of October 2020, India reached 734.82 million broadband Internet subscribers.<sup>2</sup> After China, India is the second largest Internet market by number of users in the world. For instance, the use of licensed music streaming services grew by 25% in 2019 and encompassed over 70% of the overall revenues of the Indian recorded music market.<sup>3</sup> On the audiovisual front, it is estimated by KPMG that India will reach more than 500 million users of online video by 2023, positioning the country as the second largest market for Video-on-Demand (VOD) after China. It is also estimated that video will account for more than 77% of all Internet traffic in India by 2022.<sup>4</sup>

**Online piracy:** Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, video streaming and stream-ripping sites, many of which feature and profit from advertisements of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come pre-loaded with apps that allow users to circumvent subscription services to access infringing content. Through its different forms, online piracy is the greatest threat to the film, television and music industries in India, which rose 62% in March 2020 during the pandemic.<sup>5</sup>

The *Telegram* app, which has over 200 million users globally, has gained a huge following in India and has become a major conduit for pirated audiovisual content because it creates anonymous channels for members of unlimited size, and enables the sharing of files larger than 1GB. While the operators of *Telegram*, who are believed to be located in the United Arab Emirates, are somewhat responsive to rights holders' requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage operators to responsibly cooperate or face greater accountability. IIPA requests an explicit, stand-alone obligation to impose civil and criminal liability and penalties on app stores that sell or provide free-of-charge dedicated piracy apps that provide streaming and/or direct download access to titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable state-level enforcement units to take down infringing apps.

Recorded music piracy is a major issue in India. Despite considerable growth in use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Spotify*), music piracy rates are higher in India than in any other country worldwide except for China, according to IFPI's 2019 Music Consumer Survey. Two-thirds (67%) of Indian Internet users reported that they pirated music in the previous month. This percentage rises to 75% among 16-35 year olds. 63% of Internet users had downloaded pirated music through stream-ripping sites or apps in the previous month. Between June and August 2020, based on Muso data, there were 365 million visits to music piracy sites by Indian consumers. In the third quarter of 2020, the most popular traditional music pirate site, *pagalworld.mobi*, received more than 37 million visits from India; based on SimilarWeb data, the Tamil music piracy site *masstamilan.in* received more than 24 million visits from India; the most popular stream-ripping site,

<sup>2</sup>Telecommunications Regulatory Authority of India, Press Release 101/2020 (Dec. 23, 2020), [https://www.trai.gov.in/sites/default/files/PR\\_No.101of2020\\_0.pdf](https://www.trai.gov.in/sites/default/files/PR_No.101of2020_0.pdf).

<sup>3</sup>IFPI, 2020 Global Music Report 96.

<sup>4</sup>*India's Digital Future*, KPMG, August 2019, at <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>.

<sup>5</sup><https://www.livemint.com/news/india/india-sees-big-spike-in-film-piracy-post-covid-19-11589183182123.html>.

*Savefrom.net*, received over 58.4 million visits from India, which means that more people visit *Savefrom.net* from India than from any other country in the world. Other popular stream-ripping services include *y2mate.com* and *ytmp3.cc*, which received over 28 million and 18 million visits, respectively, during the same period.

For 2020, the video game industry reports that India remained fourth in the world (where it ranked during 2019) 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, as well as in infringement of games for the PC platform. India rose from fourth place in 2019 to second place in 2020 in infringement of games on mobile devices.

**Unauthorized Camcording** is an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were traced to Indian theaters. During 2020, the COVID-19 pandemic led to the wide scale closure of theaters in India. However, India is likely to remain a major provider of camcorded films once movie theaters re-open.

**Unauthorized Book Copying:** The publishing industry continues to be concerned with the unauthorized commercial scale photocopying<sup>6</sup> and unauthorized reprint of academic textbooks and professional books (for both the domestic and export markets). While India-only, lower priced editions of textbooks continue to be made available in the domestic market to meet domestic needs, these editions continue to be found in several developed markets around the world. 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).

**Other 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) optical discs, mobile devices, and flash or pen drives (the “side loading” issue for the recording industry); (ii) the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles; and (iii) unauthorized reproduction of textbooks (as noted above).

## **COPYRIGHT ENFORCEMENT IN INDIA**

Enforcement has improved over the past year in the area of judicial site blocking. Due to the COVID-19 pandemic, the courts have shifted to electronic filings and virtual hearings, which has greatly eased burdens previously imposed on rights holders (such as the old requirement to sign every page of pleadings, which could number in multiple 1,000s). In addition, the courts have expanded their reach incrementally, now blocking “proxy portal” sites used principally to circumvent site blocking orders. The data indicates these actions are having a positive impact in reducing traffic to piracy sites.

However, other enforcement against online piracy operators remains inadequate given the current scale of the problem, officers’ general lack of familiarity investigating and handling digital forensic evidence, and the sophisticated nature of the pirate criminal enterprises operating notorious piracy sites and services. Such piracy operations can evade enforcement with ease with the help of anonymizing software. Additionally, the prospect of seeking criminal enforcement for intellectual property violations is very daunting due to the absence of a centralized IP enforcement authority and the lack of effective inter-agency cooperation at the national level and across the country’s 28 states and nine Union Territories. For example, while criminal copyright infringement falls under a national criminal code, cybercrime enforcement and related proceedings fall upon the individual states. India needs to improve the coordination of its enforcement framework against criminal piracy syndicates.

IIPA recommends the following 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

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<sup>6</sup>Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

and CBI, that is overseen by DPIIT and directed at copyright infringement occurring online and on mobile devices; (iii) the establishment of a centralized IP crime unit within the Central Bureau of Investigation's Cyber Crime Detective Unit; and (iv) a focus on training prosecutors and police officers on the seriousness of IP offences and their links to organized crime.

**Civil Enforcement and Case Developments:** Significant positive developments occurred in 2019 for copyright protection through the courts in Delhi. In particular, in April 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. V. 1337x.TO*, the court issued “dynamic” orders that allowed for the inclusion of additional domains accessing the site already blocked. In July 2019, the same court decided *Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*, where it created a “doubly dynamic” system where domains can be added to a blocking order while a case is still being adjudicated. As a result of these decisions, and many new cases and “impleadments” (whereby additional domains resolving to the same rogue piracy sites are added to the orders), the audiovisual industry has blocked a total of 150 websites comprising 1,386 domains, which has caused a significant decrease in traffic to the blocked sites and overall piracy in India. In addition, on October 19, 2020, the operators of notorious pirate site *Tamilrockers* announced they would be shutting down the service, after many site blocking actions and a significant number of notices targeting this notorious piracy site.

**Domain Registry Outreach:** A few pirate sites in India, and many piracy sites around the world, employ the .in country code in their domains. Since 2017, the music and film industries had good cooperation with NIXI, the agency in charge of the .in domain registrations, and state-based enforcement units such as Maharashtra Cyber Digital Crime Unit (MCDU), to suspend the .in domains, and registrars like *GoDaddy* were cooperative in cancelling their registrations based on false or fraudulent Whois data. Unfortunately, in 2020, NIXI determined it would cease domain suspensions. The current unavailability of timely and accurate Whois data, which has resulted from the Internet Corporation for Assigned Names and Numbers' (ICANN's) overbroad interpretation of the European General Data Protection Regulation (GDPR) led to NIXI's decision to cease domain suspensions, so these global and regional developments are now taking their toll on enforcement efforts in India.

**Collective Management of Producers' “Performance” Rights:** Following Phonographic Performance Limited India's (PPL) reorganization and application for an operating license, DPIIT should re-register PPL as a collecting society to license public performance and broadcasting rights without further delay.

## **COPYRIGHT LEGISLATION AND REGULATION IN INDIA**

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and, as of September 25, 2018, the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, IIPA members believe the current law falls short of full compliance in some respects.

In October 2020, the Indian government announced an open-ended process to review whether changes should be made to the Copyright Act, 1957, in light of the COVID-19 pandemic. IIPA submitted comments to the Registrar of Copyrights with specific recommendations. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that would weaken copyright protection, purportedly, to respond to exigencies of the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations and best practices on copyright protection. IIPA urges USTR to monitor this process closely and encourage India to ensure that any changes to its Copyright Act comply with the country's international commitments.

To fully implement the WIPO Internet Treaties and to align with international best practices, 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:

- Section 52(1)(c)
  - Clarify that service providers will attract secondary liability for copyright infringement if they had actual or constructive knowledge that they were facilitating copyright infringement and/or if they fail to remove the copyright infringing content expeditiously;
  - Require ISPs to employ measures that have been demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content;
  - Clarify that the term “person” in this Section includes ISPs;
  - Eliminate the requirement that rights holders obtain an injunctive court order to prevent infringing content from being reinstated within 21 days of submitting a notice of infringement; and
  - Amend Rule 75 sub-rule (3), (Chapter XIV) giving intermediaries 36 hours to take down content in line with recommendations to more effectively address the speed of distribution of illegitimate content online.
- Section 65A—WCT Article 11 and companion language in WPPT Article 18, require Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.” These articles establish a right against unauthorized access that is independent from acts of traditional copyright infringement. To fully comply with these requirements, the following amendments are necessary:
  - Define the phrase “effective technological measure” to expressly cover common TPMs, such as access and copy controls;
  - Expressly prohibit the manufacturing, importing, trafficking and dealing in circumvention devices and software, as well as the provision of circumvention services;
  - Establish civil *and* criminal sanctions for acts of circumvention, trafficking in circumvention devices and software, and offering circumvention services;
  - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
  - Narrow the scope of exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act”; and
  - Adopt definitions and sanctions for the unauthorized removal of RMI.
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission is not an infringement of copyright. Similar or equivalent provisions in other jurisdictions are narrower and IIPA urges the Government of India to emulate similar limitations. For instance, the exception should require the stored copy to be only temporary, that the copying does not have independent economic significance, and that the sole purpose of the reproduction is to enable transmission in a network between third parties. These safeguards would prevent benefitting infringing services or those seeking to avoid fair licensing terms.
- Section 31D—In 2012, this section created a statutory license for the use of literary and musical works and sound recordings for *radio* and *television* broadcasting. Following the 2012 revision to the Copyright Act, the Government of India published a DIPP Office Memorandum in 2016 (now DPIIT), which interprets the Section 31D statutory license as extending to Internet transmissions. The 2016 Office Memorandum is, however, inconsistent with the Copyright Act, the 2012 revision of the Act, relevant international copyright agreements (notably WCT and WPPT), as well as U.S. law. The text of the law and legislative history are clear that Section 31D is limited to radio and television broadcasting and was not intended to extend to Internet transmissions. Indeed, this was confirmed by the Mumbai High Court in 2019 in its judgment in *Tips Industries v. Wynk Ltd. & Anr.*<sup>7</sup> Despite this ruling, the DPIIT persisted in its interpretation, subsequently publishing draft amendments to the Copyright Rules, which sought to enshrine the DPIIT’s interpretation of Section 31D in secondary legislation, despite its incompatibility with the

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<sup>7</sup>There are several ongoing cases on the applicability of the Section 31D statutory broadcast license to Internet music download and streaming services. In addition to *Tips Industries v. Wynk Ltd. & Anr.*, which is currently on appeal, *Warner Chappell v. Spotify* is pending before the Mumbai High Court, and *Radio Next Webcastion Pvt. Ltd. v. Union of India and Anr.* is pending before the Intellectual Property Appellate Board.

WPPT definition of “broadcasting”,<sup>8</sup> the three-step test,<sup>9</sup> India’s own Copyright Act, and the Government of India’s position before WIPO that broadcasts do not encompass internet transmissions.<sup>10</sup> IIPA recommends the following measures:

- Withdraw the section 31D statutory license altogether to allow rights holders freely to license their rights;
- At a minimum, withdraw the September 2016 administrative Office Memorandum from the DPIIT, that interprets this statutory license as extending to Internet transmissions; and
- Reject DPIIT’s draft amendments to the Copyright Rules, and attempts to amend the Copyright Act, which would appear to broaden the Section 31D statutory license to Internet transmissions.
- Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings from 60 to 70 years accordingly.
- Section 39A—Eliminate the over-regulation of private contracts involving sound recordings. This Section appears to impose contractual limitations for authors established in Sections 18 and 19 on the ability of performers to decide the terms on which to license or transfer their exclusive rights in sound recording agreements. These limitations result in unreasonable changes to established practices in the recording industry. Section 39A does make clear that Sections 18 and 19 shall be applied to performers’ rights “with necessary adaptations and modifications.” Such “adaptations and modifications” should remove any restrictions on the transfer of performers’ rights in sound recording agreements.
- Section 52(1)(a)—Ensure the private use exception is compatible with the aforementioned three-step test codified in the Berne and TRIPS agreements and the WIPO Internet Treaties.
- Repeal the unjustifiable exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers’ and other right holders’ right of public performance in respect of “social festivities associated with a marriage”. Although it is not uncommon for national laws to include limited exceptions for the use of certain copyright works in religious ceremonies, this exception extends to purely social functions, which are customarily subject to the public performance right.
- Enact proposed Cinematograph Bill amendments that would make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility. This would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

Additionally, IIPA urges India to clarify the scope and interplay of the exceptions in sections 52(1)(b) and (c) in the Copyright Act and the IT Act, to prevent legal uncertainty and loopholes in copyright enforcement. 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. To ensure a stronger framework, IIPA recommends the following amendments: (i) clarify that safe harbors apply only to ISPs whose activities are of a neutral and passive nature; (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown; (iii) expressly include infringement of intellectual property rights as one of the grounds for intermediaries to remove or disable access to certain contents; (iv) make clear that the obligation to deploy automated tools to identify and remove unlawful content under proposed Rule 3(9) extends to copyright infringing content; (v) require service providers to adopt and effectively implement a repeat infringer policy; and (vi) introduce a penalty provision to give teeth to Rule 3 of the pending draft *Information Technology [Intermediaries Guidelines (Amendment) Rules] 2019*.

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<sup>8</sup>WPPT, Article 2 (“broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;...) (emphasis added).

<sup>9</sup>All limitations to the exclusive rights of a copyright owner, including the exclusive making available right applying to all interactive online transmissions, must comply with the three-step-test as established in various treaties. See, e.g., WCT Art. 10 (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”). Section 31D, as interpreted by the Department for the Promotion of Industry and Internal Trade (DPIIT) does not comply with the three- step test because it would not be limited to certain special cases and it would conflict with the normal exploitation of sound recordings.

<sup>10</sup>WIPO Report SCCR/23/10, paragraph 639 (2011).

**Draft National e-Commerce Policy:** In July 2020, DPIIT released a Draft National e-Commerce Policy for stakeholder comment. It is unclear whether any legislative proposals will materialize based on this draft Policy. Nevertheless, IIPA suggests this should be an opportunity to meaningfully improve online copyright enforcement. While the objectives of the policy are laudable, and the draft Policy document mentions certain anti-piracy measures to address online distribution of pirated content, piracy in the online environment should be addressed more effectively. In particular, the proposed draft Policy should: (i) limit safe harbor protection to ISPs that are passive and neutral; (ii) require ISPs to implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content; and (iii) enable consultation among industry stakeholders, including creative industries, to make determinations on “Trusted Entities” (whose complaints are resolved on a priority basis by ISPs) rather than leaving such decisions to the sole discretion of ISPs as provided under the existing draft.

**Proposed Decriminalization of Copyright Infringement Offenses:** In June 2020, the DPIIT proposed decriminalization of copyright infringement offences in the Copyright Act 1957. This proposal should be rejected because it would weaken copyright protection, remove an important deterrent for copyright infringers, disincentivize investment in the creative industries and run counter to India’s TRIPS obligations. IIPA urges India to abandon this proposal.

## **MARKET ACCESS ISSUES IN INDIA**

The negative economic effects of market access barriers in India cannot be underestimated. Some of the more egregious market access barriers for IIPA members in 2020 include:

**Foreign Direct Investment Caps:** Although India, in recent years, has raised the foreign direct investment (FDI) cap for Indian television news channels from 26% to 49%, FDI above 49% for news channels requires government approval. Further, FDI in digital news sites is still restricted to the earlier limit of 26%. However, 100% of FDI is allowed in non-news channels with government approval.

**Local Body Entertainment Tax:** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. However, LBET collected by state governments have been left out of the GST, prompting state governments (Madhya Pradesh, Tamil Nadu, and Kerala) to attempt to tax entertainment products over and above GST. Local body taxes significantly increase the tax cost for exhibitors and work against the principle of “One Nation, One Tax” and the intent of the GST model, i.e., to remove a multiplicity of high taxes. IIPA urges India to subsume all local taxes into the national GST system.

**Tariffs:** 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.

**Bill on the Registration of Press and Periodicals:** Introduced in November 2019, this bill may have detrimental implications for U.S. journal and book publishers operating in India or seeking to enter the Indian market. The bill would require printing press owners, as well as periodical publishers, to register and obtain a Certification of Registration from the Press Registrar General before engaging in any kind of publication, subject to a penalty of INR 50,000 (around US\$700). The bill is unnecessarily broad in scope and could potentially apply to all print and digital publications—regardless of whether they were published in India. The bill is replete with undefined requirements that would make it difficult for press and periodical publishers to navigate. For instance, the bill does not clearly identify the criteria on which decisions on registration will be made, or the factors that would adjudge an applicant press or publication eligible for registration.

**Mandatory Sharing of Non-Personal Data:** In July 2020, the Expert Committee on Non-Personal Data under the Ministry of Electronics and IT released a report proposing to require the sharing of “non-personal data” with the



Government of India and business competitors in India. Such proposal raises serious concerns regarding content owners' ability to maintain high standards of data security in India, severely disadvantages competition in the Indian market, and has the potential to undermine intellectual property rights if copyrighted materials are not expressly exempted.