

September 3, 2021

VIA Email To: Bikram.87@gov.in and ipr7-dipp@gov.in

Mr. Arunesh Kumar Singh
Section Officer
Government of India
Ministry of Commerce & Industry
Department for Promotion of Industry and Internal Trade
Udyog Bhavan, New Delhi-110 011

RE: IIPA Comments on India's Review of the Intellectual Property Rights Regime in India by the Department Related Parliamentary Standing Committee (DRPSC)

Dear Mr. Singh:

The International Intellectual Property Alliance (IIPA), formed in 1984, is a private sector coalition of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).¹

India plays an important role in the ongoing and future growth of the content creation and dissemination sectors, with its growing population of consumers and its status as the second largest market worldwide for Internet services and smartphones. IIPA appreciates the opportunity to provide comments to the Government of India on its review of the intellectual property rights regime in India, and specifically on the Department Related Parliamentary Standing Committee on Commerce (DRPSC) recommendation to amend Section 31D of the Copyright Act 1957 as last amended in 2012 (the "Copyright Act"). The issues and concerns raised by the IIPA are critical to the rights of creators and producers of copyright-protected works. In this regard, IIPA recalls its previous comments entitled *IIPA Written Comments Regarding Amendments to India's Copyright Act of 1957 (as amended in 2012)* that it submitted on November 23, 2020, to Government of India in response to its request for comments on potential amendments to India's Copyright Act (attached).

¹ Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services, as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

IIPA Comments on Section 31D

IIPA urges the Government of India to reject the DRPSCC's recommendation to amend Section 31D of the Copyright Act to incorporate "internet or digital broadcasters" within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings, which is established in that Section. In addition to rejecting the DRPSCC's recommendation, IIPA also calls on the Government of India to withdraw the problematic 2016 Office Memorandum prepared by the Department of Industrial Policy and Promotion (i.e., the precursor to the Department for Promotion of Industry and Internal Trade (DPIIT)) concerning the scope of the existing statutory license for broadcasting literary or musical works and sound recordings in Section 31D of the Copyright Act. IIPA asks the Government of India to bring legal certainty to this issue by committing that it will not extend the Section 31D statutory license to interactive Internet transmissions.

In 2012, Section 31D of the Copyright Act created a statutory license for the use of musical works and sound recordings for radio and television broadcasting. Following the 2012 revision to the Copyright Act, the Department of Industrial Policy & Promotion drafted a 2016 Office Memorandum that sought to extend the Section 31D statutory license to Internet transmissions. The 2016 Office Memorandum, however, is inconsistent with the Copyright Act, the 2012 revision of the Act, and relevant international copyright agreements. For many of these same reasons, amending Section 31D to include over-the-top platforms, music apps, or other making available of works over the Internet under the scope of the statutory license would be a mistake.

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. The Bombay High Court has held that the 2016 Office Memorandum went too far and that Section 31D applies only to television and radio broadcasting and not Internet transmissions.²

In addition, the proposal to amend the Copyright Act is inconsistent with India's obligations under the World Intellectual Property Office (WIPO) Copyright Treaty (WCT), the WIPO Performers and Phonograms Treaty (WPPT), and World Trade Organization (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement). Under the WPPT, for example, the definition of "broadcasting" clearly excludes Internet transmissions. The WPPT defines broadcasting as "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."³ The Guide to the Copyright and Related Rights Treaties Administered by WIPO (Publ. No. 891) clearly explains that:

² See *Tips Industries Ltd. vs. Wynk Music Ltd. & Anr.*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, Bombay High Court (April 23, 2019).

³ WIPO Performances and Phonograms Treaty, Article 2(f).

“Broadcasting” is communication of a work or an object of related rights to the public by wireless transmission. It covers both terrestrial broadcasting and satellite broadcasting. “Broadcasting” is not to be understood as including interactive making available of works and objects of related rights over computer networks (where the time and place of reception may be individually chosen by members of the public).⁴

The Government of India’s delegation to WIPO has consistently confirmed this understanding of the definition of “broadcasting.” For example, in the context of the draft WIPO Broadcasting Treaty, the Delegation of India to the Standing Committee on Copyright and Related Rights has repeatedly requested that the definition of “broadcasting” be limited to “broadcasting” in the traditional sense and that the term exclude signal casting and webcasting.⁵ According to the official report of one such SCCR meeting, the Delegation of India stated:

On the proposed WIPO treaty on the protection of broadcasting organizations, India reiterated its commitment to comply with the signal-based approach towards developing an international treaty to update the protection of broadcasting and cablecasting organizations in the traditional sense, consistent with the 2007 General Assembly mandate which was agreed during the 22nd session of the SCCR. India opposed any attempt to amend the above mandate of the 2007 mandate of the General Assembly to include retransmission over computer networks or retransmission over any other platforms, because those activities were not broadcasting at all in the traditional sense.⁶

The proposed amendment to Section 31D would thus run contradictory to the Indian Government’s clear position at WIPO.

Moreover, the recommendation to extend the Section 31D statutory license to cover interactive Internet transmission is incompatible with India’s obligation under the WCT and the WPPT by denying rightsholders the exclusive right to make available to the public their content. Article 8 of the WCT guarantees that:

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.⁷

Likewise, Article 14 of the WPPT provides that:

[p]roducers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that

⁴ Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 270.

⁵ See paras. 59 and 261 of the Report SCCR/22/18 (2011); para. 37 of the Report SCCR/32/5.

⁶ Report SCCR/23/10, para. 26.

⁷ World Intellectual Property Office (WIPO) Copyright Treaty (WCT), Article 8.

Record producers are most fairly compensated through market-based negotiations consistent with exclusive rights conferred by copyright, without government intervention. Voluntary licensing of music in the free market best ensures audiences continue to have a wide range of music to enjoy. The proposed amendment to Section 31D would deprive copyright holders of their exclusive right in contravention of WCT and WPPT obligations, and instead provide only a right of remuneration in violation of those treaties.

Article 31D of the Copyright Act is a statutory license. As such, it is a limitation under copyright law and must comply with the three-step test in the TRIPS Agreement, among other international treaties. For example, Article 13 of the TRIPS Agreement provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”⁹ Article 13 applies to exceptions and limitations to any of the “exclusive rights” associated with copyright. The proposed amendment to Article 31D would expand this limitation from television and radio transmissions that communicate to the public or perform a literary or musical work and sound recording to Internet transmissions. The nature of those Internet transmissions, however, goes beyond the nature of traditional television and radio broadcasting and do not represent a “special case,” and instead would extend the proposed limitation broadly to cover the exclusive making available right with respect to literary or musical works and sound recordings. The proposal to expand the statute would also “unreasonably prejudice the legitimate interests” of right holders.

Finally, the proposed amendment would not achieve the DRPSCC’s stated purpose. According to Section 14.8(ii) of its report entitled *Review of the Intellectual Property Rights Regime in India* (dated July 23, 2021), the DRPSCC concludes that that amendment would “ensure a level playing field by making content accessible on similar terms to both traditional and internet broadcasters alike.” In fact, the proposed amendment would have the opposite effect and create vast and profoundly negative consequences for India’s creative sector and digital economy.

First, the proposed amendment would not create a level playing field between traditional broadcasters and Internet platforms, and instead would profoundly disadvantage the former with respect to the latter. Internet platforms already benefit tremendously from economies of scale, technological advantages, and other asymmetries. This proposal would serve only to increase those disparities by subsidizing Internet platforms that are already doing very well.

Second, the proposed amendment eliminates the level playing field that exclusive copyrights create between Internet platforms and creators in India. With their exclusive rights, copyright holders and Internet platforms come to mutual agreement on commercial terms. Under the proposed amendment, creators in India would lose that parity and, by being deprived of their rights, would be placed on a profoundly lesser footing vis-à-vis those platforms. In the end, this proposal serves only the platforms at the considerable expense of creators, consumers, and the economy of India.

⁹ *Id.*

Therefore, we recommend the following measures:

- Reject the DRPSCC’s recommendation to amend Section 31D of the Copyright Act to incorporate “internet or digital broadcasters” within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings
- Officially withdraw the September 2016 administrative Office Memorandum that interprets this statutory license as extending to Internet transmissions; and,
- Commit to not extending the Section 31D statutory license to interactive Internet transmissions.

Thank you for your consideration of our comments. Please contact us if you have any additional questions.

Best regards,

Linda Quigley

Linda Quigley
Director for Policy and Legal Affairs
International Intellectual Property Alliance

ATTACHMENT

November 23, 2020

Via Email: registrar.copyrights@gov.in

Shri Hoshiar Singh, ITS
Registrar of Copyrights
Copyright Office
Department for Promotion of Industry and Internal Trade
Ministry of Commerce and Industry
Boudhik Sampada Bhawan,
Plot No. 32, Sector 14, Dwarka,
New Delhi-110078
India

Re: *IIPA Written Comments Regarding Amendments to India's Copyright Act of 1957 (as amended in 2012)*

Dear Mr. Singh:

Thank you for the opportunity to comment on potential amendments to India's Copyright Act of 1957 (as amended in 2012).

The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).¹

India plays an important role in the ongoing and future growth of the content creation and dissemination sectors, with its growing 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 growth is threatened by piracy, market access barriers, censorship of video game content, overbroad interpretations of statutory licenses for

¹Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to DCs and vinyl) for streaming and other online services, as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

broadcasting musical works and sound recordings, criminal enforcement difficulties and legal requirements that are out-of-step with technological developments. Copyright protection that is strong and 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 that need to be enacted to comply with international treaties, including, the Berne Convention, the Geneva Phonograms Convention, the World Trade Organization TRIPS Agreement, and, as of September 25, 2018, the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties).

The following amendments to India's Copyright Act would ensure compliance with the country's international obligations and current international standards of protection on technical protection measures (TPMs), Internet platform liability, and term, among others:

1. Section 52(1)(c)
 - a. Clarify that Internet service providers (ISPs) eligible for "safe harbor" protection are only those who carry out neutral and passive activities, and have no knowledge or control of the material posted;
 - b. 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;
 - c. Clarify that the term "person" in this Section includes ISPs; and,
 - d. 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.
2. 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:
 - a. Define the phrase "effective technological measure" to expressly cover common TPMs, such as access controls;
 - b. Expressly prohibit the manufacturing, importing, trafficking and dealing in circumvention devices as well as the provision of circumvention services;

- c. Establish civil *and* criminal sanctions for acts of circumvention, trafficking in circumvention devices and offering circumvention services;
 - d. Eliminate requirement of proof of a nexus between an act of circumvention and copyright infringement;
 - e. 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,
 - f. Adopt definitions and sanctions for the unauthorized removal of rights management information (RMI).
3. Section 31D – In 2012, this section created a statutory license for the use of 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 seeks to extend the Section 31D statutory license to Internet transmissions. The 2016 Office Memorandum is, however, inconsistent with the Copyright Act, the 2012 revision of the Act, relevant international copyright agreements 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. In addition, the 2016 Office Memorandum is inconsistent with international copyright law. For example, the World Intellectual Property Guide to the Copyright and Related Rights Treaties (Publ. No. 891) clearly limits broadcasting to exclude interactive making available of works and objects of related rights over computer networks, which the Government of India’s delegation to WIPO has consistently confirmed. Moreover, the statutory license proposed in the 2016 Office Memorandum is incompatible with India’s obligation under the WIPO Performances and Phonograms Treaty (WPPT) that obliges contracting states to grant record producers an exclusive right for the interactive making available of sound recordings. We recommend the following measures:
 - a. Withdraw the September 2016 administrative Office Memorandum from the Department for the Promotion of Industry and Internal Trade (DPIIT), that interprets this statutory license as extending to Internet transmissions; and,
 - b. 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.
4. 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.
5. 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.

6. 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 camcording.
7. Introduce necessary amendments to enable administrative *suo motu* action by the Ministry of Communication and Information Technology's Computer Emergency Response Team (CERT) to disable access to structurally infringing websites without prompting by judicial orders.

Before concluding, we would like to point out that the global health crisis unleashed by the COVID-19 pandemic has not eroded the need for strong copyright protection. All creative industries have adapted and responded to the crisis by making available more online resources for both distance learning and entertainment. In the age of COVID-19, copyright protection continues to incentivize the investment in the creation and dissemination of high-quality creative content. We urge India to resist any calls to introduce amendments to the Copyright Act that weaken copyright protection in light of the ongoing pandemic.

Thank you again for the opportunity to submit these brief comments. Please do not hesitate to reach out with any questions. We look forward to being of any assistance.

Respectfully submitted,

/Sofia Castillo/

Sofia Castillo, Counsel

International Intellectual Property Alliance