

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2023.¹

Executive Summary: India plays an important role in the growth of the creative content industries, with its large population of users and status as the second largest market in the world for Internet services and smartphones.² For both Indian and foreign-based creative industries, however, the promise of continued growth is threatened by piracy; an inadequate online liability framework; market access barriers; attempts to expand statutory licenses for broadcasting of literary and musical works and sound recordings to include Internet transmissions; criminal enforcement difficulties; inadequate term of protection; collective management issues and sub-par tariffs; and broad and unclear exceptions to copyright protection. India needs to consider strong copyright protection and enforcement that meets international standards and best practices, as well as effective legal remedies against the circumvention of effective technological protection measures (TPMs), which combined would help address many of these challenges and could transform India into a more engaging business environment for the creation and dissemination of copyrighted works.

India's copyright legal framework is missing key provisions, including with respect to TPMs that are crucial protections under the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties).³ IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties. IIPA also urges the Government of India to reform its online liability framework concerning infringing content, including to limit its overbroad safe harbors and to clarify the responsibilities of services eligible for them. This should be prioritized, particularly if India proceeds with its proposed Digital India Act, to ensure that online services cannot exploit opportunities created by the existing law to evade liability, disincentivizing them from seeking licenses from rights holders.

Regarding India's review of the Copyright Act of 1957, IIPA respectfully requests that USTR continue to monitor this process closely and to encourage India to pursue changes to its Copyright Act that comport with the country's international commitments and align the law with international best practices. IIPA greatly appreciates the U.S. Government's engagement with India regarding the highly concerning proposal to amend Section 31D of the Copyright Act to impose a statutory licensing system on Internet transmissions and welcomes the continued engagement of the United States to urge the Government of India to reject any attempt to impose a statutory licensing system on Internet transmissions. The uncertainty caused by this proposal will undermine the creative market in India and should be affirmatively rejected.

Criminal enforcement against Internet piracy continues to be challenging at both the national and state levels. The last major government study on piracy, published in 2010 by the Ministry of Information & Broadcasting (MIB) "Committee on Piracy," concluded that "piracy is low in terms of priority in the radar of law enforcement agencies" compared to other serious crimes.⁴ It would appear that little has changed since this MIB report. A number of India-based piracy services have become global exporters of pirated content, such as the hosting service *DoodStream* which,

¹ 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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

² CNA, *India's smartphone shipments drop 10% in Q3 as prices hit record* – IDC, November 14, 2022, available at <https://www.channelnewsasia.com/business/indias-smartphone-shipments-drop-10-q3-prices-hit-record-idc-3070631>.

³ India is also party to and obligated to comply with the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement and is negotiating a free trade agreement with the UK, which it is hoped will impose more disciplines, especially in the area of enforcement.

⁴ Arpan Banerjee, Cardozo Arts & Entertainment, Vol. 34, p. 609, *Copyright Piracy and the Indian Film Industry: A "Realist" Assessment*, available at <http://www.cardozoaeji.com/wp-content/uploads/2016/08/BANERJEE-ARTICLE.pdf> (citing Committee on Piracy, *Report of the Committee on Piracy*, p. 14 (2010)).

according to SimilarWeb, had 137 million visits in November 2022 alone. In addition, audiovisual rights holders continue to face challenges from pirate infrastructure providers that provide unauthorized turnkey solutions (Piracy-as-a-Service (PaaS)) to would-be pirate operators, such as *WHMCS Smarters*. While criminal enforcement in India is lacking, judicial enforcement, particularly through the Delhi High Court, has been successful. The seminal 2019 Delhi High Court decision in *UTV Software Communication Ltd. v 1337x.To and Ors.*⁵ established permanent site blocking in India against flagrantly infringing “rogue” piracy sites. Later decisions following this precedent led to the closure of the notorious piracy site *Tamilrockers*, although *TamilBlasters*, *StreamBlasters*, and *TamilMV* have filled the void. In 2022, industry secured the first “pirate brand” order by which a site can be blocked based on the use of the same name or branding, and the first cyberlocker blocking order targeting the locker *mixdrop*. Orders are issued quickly and are “dynamic,” meaning that subsequent iterations of the same piracy service can likewise be blocked quickly and efficiently, and “doubly-dynamic” meaning new domains discovered prior to the final disposition of a case can be added to orders.

In recent months, there have been encouraging landmark judicial decisions. The Delhi High Court, in *Neetu Sing v Telegram* (2022), directed *Telegram* to disclose information about uploaders of pirated content. Moreover, a recent Supreme Court decision found that the crime of copyright infringement (or abetting copyright infringement) is a cognizable and non-bailable offense.⁶ However, with copyright infringement remaining a low priority, the greater challenge involves investigation and arrest, rather than bail. IIPA urges the Indian government to better prioritize intellectual property (IP) crimes in addition to mobilizing to address these middleware services and other PaaS actors and to modernize its laws on secondary liability, knowledge, and constructive knowledge.

PRIORITY ACTIONS REQUESTED IN 2023

Enforcement

- Strengthen and standardize the national IP enforcement regime through a national central authority to coordinate with state-level enforcement units.
- Establish uniform, state-level cybercrime law (to include IP crimes) and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.
- Encourage greater cooperation and cross-training between national and state law enforcement agencies and the creative industries.
- Resume the suspension of the use of domains if based on false or fraudulent Whois information by the National Internet Exchange of India (NIXI).

Legislation

- Reject the proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings and musical works, as well as literary works, in breach of India’s obligations under the WCT, WPPT, and WTO TRIPS Agreement, and reject the 2016 Office Memorandum erroneously interpreting the current provision to include such transmissions.
- Ensure any ongoing review of copyright law and legislation relating to online liability is used as an opportunity to bolster IP protections for the online environment and does not result in the weakening of existing protections.
- Reform the Information Technology Act, 2000 (IT Act), particularly if India proceeds with its proposed Digital India Act, to:

⁵ *UTV Software Communication Ltd. v 1337x.To et Ors*, April 10, 2019, available at https://indiankanoon.org/doc/47479491/?_cf_chl_tk=2Fw0s2GRI5l_czPzh7h1hTkdcT9UJiFPxl_uWUJe3Hq-1674682018-0-gaNycGzNCqU.

⁶ *M/s Knit Pro International v The State of NCT of Delhi & Anr.*, Criminal Appeal No. 807 of 2022, Sup. Ct. India, May 20, 2022, available at <https://indiankanoon.org/doc/180042115/>.

- amend Section 79 to limit its overbroad safe harbors and to clarify the responsibilities of services eligible for them, (i) ensuring that there is a clear legal basis for the liability of active online services, (ii) clarifying that safe harbors apply only to passive and neutral intermediaries that do not contribute to infringing activities, and (iii) setting out the responsibilities of services eligible for safe harbors, including an obligation on hosting service providers to remove infringing content expeditiously; and
- encourage all relevant intermediaries to implement “know your business customer” (KYBC) policies to ensure they keep up-to-date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.
- Amend the Copyright Act to fully comply with the WIPO Internet Treaties by appropriately defining TPMs, ensuring sanctions apply to both acts of circumvention and to trafficking in devices, software, components, and services that circumvent, and providing civil and criminal penalties for violating TPM provisions.
- Amend the Copyright Act to narrow the scope of Section 52(1)(b) and (c).
- Amend the Copyright Act to provide measures demonstrated effective in preventing or restraining infringement.
- Ensure the private or personal use exception under Section 52(1)(a)(i) is compatible with the three-step test.
- 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 the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.”
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Increase the term of protection for works and sound recordings.
- Enact the proposed Cinematograph Amendment Bill, 2019, that will 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 or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Encourage all relevant intermediaries to implement KYBC policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.

Market Access

- Eliminate local body entertainment taxes (LBET) imposed over and above national Good and Services Tax (GST).
- Eliminate high tariffs on video game software and hardware.
- Remove revisional powers of the central government in the proposed Cinematograph Bill amendments that would give the central government the authority to re-examine any certified film that has a valid certificate from the Central Board of Film Certification (CBFC) under Article 19(2) of the Constitution of India.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.

THE DIGITAL MARKETPLACE IN INDIA

By the end of September 2021, India reached 794.88 million broadband Internet subscribers.⁷ After China, India is the second largest Internet market by number of users in the world.⁸ India was the 17th largest recorded music market in the world in 2021 by revenue, maintaining its position from 2020.⁹ After the United States, China and India were the biggest markets for ad-supported audio streaming in 2021.¹⁰ India had revenues of US\$83 million for ad-supported audio streaming in 2021.¹¹ Recorded music revenues in India increased by 20.3% in 2021, to a total of US\$219 million.¹² This growth was driven by a 22.5% increase in streaming, which accounted for 86.9% of the market’s

⁷ Tanushree Basuroy, Statista, *Number of Internet Users in India 2020-2040*, July 27, 2022, available at <https://www.statista.com/statistics/255146/number-of-internet-users-in-india/>.

⁸ Id.

⁹ International Federation of the Phonographic Industry (IFPI), *2022 Global Music Report*, p. 157.

¹⁰ Id. at p. 79.

¹¹ Id.

¹² Id. at p. 119.

overall revenue, up from 85.3% in 2020.¹³ On the audiovisual front, India had almost 40 million households subscribing with 80 million subscriptions to legitimate video-streaming services in 2021, which is expected to grow to 60 million households paying for 110 million subscriptions by 2024.¹⁴ The overall video viewership in India increased by 10% to reach 497 million people in 2021, and it is estimated this will grow to over 600 million people by 2024.¹⁵ These subscriber numbers exclude YouTube, which has crossed 500 million monthly active users by the end of 2021.¹⁶ Online gaming will continue to grow and is expected to reach 500 million gamers by 2025.¹⁷ These figures remain well below India's full commercial potential.

Online piracy: Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, peer-to-peer (P2P) file sharing, video streaming, torrent, and stream-ripping sites, many of which feature and profit from advertisements, often of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement, and some piracy devices (PDs) come either pre-loaded with apps that allow users to circumvent subscription services to access infringing content or are accompanied by instructions to download such apps. While the creative industries have made a dent in online piracy in India, particularly through the use of site-blocking orders at the Delhi High Court, IIPA notes that overall piracy trends are troubling. IIPA continues to request an explicit, stand-alone obligation to impose civil and criminal liability and penalties on piracy apps that provide streaming or direct download access to unauthorized versions of titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable the take-down of infringing apps, which may involve a national-level unit, coordinating with state-level enforcement if appropriate.

Internet piracy is the greatest threat to the copyright industry sectors in India. Major websites providing unauthorized access to film and television content continue to be popular, including *ExtraMovies*, *TamilMV*, and pirate brands like *KatmovieHD*.¹⁸ India-based video-hosting services offering free storage, as well as premium services for priority encoding, such as *Doodstream*, are growing in popularity at a global level. *DoodStream* had 137 million visits in November 2022, according to SimilarWeb. *DoodStream* is not only popular with *Telegram* groups but is also utilized by many infamous piracy sites wherein site operators can simply embed the *DoodStream* link within their website. It is hosted by DDoS-Guard LTD in Russia and by OVH SAS in France. *Pikashow* is a piracy app which, according to Motion Picture Association (MPA) analysis, has been downloaded over 10 million times across various mobile application stores and *Telegram*. The application sources most of the content directly from the servers of copyright holders (live TV and video-on-demand (VOD)) by circumventing their TPMs and then hosts the stolen content on third-party cyberlockers and user-generated content platforms. The operator is believed to be located in India.

In addition to blocking pirate sites, as discussed in greater detail below, MPA is engaged in search engine delisting with *Google*, which has been shown to help increase the efficacy of site-blocking actions. The creative industries have become aware of *Telegram*'s role in piracy in recent years, and while industry is now engaging directly with *Telegram* to request that it better address piracy on its platform, *Telegram* should be more accountable in relation to infringements occurring or being facilitated over its service. To date, enforcement actions have been brought successfully in India requiring *Telegram* to disclose pirate users' details, but *Telegram* is appealing.¹⁹ While the

¹³ Id.

¹⁴ FICCI, EY, *Tuning into consumer: Indian M&E rebounds with a customer-centric approach*, March 2022, available at https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2022/ey-ficci-m-and-e-report-tuning-into-consumer_v3.pdf, p. 12.

¹⁵ Id. at p. 62.

¹⁶ Id.

¹⁷ Id. at 16.

¹⁸ *KatmovieHD* changes domains frequently to avoid site blocking and tracking. This has resulted in 44 domains currently associated with the website. The most recent domain, *KatmovieHD.rs*, had 15.56 million visits with a total of 31.69 million visits over all currently active domains in August 2022, according to SimilarWeb. *KatmovieHD.rs* was ranked 4,083 globally and 361 in India in August 2022, according to SimilarWeb. All active domains utilize Cloudflare's reverse proxy service to mask their location. The Motion Picture Association (MPA) and other rights holders' organizations are targeting the sites and their social channels for takedown in India, Indonesia, and elsewhere.

¹⁹ *Telegram* is an instant messaging service based in Dubai available on Windows, iOS, Android, and Linux that allows users to create channels and groups, upload and share content, and run livestreams. *Telegram* has an active userbase of around 550 million accounts, with particularly significant reach in Russia, India, and Indonesia. One of its growth drivers is the presence of infringing copyrighted content on the platform and core features that support the sharing and discoverability of unauthorized files, protect anonymity of uploaders, and make consumption easy and convenient, which supercharges the circulation of infringing content, whether deliberate or accidental. *Telegram*'s Terms of Service make no mention of copyrighted content. While there has been improvement in compliance rates for the

operators of *Telegram* are sometimes responsive to rights holders' requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage KYBC disciplines on intermediaries like *Telegram* and to encourage operators like them to responsibly cooperate.

Recorded music piracy is also a major issue in India. Despite considerable growth in the use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Apple Music*, *Spotify*), globally India had one of the worst rates of music piracy in the world.²⁰ According to the International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS), almost three quarters of internet users (73%) used unlicensed or illegal ways to listen to music in India.²¹ The major piracy issue facing the recorded music industry in India is stream ripping. The most popular stream-ripping site used by Indian Internet users is *ssyoutube.com*, which received more than 200 million visits from India in the third quarter of 2022. The site was the 56th most popular site of any kind in India in September 2022. Other popular stream-ripping services include *Savefrom.net*, which received over 66 million visits in the third quarter of 2022 and *Y2Mate*, which received over 49 million visits from India during the same period, according to SimilarWeb data.

However, stream ripping is not the only piracy problem in India. The most popular domestic music download site after *MXTube* is *pagalworld.pw* (previously *pagaworld.mobi*), which ranked the 206th most popular web site in India with more than 43 million visits from India during the third quarter of 2022. The Indian music download site *mr-jatt.im* received more than 11.0 million visits from India during the same period.

BitTorrent sites and cyberlockers also remain popular. For instance, the cyberlockers such as *AnonFiles* and *Zippyshare* received over 18 million and over 6 million visits from India respectively during the third quarter of 2022. India is the largest source of visits worldwide for many major piracy destinations, such as *ssyoutube.com*, *yt1s.com*, *masstamilan.in*, and *proxyrarbg.com*. Infringements of rights in sound recordings also are prolific on unlicensed user-uploaded content short form video apps. Other kinds of infringing mobile apps that are available on mainstream app stores and are popular in India include stream-ripping apps and MP3 download apps.

For 2021, the video game industry reports that India remained fourth in the world (where it ranked in 2021 and 2020) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public P2P networks, as well as in infringement of games for PCs and mobile devices.

Online Book and Journal Piracy: The scale of online piracy of books and journals is likewise a threat to the publishing industry. *Sci-Hub* and *Libgen*, two notorious pirate sites, continue to provide access to millions of infringing copies of journal articles and books in the country. Despite the Delhi High Court having issued blocking orders against several notorious online sites engaged in the unauthorized distribution of pirated content, it is curious that a similarly expeditious grant of injunctive relief against an adjudged pirate site such as *Sci-Hub* has not yet occurred as proceedings continue. At the outset of the litigation initiated by two journal publishers in December 2020, the site operator agreed to refrain from further uploading of purloined articles to the site. Yet, in September 2021, the pirate operator—in open contravention of the obligation undertaken with the court—uploaded a further 2 million journal articles illegally obtained from journal publisher databases. To date, *Sci-Hub* boasts that it has over 88 million articles and books that it provides for free without permission from the copyright owner. In a positive development, in August 2022,

removal of infringing links and channels, *Telegram*'s response to takedown notices varies greatly, from almost immediate to no response at all, despite multiple re-notifications. Furthermore, instances of online piracy accessed through *Telegram* remain high overall due to the ease with which the same content can be uploaded to other channels, discovery of infringing content that is facilitated by piracy bots, and inconsistent enforcement of its repeat infringer policy. In 2020, the European Commission placed *Telegram* on its Counterfeit and Piracy Watch List. Enforcement actions have been brought successfully in India to require *Telegram* to disclose information on alleged infringers, and in Israel and Italy requiring *Telegram* to block access to infringing content. *Telegram* continues to be a platform of concern.

²⁰ See Andy Chatterly, Muso, *Discover Piracy by Industry Data Review*, 2021, p. 9, available for download at <https://www.muso.com/wp6-2021-muso-discover-piracy-by-industry-data-review>.

²¹ IFPI, *Engaging with Music 2022*, p. 25, available at https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf.

a domestic publisher successfully obtained a court order requiring Internet service providers (ISPs) to block access to four domains of *Z-Library*, a notorious *Libgen* mirror.²²

Unauthorized Book Copying, Digitization, and General Indexes: The publishing industry continues to be concerned with the unauthorized commercial-scale photocopying²³ and unauthorized reprint of trade consumer books, academic textbooks, and professional books (for both the domestic and export markets). While India-only, lower-priced editions of textbooks are made available in the domestic market to meet domestic needs, these editions continue to be found in several 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). There are also concerns regarding book scanning and digitization efforts using high-quality book scanning hardware that may provide the scanned and digitized copies to unauthorized online repositories of infringing digitized book content as well as so-called general indexes that enable search functionality, which either leads to aforementioned scanned and digitized books or infringing digital copies of books obtained via online platforms that engage in large-scale commercial level exploitation of pirated files (e.g. *Sci-hub* and *Library Genesis*).

Unauthorized Camcording: Unauthorized camcording of films during their initial release windows is an ongoing problem in India, and criminal referrals against suspects to date have not resulted in meaningful steps to deter such activities. For example, in the 2015 high-profile case *Rahul Mehta v State of Madhya Pradesh*, the Jabalpur police arrested a piracy syndicate responsible for camcording and distributing *Baahubali*, one of the highest grossing Indian movies of all time. The accused were granted bail by the trial court. However, as of 2022, the case remains pending, and there is no record of any hearings occurring after 2017. Frustratingly, the accused were arrested again in 2017 for camcording *Baahubali 2*, the film's equally successful sequel. Due largely to the pandemic, numbers for 2020 and 2021 are anomalous. The high number of past audio cams reflects the strong demand for local language audio files, which are sourced for various international release groups. State authorities should undertake efforts to tackle this pervasive problem. The Government has included anti-camcording provisions in the 2021 Cinematograph (Amendment) Bill, which awaits clearance in Parliament. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema, which would improve enforcement.

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

India is hindered by widespread piracy and a challenging enforcement environment, both at the National and State level. The courts in certain states like Delhi are functioning well, but overall enforcement coordination efforts throughout the states are uneven and require a more robust and proactive approach to address some of the serious problems the creative industries face, such as the proliferation of pirate video hosting and pirate infrastructure services like *DoodStream.com* and *WHMCS Smarters*, as well as piracy apps such as *Pikashow*.

The courts have expanded their reach incrementally, now addressing “proxy portal” sites used principally to circumvent injunctive orders, and in 2022, the Delhi High Court issued orders to block pirate brand domains and a cyberlocker that facilitated massive infringement in India. Data indicates that these actions are having a positive impact in reducing traffic to piracy sites and migrate users to legal VOD services. This said, India remains one of the world's most challenging major economies with respect to the protection and enforcement of IP, in no small part due to the

²² See Aron Deep, Entracker, *Delhi district court behind Z-Library block in India*, August 18, 2022, available at <https://entrackr.com/2022/08/exclusive-delhi-district-court-behind-z-library-block-in-india/>.

²³ Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

absence of a centralized and nationally coordinated enforcement department. It is unfortunate that the NIXI ceased suspending the use of domains if based on false or fraudulent Whois information. The current unavailability of timely and accurate Whois identifying information, which is in part due to NIXI's view of General Data Protection Regulation (GDPR) online privacy obligations imposed in Europe, is now taking its toll on enforcement efforts in India.

Criminal Enforcement and Case Developments: The Telangana Intellectual Property Crime Unit (TIPCU), which launched in 2016, was unfortunately disbanded in recent years. The Maharashtra IP Crime Unit (MIPCU), formerly the Maharashtra Cyber Crime Unit (MCDU), has been active since 2017. MPA was heartened to see MIPCU's first enforcement action in July 2021 against a pirate service called *Thop TV*; however, this remains the Unit's only criminal enforcement action to date. MIPCU has also started to invoke Section 160 of the Code of Criminal Procedure to escalate cases when app operators do not comply with infringement notices. In addition, some practical hurdles remain in relation to the record industry's priority services, such as stream-ripping and cyberlocker services which, so far, have not been subject to any blocking orders.

The lack of enforcement against online piracy operators remains inadequate given the current scale of the problem. Enforcement agencies' lack of understanding of IP crimes, a 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 are all areas that need to be addressed. Additionally, the prospect of seeking criminal enforcement for IP violations is very daunting due to the absence of a centralized IP enforcement authority, the lack of effective inter-agency cooperation at the national and state levels, and the overarching lack of prioritization afforded to IP crimes. 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 urgently elevate the priority afforded to IP crimes and to improve the coordination of its enforcement framework against criminal piracy syndicates.

In May 2022, the Supreme Court of India held that offenses under Section 63 of the Copyright Act, 1957 are cognizable and non-bailable offenses.²⁴ Offenses under section 63 being cognizable allows the police to conduct investigations and register first information reports (FIRs) without the permission of a magistrate and allows arrests of persons against whom there is an allegation of knowingly committing or abetting copyright infringement without a warrant, putting the crime of copyright infringement in the category of more serious criminal offenses. Further, the person cannot be granted bail as a matter of right but will have to approach the court for the same. The decision essentially gives the police greater ability to respond in an agile manner to copyright infringements being committed within their jurisdictions. IIPA urges the Ministry of Commerce and Industry to analyze and, as necessary, seek to amend, any penal provisions or ancillary provisions related to Section 63 that may still lead to conflict with this important Supreme Court judgment.

In June 2022, the Delhi High Court granted an interim injunction in favor of plaintiffs directing the domain registrars and ISPs to block access to the infringing Android-based apps and websites that provide .APK (Android Package Kit) files that enable the sideloading of such apps.²⁵ This decision is a positive development in relation to the availability of injunctions with respect to intermediaries that support the distribution of infringing mobile apps. IIPA hopes that this case will serve as a precedent to help address the issue of infringing mobile apps, particularly in light of the large-scale infringement occurring via short form video apps.

IIPA also recommends the following steps: (i) India should focus on inter-state operations of organized crime units engaged in piracy and establish state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) India should establish a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and Central Bureau of Investigation (CBI), that is overseen by the Department for Promotion of Industry and Internal Trade (DPIIT) and directed at copyright infringement occurring online and on mobile devices; (iii) India

²⁴ *M/s Knit Pro International v The State of NCT of Delhi & Anr.*, Criminal Appeal no. 807 of 2022, Order dt. May 20, 2022, available at https://www.livelaw.in/pdf_upload/copyrightinfringementcognizable-418594.pdf.

²⁵ *Star India Pvt. Ltd. & Anr. v Ashar Nisar & Ors*, CS(COMM) 214/2022, June 4, 2022, available at <https://dot.gov.in/sites/default/files/letter%20to%20ISPs%20dated%2006-09-2022%20CS%20Comm%202.pdf?download=1>.

should establish a centralized IP crime unit within the CBI's Cyber Crime Detective Unit; and (iv) India should focus on training prosecutors and police officers on the seriousness of IP offenses and their links to organized crime.

Civil Enforcement and Case Developments: In April 2019, the Delhi High Court firmly established permanent injunctive relief as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. v 1337x.To and Ors*,²⁶ 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 Hindilinks4u.To*, in which the court created a “doubly dynamic” system wherein domains can be added to an injunctive order while a case is still being adjudicated. In May 2022, the Delhi High Court issued the first “pirate brand” orders in *Universal City Studios LLC & Ors. v Vegamovies[.run & Ors.*, CS(COMM) 265/2022,²⁷ meaning persistent infringers who use the same name or branding can now be blocked. No fault injunctive relief actions are now starting to address some of the more cutting-edge piracy problems like direct download cyberlockers (notably, MPA obtained orders to block the cyberlocker *mixdrop* on October 13, 2022, in *Universal City Studios LLC & Ors. v Mixdrop.co & Ors.*, CS(Comm) No. 663 of 2022),²⁸ as well as targeting other streaming video-hosting sites and services.²⁹ These positive precedents are encouraging, but more must be done to ensure pirates cannot simply circumvent the orders by changing domains, and India should address extremely high levels of piracy more holistically.

In another positive development, the Delhi High Court Intellectual Property Rights Division Rules entered into force in February 2022. The rules establish an IP Division of the Delhi High Court and seek to ensure that the judges hearing IP cases are well versed in IP laws and practice. These rules have had a positive impact on the adjudication of IP cases to date and could provide a model for other states.

However, despite these positive developments, India is home to pirate infrastructure providers that provide the backbone for piracy turn-key solutions that are used worldwide, such as *WHMCS Smarters*.³⁰ The law remains unsettled as to whether the commercial provision of infrastructure services to pirate operators, or other PaaS, is actionable. The jurisprudence is outdated with actual knowledge of a specific infringing act required. This should be clarified since, to date, operators of almost all turn-key services that provide pirates with the blueprint for their operations have been able to skirt liabilities. These home-grown providers, including services like *WHMCS Smarters*, can be stopped only if Indian laws keep pace by providing appropriate rules on secondary liability, knowledge, and constructive knowledge.

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 .in domain registrations used by commercial-scale copyright infringers, and the state-based enforcement units, such as the MIPCU, to suspend the .in domains used by commercial-scale copyright infringers. Registrars like *GoDaddy* were also cooperative in cancelling these registrations based on false or fraudulent Whois data. However, a few years ago, NIXI ceased suspending the use of domains if based on false or fraudulent Whois information. The current unavailability of timely and accurate Whois identifying information, which NIXI blames on implementation of the EU's GDPR, is taking its toll on enforcement efforts in India.

Misinterpretation of Section 31D: 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 Bombay High Court held that the 2016 Office Memorandum went too far and

²⁶ *UTV Software Communication Ltd. v 1337x.TO et ors* April 10, 2019, available at https://indiankanoon.org/doc/47479491/?_cf_chl_tk=2Fw0s2GRi5I_czPzh7h1hTkdcT9UJiFPxl_uWUJe3Hg-1674682018-0-gaNycGzNCqU.

²⁷ *Universal City Studios LLC & Ors. v Vegamovies.run & Ors.* CS (COMM) 265 of 2022, available at <https://indiankanoon.org/doc/106006995/>.

²⁸ *Universal City Studios LLC & Ors. v Mixdrop.co & Ors.* CS (Comm) No. 663 of 2022, available at <https://dot.gov.in/sites/default/files/Letter%20to%20ISPs%2004-10-2022%20CS%20Comm%20663%20of%202022.pdf?download=1>.

²⁹ For example, MPA was successfully able to block *vidcloud9.com* in India in 2021.

³⁰ *WHMCS Smarters* is an IPTV turnkey solution. Its IPTV software solution offers website design and development, customized apps on several platforms (including iOS, Android, and Windows), and a billing platform. They also offer an IPTV media player through the *IPTV Smarters Pro* app. The *IPTV Smarters Pro* app and *WHMCS Smarters* were developed by New Spark Technology, a company based in Mohali, India.

that Section 31D applies only to television and radio broadcasting and not Internet transmissions.³¹ The decision in this case was most recently upheld on appeal in September 2022.³²

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. Following the initial and unexpected denial of its registration by DPIIT, PPL has approached the Delhi High Court asking the court to vacate the DPIIT decision. The case remains pending; however, DPIIT should reconsider its decision on its own initiative and re-register PPL, which represents the majority of domestic and international rights in India. The lack of accreditation for PPL India is causing confusion in the market and, worse, encourages users to avoid entering licenses for their uses of recorded music.

Section 31D Royalty Rates: Moreover, on December 31, 2020, the Indian Intellectual Property Appellate Board (IPAB) handed down its decision on the Section 31D royalty rate to be paid by commercial radio stations for the broadcasting of sound recordings and the underlying works. While the decision set new “needle hour” rates that increased the rate from the existing rate of 2% of the net advertising revenue rate, it still undervalues the rights in question. The decision has therefore been appealed to the New Delhi High Court. The validity of the determined rates was, however, extended only to September 30, 2021, because in February 2021, a new law was passed dissolving various tribunals in India, including the IPAB. Its powers and duties were transferred to the High Courts and Commercial Courts (including related to copyright matters). The process highlights a serious problem with the speed and lack of commercial certainty related to the statutory licensing and the rate-setting process in India. The recording industry’s priority is to secure a rate that represents the economic value of the use of sound recordings to broadcasters.

COPYRIGHT LEGISLATION AND REGULATION IN INDIA

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 (see above). In July 2021, the Department Related Parliamentary Standing Committee on Commerce (DRPSCC) Report on Review of the Intellectual Property Rights Regime in India recommended amending and extending Section 31D of the Copyright Act to include “internet or digital broadcasting” within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings found within that section. The Government of India held a consultation on the DRPSCC recommendation to amend Section 31D in September 2021, and IIPA, as well as other industry representatives, filed comments in opposition.³³ Since then, the Government of India has regularly convened stakeholder roundtables to raise the matter, which continues to create uncertainty over the proposed extension of 31D. IIPA is grateful for the U.S. Government’s intensive engagement with India, including as part of the U.S.-India Trade Policy Forum (TPF) meetings, the TPF Intellectual Property Working Group, and other bilateral engagement. The proposal to amend the Copyright Act remains inconsistent with India’s obligations under the WCT, the WPPT, and the WTO TRIPS Agreement. IIPA urges the Government of India to affirmatively reject the proposal and to provide certainty by committing to not extend the Section 31D statutory license to Internet transmissions.

In June 2022, the Ministry of Electronics and Information Technology (MeitY) proposed amendments to the existing Intermediary Guidelines and Digital Media Ethics Code. These proposed amendments were approved as final on October 28, 2022. In August 2022, MeitY also announced its intention to introduce legislation, the Digital India Act, which will replace the IT Act and will aim to ensure an open, safe, trusted, and accountable Internet for its users. IIPA

³¹ See *Tips Industries Ltd. v Wynk Music Ltd. & Anr.*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, Bombay High Court (April 23, 2019), available at <https://indiankanoon.org/doc/156695842/>.

³² See *Wynk Ltd. & Anr. v Tips Industries Ltd.*, Bombay High Court (Division Bench) (Commercial Appeal No. 424 of 2019)

³³ See IIPA Comments on India’s Review of the Intellectual Property Rights Regime in India by the Department Related Parliamentary Standing Committee (DRPSCC), September 3, 2021, available at <https://www.iipa.org/files/uploads/2021/10/IIPA-Comments-on-Review-of-the-Intellectual-Property-Regime-in-India-Final.pdf>.

urges the Government of India to use these reforms as an opportunity to improve the currently inadequate online liability framework in India.

On February 25, 2021, MeitY introduced the 2021 IT Rules, extending the scope of obligations on intermediary platforms. Although the 2021 IT Rules provide increased accountability and obligations on intermediary platforms, they do not improve the inefficient notice and takedown regime. By way of example, Rule 3(1) of the 2021 IT Rules provides for a takedown mechanism pertaining to complaints regarding copyright infringement. However, it directs the ISP to take down infringing content only upon being notified by an appropriate government authority. Further, the 2021 IT Rules provide a 36-hour deadline for removal, which is too long for infringing content to remain on the internet. Indian legislation currently provides ample opportunities for digital services, including User Upload Services, to avoid liability for copyright infringing content on their platforms. The recently adopted 2021 IT Rules have placed increased obligations on platforms; however, the rules lack clarity. Further, the 2021 IT Rules do not go far enough to address the flaws in the system. While the National E-Commerce Policy, 2020, includes positive proposals, it is not clear whether legislative action will follow.

It remains unclear how the Copyright Act and the IT Act interact, which is a cause of legal uncertainty and results in loopholes in copyright enforcement. In particular, the notice and takedown mechanism should be improved to prevent the reappearance of the same infringing content. IIPA suggests this should be an opportunity to meaningfully improve the ISP safe harbor provisions (and online copyright enforcement more generally).

To resolve the situation with the online liability regime, the Indian government should use the ongoing introduction of the Digital India Act to amend Section 79 of the IT Act, 2000 and corresponding IT Rules to limit its overbroad safe harbors and clarify the responsibilities of services eligible for them. Such changes are essential to ensure that Indian content creators and content owners are fairly rewarded and that the legal framework in India supports the sustainable growth of the digital content market, instead of shielding copyright infringing services in India. In doing so, the Indian government should (i) limit, to begin with, safe harbor protection to purely technical, automatic, and passive intermediaries; (ii) have ISPs implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific 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. Despite the importance of this issue, no revised drafts or policy proposals have been seen since.

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and the WIPO Internet Treaties. While the Government of India believes its current law is treaties’ compliant, IIPA members believe the law falls short of full compliance in some respects. 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:

- 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 infringing content identified by the rights holder.
- Amend Copyright 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 52(1)(c):
 - Section 52(1)(c) establishes that “transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy” is not an infringement of copyright. However, the provision should be narrowed to be consistent with other jurisdictions and provide certain conditions.

- 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 clarify that service providers mentioned in Section 52(1)(c) must remove or disable access to the copyright infringing content or links to such content expeditiously when (i) the material has previously been removed from the originating site or access to it has been disabled; and (ii) the party giving the notification includes a statement confirming that the material has been removed from the originating site or access to it has been disabled, not only when a court orders it.
- 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 and devices;
 - Establish civil and criminal sanctions for acts of circumvention, trafficking in circumvention devices and software, and offering circumvention services; and
 - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
 - Narrow the scope of the overbroad and vague exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act.”
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission or communication to the public is not an infringement of copyright. However, the provision should be narrowed to include specific conditions.
- Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to at least life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings and films from 60 to at least 70 years accordingly (The current 60 years is shorter than the term of protection in the United States, the EU, and in at least 73 countries worldwide).
- 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 three-step test codified in the Berne and WTO 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 rights holders’ right of public performance in respect of “the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority” (i.e., “social festivities associated with a marriage”). Although it is not uncommon for national laws to include limited exceptions for the use of certain copyrighted works in religious ceremonies, this exception extends to purely social festivities associated with a marriage, which are customarily subject to the public performance right.
- Enact proposed Cinematograph Bill amendments that would make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility. Such amendments would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

Information Technology Act and Information Technology Rules (2021 IT Rules): The express inclusion of IP infringement as a ground for no fault injunctive relief under the IT Act or under the Information Technology (Intermediary Liability and Digital Media Ethics Code) Rules, 2021 (2021 IT Rules) would represent a major improvement in the IP enforcement system. It would also further increase the effectiveness of the current system in which some website blocking orders have been issued, including notable dynamic injunctions by the Delhi High Court, and would complement the work of law enforcement agencies in the area of domain name suspensions, where Indian authorities had previously made progress, before NIXI ceased suspensions. However, more progress is needed in tackling unlicensed services using alternative domain names, which is the most common practice.

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 include:

Local Body Entertainment Tax (LBET): In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. Effective October 1, 2021, the GST rate for “content licensing, right to broadcast and show original films” is taxed at a single rate of 18%. However, the 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 (particularly cinema tickets) 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 on cinema tickets 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.

Cinematograph Bill: The government should remove the revisional powers of the central government in the proposed Cinematograph Bill amendments. These powers would give the central government the authority to re-examine any certified film that has a valid certificate from the CBFC under Article 19(2) of the Constitution of India.

WTO E-Commerce Moratorium: IIPA urges the Government of India to agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.