

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

INDIA

Special 301 Recommendation: IIPA recommends that India be retained on the Priority Watch List.

EXECUTIVE SUMMARY

Effective enforcement against widespread copyright piracy, including judicial reform and legislative improvements, have been actively discussed as part of the U.S.-India Trade Policy Forum (TPF) begun in 2006 and continued in 2007. However, 2007 saw little significant progress in any of these areas, though regular meetings are continuing. Piracy rates and losses remained essentially unchanged. However, the recording industry reports some important gains, but for the remaining industries progress on the problems that IIPA and its members have raised over at least the last five years has yet to emerge.

PRIORITY ACTIONS TO BE TAKEN IN 2008

- **Establish Specialized IP Courts or IP Judges, Increase Speed of Adjudication of Criminal and Civil Cases, and Increase Deterrence:** While this topic has been a key part of the TPF, and is an essential ingredient for improvement in this area, there has been no progress to date. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. The Government of India should set up specialized IP courts, or the chiefs of the high courts should appoint special judges in all the states to:
 - ease backlogs;
 - enforce deadlines for adjudication/resolution of piracy cases;
 - encourage completion of a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy;
 - prevent unjustified continuances;
 - adopt case management techniques (we understand progress has been recently made on this and on instituting plea bargaining);
 - treat piracy as a serious economic crime.
- **Adopt a System of Statutory Damages; Allow Compensation to be Awarded in Criminal Cases:** Existing law casts the entire onus of proving the amount of damages suffered, on the right holder. India should introduce a system of statutory damages in civil cases to provide the right holders with an alternative to proving actual damages. This is particularly important for the business software industry, where end-user piracy in business is the primary cause of high losses in India. India should also consider awarding damages to right holders in criminal cases on the basis of per unit seized, given the ineffective civil system in India.
- **Create a National Anti-Piracy Task Force:** This continues as a major priority. The lack of national enforcement coordination (IPR enforcement in India is a “state” matter) has resulted in low priority for anti-piracy enforcement and the absence of a national policy to provide effective copyright protection. The growth of Internet penetration and Internet piracy also demands increased focus on this issue. The Home Ministry should take the lead in providing training and resources. The Home Minister should issue a strong and widely publicized condemnation of piracy and the damage it is doing to India, and urge all police forces to take immediate action to root it out.

- **Reinvigorate “IP Cells” within the State Police, Provide them with Significantly Increased Resources and Establish Specialized IP Prosecutors:** While the government announced in 2002 the creation of 19 such IP cells, few are fully functioning. Those that are functioning are woefully under-resourced and in most states they do not function effectively at all. The lack of resources and manpower make all of these cells incapable of raiding larger pirate distribution and production targets. Training and funds are desperately needed. In addition, the lack of trained prosecutors severely hinders effective enforcement. States should set up specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes, guided and funded by the National Anti-Piracy Task Force and the government.
- **Increase the Number of *Suo Moto* Raids:** In its 2007 report, IIPA commended the increase in the police conducting more *suo moto* (*ex officio*, e.g., without the need for a right holder complaint) raids in 2006 in most copyright sectors (book piracy being a glaring exception). In 2007, many copyright industries reported a decrease in *suo moto* raids and, with the exception of the recording industry (IMI), a seeming loss of interest in IPR enforcement for other sectors. This disappointing development should be a key focus of the 2008 meeting within the TPF context.
- **Pass Optical Disc Regulations:** India has 36 optical disc plants and known pirate production. Optical disc legislation has been pending for at least four years and, though it was expected to be adopted in 2007, nothing has happened. India should immediately adopt modern optical disc regulations to license factories, gather sample discs for forensic testing, mandate the use of SID mastering and mould codes, and provide authorities with the ability to run surprise inspections, day or night, to detect illegal production.
- **Enact Copyright Law Amendments Consistent with the WCT and WPPT:** After many years of discussion within a “core group” appointed by the Ministry of Human Resources Development (HRD), HRD finally released a draft in 2005 and sought public comment. Almost three years later, there appears to have been *no* word from the Ministry on following through with an actual bill. With the growth of Internet penetration, domestic and U.S. right holders cannot afford to wait for the Government of India to adopt the necessary amendments to the copyright law to correct deficiencies and properly implement all the obligations of the WIPO Internet Treaties (WCT and WPPT), actions that have been taken already by many of its Asian neighbors. Such legislation should include protection for temporary copies; adequate and effective protection against the circumvention of technological protection measures; and ISP liability rules that are clear, with narrow exceptions, and with an effective notice and takedown system. Even the now very old draft amendments, fall well short of these goals. The TPF process should be used to press for the release of an improved bill to be then promptly introduced into Parliament and adopted into law.
- **Legalize Use of Published Materials at Educational Institutions:** Two years ago, the Ministry of Human Resource Development (HRD) committed to issue a government order/circular (proposed by the U.S., UK and Indian publishing industries) to all educational and research institutions to combat illegal photocopying on university campuses. HRD has still not issued this circular and the problem remains acute.
- **Empower Customs to Effectuate Seizures and Destruction of Pirate Goods:** Customs should be empowered to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPS-inconsistent practice must stop. Additionally, the customs process continues to be cumbersome. Customs should take significant action to; (a) reduce the substantial imports of pirate product; (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film’s Indian theatrical run; and (c) prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports, given the vast import and export problem.

- **Adopt an Anti-Camcording Criminal Provision:** A vast number of movies are stolen right off the screen by professional camcorder pirates who use video cameras to illicitly copy a movie during exhibition in a movie theatre — usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to pirate “dealers” throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures. This legislation should make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the United States and other countries prohibiting “camcording” has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India’s motion picture industry.

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>

INDIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Records & Music	13.8	55%	52.7	55%	56.4	57%	67.3	50%	6.0	40%
Business Software ²	732.0	69%	574.0	71%	255.0	72%	239.0	74%	187.0	73%
Motion Pictures ³	NA	NA	NA	NA	NA	NA	80.0	60%	77.0	60%
Entertainment Software ⁴	129.9	89%	85.6	86%	65.2	86%	59.5	86%	113.3	84%
Books	38.0	NA	40.0	NA	42.0	NA	38.0	NA	36.5	NA
TOTALS	913.7		752.3		418.6		483.8		419.8	

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Court Failure to Conclude Cases – Criminal: The principle challenge posed by the Indian enforcement system is to make the criminal system work despite corruption, inefficient court procedures, lack of training, massively long delays, and few convictions (and even those are followed by low fines and virtually no significant jail terms). There have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63) since January 1, 2000 – reportedly six for movie piracy (including a 2007 conviction with a seven month prison sentence and a Rs. 55,000 fine (US\$1,391)), and none for software or book piracy. IIPA has reported that in the over 15 years that it has been working on Indian copyright issues, it has been able to count no more than 16 convictions for copyright piracy under Article 63, the criminal copyright piracy provision. However, the recording industry in 2007 has reported some convictions under both Article 63 and Article 52A which are not reported in this prior number. Overall, the recording industry reports that it has obtained more than 1,400 convictions since 1997 under Section 52A of the Copyright Act which criminalizes failure to use the required certificate on sound

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at <http://www.iipa.com/pdf/2008spec301methodology.pdf>. For information on the history of India under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in India, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁴ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

recordings (Section 52A also applies to videos and DVDs). Fines in these cases have ranged from Rs. 50 (US\$1.26) to Rs. 200,000 (US\$5,057.00) and imprisonment of one day up to the maximum permitted under the law of three years.⁵ In 2007, the recording industry reported improved enforcement and more cooperation from police, including over 3,500 raids, which is more than half of all the IP raids conducted in India. Over 1,600 OD burners were seized. The recording industry also reported increased penalties imposed under Section 52A and Section 63 in 2007, although most still involve small fines and only a few have involved jail time.⁶

MPA has over 3,100 pending criminal cases, the publishing industry 126 cases, the recording industry (mainly Section 52A cases) over 8,000, and BSA has 16 cases. Despite the few convictions for piracy, pretrial detention and permitted one year maximum detentions under the Goondas Act in Tamil Nadu continue to result in some deterrent effect.

Court Failure to Conclude Cases – Civil: The business software and motion picture industries continue to use civil cases with varying degrees of success. In 2007, the software industry took ten civil end-user actions, the most ever in one year in India. India is not viewed as a country with a damages culture; there are few such examples in the copyright area. As noted elsewhere in this report, adoption of a statutory damages regime would be most helpful.

MPA had 31 civil actions pending at the end of 2007 and has had some success over the years in using the civil system to obtain preliminary injunctions against some of the 40,000 pirate cable systems that transmit U.S. films and TV programs without authorization. These preliminary orders against entire cable networks have had some deterrent effect, even though these cases rarely, if ever, come to judgment with damages awarded. Even contempt proceedings brought for violation of such injunctions rarely, if ever, are concluded. Moreover, some networks continue to operate in contravention of the law and in violation of these specific court orders. Proceedings to enforce these injunctions are costly and time-consuming.

Court procedures are overly burdensome; courts are severely backlogged and there are massive delays in bringing criminal and civil cases to final judgment in violation of TRIPS Articles 41, 41(2), 42 and 61. India must adopt meaningful court reform to decrease burdens, costs, and delays, and to ensure that cases are concluded promptly with deterrent penalties and damages, including, in particular, setting up IP courts with both civil and criminal jurisdiction.

The Use of *Suo Moto* Raids Has Decreased in 2007: In a very disappointing development, most IIPA members are reporting a significant decrease in *suo moto* raids in 2007. As reported in IIPA's 2007 submission, *suo moto* raids had been on the increase in 2005 and 2006. The recording industry, however, continues to report that it is still getting *suo moto* raids in many parts of the country, especially Kerala, Tamil Nadu, Gujarat, Bihar, and West Bengal. *Suo moto* raids have been one of the only positive indicia of even small improvements in enforcement in India. Now even this gain appears to be receding.

Internet Piracy: There were 60 million Internet users as of December 2007. Broadband subscribers are estimated at 2.5 million, still low by Asian standards, but growing.⁷ The recording industry has experienced growing P2P filesharing and has reported shutting down up to 600 pirate websites in the last few years. Many pirate sites outside India have also harmed legitimate sales. As a result, Internet revenues remain low. However, mobile cell phone technology is making possible steadily increasing revenues from legal downloads of recorded music and ringtones. India is expected to become second to South Korea in developing a major market for cell phone downloads.⁸ IMI has conducted more than 150

⁵ Unlike Article 63 which carries minimum fines and jail terms, (Rs. 50,000 (US\$1,264 and six months), Article 52A offenses bear no minimum fine or minimum jail term and historically fines under Article 52A have been notoriously low and non-deterrent.

⁶ The recording industry reports that in five of its 200 convictions in 2007, jail terms were imposed. It is unclear whether probation was granted in these cases and the jail terms were actually served

⁷ <http://www.internetworldstats.com/stats3.htm>.

⁸ Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," The Hindu, March 25, 2007.

raids against people involved in mobile chip piracy and was the first to conduct such actions. P2P file sharing and other Internet piracy has also affected the motion picture industry. Actions against such piracy were taken in 2007 against approximately 10 such sites including rapidshare.com, rapidshare.de, badongo.com, filefactory.com, gigeshare.com, mediafire.com, oxdion.com, putfile.com, sendspace.com and speedshare.com. Approximately 10,000 infringing movie files were taken down from these servers. An ESA member company also reports that vendors of pirated PC game products continue to sell through their Ebay India virtual stores.

The Business Software Alliance (BSA) reports that online infringements of its members' software increased significantly from about 6,700 in 2006 to over 40,000 in 2007. Pirates appear on auction sites and a few of them have now created their own websites selling pirated software. Actions have been taken against sites that took orders through email, but the problem continues to grow by leaps and bounds. BSA sent out an average of 1,682 notice and takedown letters per month in 2007, and reports that it has not been possible to accurately determine the compliance rate.

There is still no formal notice and takedown system in the Indian Copyright Law (though this was the chief enforcement tool against download sites) and, as described further below, the copyright law has still not been updated to cover WIPO Treaties obligations. It is crucial that India take urgent steps to shore up its legal infrastructure and put a workable notice and takedown and enforcement strategy in place, or Internet piracy will quickly become a major threat to legitimate right holders in India.

Optical Disc Piracy — Some Factory Production and Many Burned Pirate Discs: There were a reported 36 OD factories in India in 2007. In 2005, the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. A draft law was made public in 2007 but continues to be held up within MIB. A dispute over the licensing of factories that make blank disks and whether SID codes should be mandated appears to be a factor in the hold up. We understand a draft will surface again in March 2008. A good optical disk law covering recordable media should be adopted in 2008.

Notwithstanding evidence of pirate factory production and reports of some imports of pirate disks from Malaysia, the predominant form of optical disc piracy in Indian markets today, consists of burned recordable discs, with content including music compilations in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),⁹ motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), business software, and books/reference materials. Publishers report, for example, cases where 200-250 best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less.

In 2007, entertainment software publishers began formalizing their enforcement efforts in India. A survey of the market for pirated PC games found that the bulk of the pirated product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Vendors of pirated PC games continue to use E-bay India for pirate sales. Pirated PC game product is typically burned CD/DVD product, cheaply finished with handwritten titles, in a clear plastic sleeve with a badly photocopied cover slipped in with the disc. The pirated PC game products available in the market appear to be copied from pirated versions produced in Southeast Asia. Pirated console games, on the other hand, appear to largely be in pressed CD format. Industry investigators are still in the process of identifying the source of pirated and burned entertainment software products. In addition, most console hardware in the market appears to have been circumvented to facilitate the play of pirated games. The markets are replete with a large selection of game titles, both old and new, and the vendors sell them quite openly, making no attempt to conceal the products or keep them off-site.

A video game publisher began enforcement operations in the country in 2007, focusing early efforts in the cities of Mumbai, Delhi, Kolkata, Chennai, Hyderabad, and Bangalore. There were 24 raids

⁹ Since pirates do not pay taxes, the local Indian music industry association, IMI, has written letters to the Income tax and sales tax departments to take action against pirates.

successfully conducted, with early signs showing that the raids had had an impact on pirates, resulting in a modest increase in legitimate retail sales immediately following the raids. The materials seized included pirated video games (a total of 16,317 discs), a few CD stampers and CD-writers, blank CDs, and inlay cards. A number of the vendors were arrested and some remanded for a 15-day period under judicial custody.

Signal Theft and Public Performance Piracy: Piracy of cable and satellite broadcasting signals remains rampant, mainly through significant under-declaration of subscribers to content owners. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is at 80% with significant losses. Small video parlors in small and medium sized cities often show pirated film product. These parlors are often licensed by the state governments and compete with legitimate theaters. The recording industry has also undertaken a training campaign with police to deal with public performance piracy and had good enforcement results in December 2007 in Goa.

Piracy of Business Software Continue to Causes Huge Losses to the Software Industry: Corporate end-user piracy (unauthorized use of business software in a business setting) continues unabated in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. Losses increased significantly in 2007, to US\$732 million, while the piracy rate fell slightly from 70% to 69%, which is still much higher than the regional average in Asia. A few significant damage awards were granted in civil cases in 2007 and BSA reports good support from the High Court in New Delhi. However, criminal enforcement does not work. There is a high rate of pending cases, complainants must always appear at any hearing, and cases are rarely concluded. There were no software piracy convictions in 2007 — in fact, there has never been a successful criminal conviction for software piracy in India.

Book Piracy—Pirate Printing and Photocopying Remain Severe Problems: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality cover-to-cover photocopies and obviously pirated cheap reprints, to hardbound copies of medical reference volumes and high quality offsets, remain readily available. Efforts in 2007 have resulted in mild progress. For instance, the number of pirate manufacturing facilities has decreased in Bangalore, and pirate retail establishments have lessened in number in Mumbai. Piracy at traffic centers in New Delhi continues virtually unabated. Publishers lose vast portions of their market to pirates, despite the fact that prices for legitimate titles in India are among the lowest in the world.

Photocopying remains a severe problem at educational institutions, and is on the rise with regard to medical texts.¹⁰ A growing problem also in the educational context is unauthorized compilations in the form of coursepacks, or “self instructional material” (SIM). This increasingly frequent copying among India's educational institutions is costing educational publishers substantial revenue, also threatening the reputation of India's institutions and scholars.¹¹

The publishing industry continued to be active in addressing all forms of book piracy in 2007. However, the industry is still suffering from a lack of political will among local enforcement units. Most inconsistent are the police units in Mumbai and Kolkata, but the Delhi police are erratic in their

¹⁰ Raids on the All-India Institute of Medical Sciences in Delhi, India's pioneer medical education institution, and noted in IIPA's 2007 submission, revealed that the originals used for making photocopies by the pirates were issued by that institution's library. In another action in Kanpur in the State of Uttar Pradesh, the copy shop raided by the police was found to be owned by an assistant librarian of Kanpur Medical College.

¹¹ Reports of unauthorized compilations by the distance learning departments of universities such as Maharishi Dayanand University, Rohtak and the Institute of Management Technology, Ghaziabad, abound.

cooperation as well. To add insult to injury, *suo moto* raids are rare to nonexistent.¹² Publishers have still not obtained a single conviction for book piracy.

The early 2006 commitment from HRD to issue a circular to universities in India concerning illegal reproduction of academic materials by students and lecturers on campuses has still not resulted in action. Failure to implement this promise has been a huge disappointment, and action on this circular is sorely needed.

Unauthorized Rental of Motion Pictures: Piracy via unauthorized rental has again returned to a rampant path despite some success against it in 2006 by bringing civil and criminal actions against these rental shops, resulting in obtaining preliminary injunctions and citations for contempt for violation of those orders. However, this has had minimal impact and pirate rental libraries exist all over India and there is virtually no rental market in India.

Pre-Trial Procedural Burdens, Leaks, Hurdles, Costs and Delays: Exacerbating the overall non-deterrent effect of criminal actions taken in India, are the continuing procedural barriers erected in the path of a legitimate right holder. For example, obstruction of the raiding process is all too common, such as leaks to the pirates before raids occur. Once the raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to pirates higher up in the supply chain, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable.

A promising development has been the engagement of the courts in a judicial reform process, which has brought some progress in civil cases through alternative dispute resolution and reports, are the plea bargaining is now or will soon be available in some criminal courts. The latter should help clear some dockets and expedite the criminal process.

COPYRIGHT LAWS AND RELATED ISSUES

Proposed Copyright Amendments Finally Released for Public Comment; Many Proposals Are Deficient: India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.¹³

IIPA has reviewed the new draft copyright amendments placed on the Copyright Office's website in 2005.¹⁴ These had been in preparation for the last eight or more years. In prior submissions, IIPA had indicated its grave concern that this amendment process was being conducted in secret and that foreign right holders and the U.S. Government were not permitted to participate. IIPA was pleased when the Copyright Office in HRD announced that it had completed its work and was finally opening up the process for full public comment. However, since that time, there has been absolutely no word of further developments and the draft seems completely stalled within HRD. A number of IIPA members have filed comments on the draft.

¹² Publishers report a recent willingness of some authorities in Bangalore to register a case without a complaint, but even in these cases publishers must do virtually all the work thereafter, including paying for the storage of seized books.

¹³ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

¹⁴ The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

IIPA reviewed the draft in its 2007 submission and noted that there are many positive amendments. However, there are other proposals which raise grave concern, particularly certain provisions, which are intended to implement the provisions of the WIPO “Internet” Treaties (WCT and WPPT). Because of the importance of revising this draft to fully implement those treaties, we repeat our analysis again this year.

The proposed amendments also make major revisions to the exceptions to protection provisions in the Copyright Act, which appear dangerously overbroad, particularly in the context of Internet transmissions (uploading and downloading of copyrighted works), which are not authorized by the right holders of those works. Below we highlight again the most important of these concerns:

- **Unclear Protection for Temporary Copies:** The provisions defining the scope of the reproduction right, seek to protect copies “stored” in a computer. However, the provisions are ambiguous with respect to whether temporary and transient copies made in the RAM of a computer are reproductions as required by the Berne Convention, the TRIPS Agreement, and the WCT and WPPT. While there are provisions later in the proposed amendments deeming that certain transient and temporary copies are not infringing copies, implying that such temporary copies fall under the reproduction right, the drafting should be much clearer and cover all copies whether they are permanently stored in a computer or merely temporary and transient in computer RAM.
- **Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention:** The proposed amendments seek to implement the anti-circumvention provisions (regarding technological protection measures (TPMs) of the WCT and WPPT). The proposed provision is seriously deficient, and if enacted in its present form would be incompatible with the WCT and WPPT. The provision (Article 65A): (a) does not cover access controls and is limited only to TPMs protecting the exercise of exclusive rights; (b) covers only the “act” of circumvention and does not also cover trafficking in circumvention devices or services; (c) does not define an “effective technological measure”; (d) contains an exception which would appear to permit circumvention for any purpose that would not amount to infringement under the act (thereby almost completely eviscerating any protection); (e) creates other overbroad exceptions; and (f) provides for only criminal and not civil remedies.
- **Overly Broad Exceptions:** The proposed changes to Article 52 would create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. These include: (a) a broad “private copying” exception;¹⁵ (b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”; (e) an overbroad exception with respect to reproduction of books by libraries; (f) an overbroad exception with respect to making reproductions of books not available for sale in India; and (g) a change in the scope of the rental

¹⁵ The motion picture industry is concerned that this exception in Section 52(1)(a)(1) can also be interpreted to permit the making of camcorder copies in theaters under the pretext of the copies being for private and personal use. It appears that the HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theatres by further limiting the exception for private use to “private and personal use.. However, this does not alleviate the foreseeable difficulties with such an exception as a broad exemption can completely undermine the anti piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use” is covered under the three–step test in the Berne Convention and TRIPS. Since India must adhere to *minimum* international standards of copyright protection and its treaty obligations and for clarity in application, MPA strongly urges the HRD to further revise this Section to explicitly incorporate the three - step test into the law and remove any potential for camcording in theatres as permitted personal use.

right.¹⁶ These and certain other exception would violate India's obligations under the Berne Convention and the TRIPS Agreement.

- **ISP Liability and Exceptions thereto:** While not required by the Treaties, the issue of secondary liability of ISPs and exceptions to such liability, has been dealt with in the laws of most countries implementing the WIPO Treaties. Clarity on such issues is indispensable to the fight against online piracy, and implicate the enforcement provisions of the Treaties and of TRIPS. The draft appears to deal with this issue, at least in part in Section 52(1)(c)(ii), but that treatment is far too terse and oversimplified as to be appropriate for this complex area. We urge again that this provision be substantially revised or replaced by detailed provisions modeled on the way these sets of issues were dealt with in the U.S., the EU and in many other countries in Asia.

India Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre — usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to pirate "dealers" throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures. The MPA strongly supports legislation, in addition to copyright law amendments, that specifically make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the U.S. and other countries prohibiting "camcording" has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India's motion picture industry.

GENERALIZED SYSTEM OF PREFERENCES

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective" copyright protection. In the first 11 months of 2007, \$4.4 billion worth of Indian goods entered the U.S. under the duty-free GSP program, representing a 13.6% decrease from the same period in 2006.

MARKET ACCESS

Many market access barriers in 2007 continue to hinder copyright owners' abilities to participate fully in the market in India. For the motion picture industry, entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is reasonably estimated to be 35 - 40%, and constitutes a significant disincentive to the much-needed cinema construction in India. Additionally, at the request of their local state film industries, a few states now follow a differential tax regime under which the local state language films are charged nil or lower tax rates while the non-state language films are charged higher rates.

Entertainment software publishers' experience with the Indian market is one hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30 percent), console game products (tariffs also as high as 30 percent), and game console hardware. Information from companies active in the market suggests that these rates are actually closer to 35 percent, and break down as follows: (a) basic excise duty at 10 percent of the landed cost; (b) countervailing duty (CVD) at 16 percent of landed cost (+ BED); (c) an additional assessment (cess) on CVD of 3 percent; (d) a further assessment on the total duty (essentially the sum of a+b+c above) of 3 percent; and (e) an additional duty of 4 percent on the sum of a+b+c+d and the landed cost. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where

¹⁶ The proposed amendment in Section 14(d), which in particular includes substitution of the word "hire" with the words "commercial rental" and the further explanation that "commercial rental" will not include rental for nonprofit purposes by a nonprofit library will only enable the pirate libraries to circumvent the law.

penetration rates of unauthorized (grey market) consoles are only a fraction of what they would be under less restrictive market conditions. For instance, India imposes both a sales tax, including a CST at 3%, VAT at 4.4% and octroi (or local tax) in some states at 3 percent. There is also excise duty assessed on PC and other locally replicated products. The current duty rate is at 8.24 percent of the wholesale price, or about 5 percent of the MRP. With tariff rates at this level, the ability of legitimate publishers to compete in the market and establish legitimate distribution channels will continue to be severely hampered.

For the business software industry, high excise taxes on packaged software have increased the price of legitimate software, increasing the use and sale of pirated software. These taxes should be eliminated.

MPA is particularly concerned by a 2006 decision of the Ministry of Information & Broadcasting which notified broadcasters that only "U" rated films could be broadcast on TV channels. Censor Board resources have not been increased and all this has introduced uncertainty and disruption in the marketplace. These guidelines place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India and their requirement that all sport events be shared with the local Indian public broadcaster. Additionally, a Bombay High Court order specifying that all films must be rated for universal viewing, is of concern to foreign broadcast channels. While local broadcasters can have their films re-certified for such universal viewing, foreign broadcasters will not find it as easy or cost effective to incur this obligation, particularly bearing in mind those channels broadcast into India from foreign feeds.

The Telecom Regulatory Authority of India had introduced regulations, which prohibit broadcasters from granting exclusive contracts to distributors. This regulation went into effect in January 2007. These provisions eliminate all potential for competition and incentive to develop programming or to buy "rights." MPA opposed these provisions as inconsistent with a free and competitive market. Its entreaties were rejected. The Direct to Home (DTH) Guidelines were also amended to prohibit DTH operators from entering into exclusive contracts with any broadcaster, and from carrying the signals of any broadcaster that has entered into any exclusive contracts. This also severely limits competition in the marketplace.

The U.S. motion picture industry faces numerous other market access barriers, including foreign ownership restrictions and customs valuation practices that include projected royalties, not just the value of the medium.

TRAINING

IIPA member associations continued to conduct training in 2007.

MPA conducted 37 trainings in 2007 of both police and prosecutors. It launched a Hindi language anti-piracy movie trailer in Mumbai that is being dubbed into many local languages. It produced a 23-minute documentary on creativity and copyright, which was distributed to students in the law school in Hyderabad and organized a seminar at Delhi University at which the documentary was also shown.

The local recording industry association (IMI) conducted in 2007 more than 38 training programs in India in various states for the police, judiciary and public prosecutors and in law colleges. It also participated in four conference dealing with mobile chip piracy and five programs on public performance licensing issues.

CONCLUSION

India is becoming a serious market for the copyright industries and revenues are beginning to increase. However, piracy continues at very high levels and the Indian enforcement system remains ill-equipped to deal with the problem. Until the significant reforms recommended at the beginning of this submission are put into effect, the Indian market will continue to be hobbled.