

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2012.<sup>1</sup>

**Executive Summary:** India has the potential to be one of the world's leading markets for the creative industries – both foreign and domestic. The country produces the greatest number of films in the world (over 1,000 full-length feature films per year), boasts a creative and diverse music market, a prolific publishing industry (19,000 publishers producing 90,000 titles per year), and a vibrant software market.<sup>2</sup> Key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. However, physical, online, and mobile piracy (through both mobile uploading/downloading, as well as mobile applications being used to infringe), circumvention of technological protection measures (TPMs), e.g., through the use of mod chips and game copiers, illegal camcording of movies from cinema screens, print and photocopy piracy, pay TV theft, and unlicensed use of business software, stifle the market and keep India's creative industries from reaching their potential.<sup>3</sup> Existing and proposed market access and related barriers in India affect the film, business software, and entertainment software industries, further fueling piracy.

Industry reports some important enforcement activities and court decisions in 2011 that have helped curb piracy experienced in some states, and positive new initiatives by the central and certain state governments to promote the use of legal software in government agencies and enterprises. The Indian Government also took some measures to combat copyright infringement, including actions to disable access to certain notorious piracy websites in July, August, and December 2011. IIPA welcomes the Indian Government's announcement of an initiative to develop a national IPR policy and to engage with industry stakeholders in this process. It is critical that this effort lead to better coordinated, national government-level efforts to bolster IP enforcement. State Nodal officers have been established throughout India and should be encouraged to take more *suo moto* raids to deter physical piracy. Industry reported some breakthroughs in court cases, particularly in Delhi, in 2011, with some impressive settlement amounts and plea bargains. Nonetheless, the number of cases pending remains far too large, and other problems continue to hinder the effectiveness of judicial processes, especially outside Delhi. New IP courts with expert judges and trained prosecutors need to be established. The current copyright law underwent a modernization effort in 2011, although the legislative process unfortunately stalled in December 2011. The April 2011 Information Technology (Intermediaries Guidelines) Rules, 2011, further defined the role of intermediaries in dealing with online infringements (under the Information Technology Act, 2000), but did not make all needed adjustments. It is hoped the Copyright Bill 2010, amendments put forward in 2011, along with other additional improvements suggested in this filing, will be re-introduced soon. To achieve Prime Minister Manmohan Singh's call for India to experience a "decade of innovation," the Indian Government should swiftly pass and implement an improved law and seek continued momentum in enforcement to address the many piracy challenges identified herein.

## Priority Actions Requested in 2012

### Enforcement

- Create a national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state Nodal officers,<sup>4</sup> providing them with significantly increased resources; provide more accountability and power to the

<sup>1</sup>For more details on India's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>For example, it is estimated that software and services industries alone accounted for nearly 5% of the entire Indian GDP in 2008, according to NASSCOM, while a recent industry report pegged the Indian film and television industry's total gross output at US\$20.4 billion, higher than the advertising industry. PricewaterhouseCoopers, *Economic Contribution of the Indian Film and Television Industry*, March 2010.

<sup>3</sup>For example, the legitimate music market in India has shrunk in recent years according to IMI (26% between 2006 and 2009).

<sup>4</sup>Nodal officers in the Indian State enforcement system are designated contact individuals relevant to intake and response.



recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD).

- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.
- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.

### **Legislation**

- Ensure the new version of Copyright Bill 2010 (as amended in 2011) contains WCT- and WPPT-consistent protections, does not restrict the ability to contractually transfer rights, and does not contain compulsory licenses or other provisions contrary to India’s international obligations.
- Adopt effective anti-camcording law.
- Deal with damaging “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- Adopt statutory damages in civil cases; allow restitution to be awarded in criminal cases; and establish enhanced penalties for “pre-release” piracy.
- Provide that *ex parte* seizure orders should be granted to copyright owners as a matter of right in civil cases.
- Add a provision to the Copyright Law that refusal to comply with a court order shall result in a defendant being held in contempt.
- Adopt procedures allowing courts granting Anton Pillar orders in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as the evidence can be preserved by court appointed commissioners.
- Amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices.
- Regulate production of optical discs including a licensing requirement, among other provisions.
- Provide tax benefits for associations involved in anti-piracy actions and capacity building.

### **Market Access**

- Eliminate significant market access barriers including those highlighted herein which are imposed on the motion picture, entertainment software, publishing, and business software industries.

## **PIRACY AND ENFORCEMENT UPDATES IN INDIA**

Overall, the piracy landscape is changing in India as Internet and broadband penetration widen, and thus online forms of piracy have become more prevalent. The ubiquitous use of mobile devices and the rapid expansion of mobile and console-based game playing have led to new opportunities for right holders but unfortunately also to new challenges, as evidenced by the spread of mobile device piracy and modification chips for circumventing TPMs used to protect console-based games. Losses are very difficult to calculate for most industries, but for example, the music industry estimates a total loss of over \$430 million in 2011 (the largest percentage of that attributable to mobile device piracy) and 95% music piracy online, while the business software industry reported that the rate of PC software piracy in 2010 was 64% (down from 65% in 2009) with a commercial value of unlicensed U.S. software in

2010 estimated to be almost US\$1.4 billion. A couple of additional studies have in recent years attempted to estimate or quantify harm due to piracy in India.<sup>5</sup>

**Internet and Mobile Piracy:** With the growth of Internet connectivity, and increasing mobile penetration Internet and mobile piracy have become key concerns for many in the copyright industries in India. Nielson reports 80 million Internet users in India as of November 2011, with 12.34 million broadband users, and 594.7 million mobile subscribers (but other estimates indicate the number is closer to 700 million), 240 million of whom now experience the Internet through their phone.<sup>6</sup> The industries report increases in illegal downloading sites (such as *songs.pk*), P2P filesharing and BitTorrent, streaming sites, deep linking sites, blogs, forums, or social network sites being used to direct people to infringing files, illegal storage of massive amounts of copyrighted material through the use of one-click hosting sites (sometimes referred to as cyberlockers), and piracy through auction sites.<sup>7</sup> For the business software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download.

For the motion picture industry, sites like *tamilwire.com*, *moviesmobile.net*, *bharatmovies.com*, *tamilthunder.com*, *bwtorrents.com*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in*, *dctorrent.com*, *hindilinks4u.net* and many others cause significant harm. These sites play on the demand for local language dubs of U.S. films as well as Indian films. A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy, as pirated films out of India appear on the Internet in an average of 3.15 days.<sup>8</sup> Further, the Motion Picture Association of America (MPAA) indicates that during 2011, Peer Media Technologies reported that users initiated over 25 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in India.<sup>9</sup> The entertainment software industry also reports a rise in online piracy in India, as India placed seventh in the world in 2011 in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association member titles on public P2P networks, up from eighth place in 2010. For the music industry, in addition to 95% piracy online, there are two problems of increasing concern. One is mobile device piracy, in which retail establishments sell or offer for free flash cards or other storage devices (or chips) for mobile phones preloaded with music to customers (sourced either from pirate or legitimate CDs or downloaded from pirate websites or through P2P filesharing services). In addition, increasingly, mobile applications – infringing applications, for example, operating on iOS and Android phones – are used to make available Indian and international music to mobile subscribers without authorization.

The legal and enforcement infrastructure in India is just beginning to come into place to address these challenges, but industry fears the response may not be as effective and expeditious as needed. There were several positive developments in 2011. First, industry has used John Doe orders (known locally as “Ashok Kumar” orders), commonly used in India to target individual sellers and cable TV operators, to have ISPs disable access to infringing materials. In July 2011, a local Indian film studio (Reliance) in the process of releasing a major Indian film (*Singham*) in the market, and following up on a similar request by another film studio (having released another major Indian motion picture earlier in the year), obtained an “Ashok Kumar” Order, allowing it to send cease and desist notices to

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<sup>5</sup>According to a 2008 report, “The Effects of Counterfeiting and Piracy on India’s Entertainment Industry” published by the U.S. India Business Council and Ernst & Young, the Indian film industry lost an estimated US\$959 million and 571,896 jobs due to piracy.

<sup>6</sup>A report by comScore and the Telecom Regulator Authority of India (TRAI) suggests India had 11.21 million broadband users as of March 2011, and Nielson reports that the number increased to 12.34 million by November 2011. See Manan Kakkar, *Nielson India Shares Numbers About Internet Connectivity and Brand Reach*, ZDNet, November 29, 2011, at <http://www.zdnet.com/blog/india/nielson-india-shares-numbers-about-internet-connectivity-and-brand-reach/776>.

<sup>7</sup>The independent film and television segment of the motion picture industry (IFTA) reports that Internet piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors in India to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with pirates. Internet piracy also prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions.

<sup>8</sup>See Motion Picture Distributors Association (MPDA) (Prepared by PricewaterhouseCoopers), *Economic Contribution of Indian Film and Television Industry*, 2010, at <http://mpda.in/press/EconomicContribution.pdf>, at 10.

<sup>9</sup>A major U.S. movie is defined as a movie release in 1,000 or more theaters in the U.S. This estimate reflects only a subset of movie-related piracy activity occurring during the monitoring period, as it accounts only for initiated downloads or uploads of major U.S. films through the listed P2P protocols. It does not include: 1) downloads/uploads of unauthorized copies of movies that are not major U.S. releases, including local titles, through these P2P protocols; 2) downloads/uploads of unauthorized copies of any movies via other P2P protocols or through non-P2P technologies (e.g., websites); or 3) streaming of unauthorized copies of any movies via any technologies. Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

disable access to its new film which was to be released two days later.<sup>10</sup> Shortly thereafter the ISPs started some limited disabling of access to various notorious sites including *Megaupload.com*, *Mediafire.com*, and *Megavideo.com*.

Other successful industry actions included one initiated in 2010 by Alliance Against Copyright Theft (AACT) (MPA allied with the local Hindi film industry). In July 2011, the Mumbai Cyber Police arrested two suspected operators of the site *moviemax.in* in Gujarat, which was one of five locally based sites (among 99 notified to police), and the police have been helpful in ensuring those sites can be taken down as well, although industry has no confirmation as to the current status of the other four sites. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*,<sup>11</sup> decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspaces” or “places” to be used for sharing infringing materials. The local Indian record industry has been involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites.

The record is less stellar when it comes to voluntary notice and takedown. As a result of overall lack of voluntary cooperation, it has been difficult for right holders to locate or identify infringers and Internet content providers (pirate websites). The Indian music industry, for example, notified authorities of more than 200,000 songs and operated hundreds of detections for pirated materials online in 2011, yet little has been achieved with regard to voluntary removal of infringing content hosted on servers, particularly those located overseas that are supplying the Indian market. The International Federation of Phonographic Industries (IFPI), the recording industry’s international affiliate, has been making requests for takedowns of overseas websites and content, but with only a 21.5% takedown rate in 2011, the problem has not been addressed effectively.<sup>12</sup>

Where investigations reveal websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. In particular, the domestic recording industry is working intensively with the Mumbai, Delhi and Hyderabad police on Internet piracy issues. The film industry has also commenced criminal action against 99 pirate websites, seeking a remedy to disable access to these sites in India under the Copyright Act. *Moviemax* was one of these sites and two individuals suspected of operating the site were arrested in July 2011. Under the criminal laws of Maharashtra, the industry is hopeful that Magistrates there will issue interim site blocking orders (until final adjudication) to ISPs if the operators of the pirate websites fail to show at the criminal proceeding. With respect to mobile device piracy, the Indian music industry is bringing to the police more than 200 mobile device piracy cases per month. However, cases such as these are not high on the agenda of Indian police. Their Internet or mobile cases seem to focus principally on credit card fraud or false name and address cases. There persists in India a lack of knowledge regarding Internet and mobile piracy, and to address this, more training in various states is needed.

**Retail Piracy, Circumvention of TPMs:** Retail trade in pirated hard goods continues to harm the content industries in India. The predominant form of optical disc piracy in India is burned recordable discs,<sup>13</sup> with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), 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), and CD-ROMs and DVDs of business software, entertainment software and books/reference materials.<sup>14</sup> Some imported discs and factory-produced discs from India have reportedly still been

<sup>10</sup>Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*.

<sup>11</sup>*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

<sup>12</sup>The music industry reports takedowns in 1,811 cases out of 8,430 notices, or not even a 21.5% takedown rate.

<sup>13</sup>See *Accused Arrested in Mapusa Pirated CDs Case Out on Bail*, The Times of India – Goa, December 22, 2011, at [http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598\\_1\\_mapusa-police-cds-dydp-sammy-tavares](http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dydp-sammy-tavares) (in which the shop “Suresh Music” at the Mapusa municipal market was raided, resulting in seizure of around 5,000 pirated CDs and a CD writer; the complaint was laid by famous *tiatr* artist Francis de Tuem, after finding a pirated CD of his latest *tiatr* titled *Illegal*, with the Mapusa police. See also *Pirated CDs Seized from House in Beemapally*, January 29, 2012, BuzzExpress, at <http://expressbuzz.com/cities/thiruvananthapuram/pirated-cds-seized-from-house-in-beemapally/358030.html> (reporting the seizure of massive numbers of DVD covers and hundreds of DVD-Rs burned with content, mostly pornographic, as well as burners; the accused was apparently able to produce 60 discs in a period of 3 seconds, which translates to many thousands of discs per hour).

<sup>14</sup>IIPA recently identified many markets known for their high volume of pirated DVDs, pirated software, and other counterfeit products. These include Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort District, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai); SP Verma Road (Patna); GS Road (Guwahati); Sahid Narag (...continued)

detected in recent years.<sup>15</sup> Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard-disk loading piracy) is also prevalent in India.<sup>16</sup> There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkatta, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs.<sup>17</sup> Because India has yet to implement protection for TPMs consistent with the WCT and WPPT, vendors openly sell circumvention devices on the Internet, in retail stores and kiosks, or sell game consoles that are already modified.

Some industries experienced good support from Indian authorities, with law enforcement generally willing to conduct complaint-based raids and, e.g., running *suo moto* raids for the music industry. The music industry reports more than 1,400 raids during 2011, more than 570 of which were *suo moto* raids, while the number of piracy cases remaining in litigation stands at approximately 20,000. The motion picture industry reports good enforcement cooperation in some states such as Andhra Pradesh, and experienced some decline in DVD piracy at the street vendor level in certain cities such as Mumbai due to self-help enforcement activities by AACT and law enforcement. In 2011, AACT was involved in at least 376 raids, over 290 arrests, and seizures of over 730,000 pirate DVDs and 445 optical disc burners involving film industry products. Major hurdles remain the lack of anti-piracy teams among the Indian Government other than in Tamil Nadu and Kerala, the lack of dedicated prosecutors or police, and the fact that piracy continues to be in general a low-priority offense amongst enforcement authorities.

**Signal Theft and Public Performance Piracy:** Cable piracy is another problem which plagues the industry. Unlicensed films/titles are aired by local cable operators. At times even new releases are broadcast over cable networks. Cable operators in India routinely “underdeclare” the number of subscriptions for which they are being paid, so they pay right holders in movies and television content substantially less than they are rightfully owed. Given the size of the Indian market, the loss to the industry from such levels of underdeclaration is huge. These practices result in substantial losses in tax revenue to the Indian states, and several of the states have begun complaining loudly about losses. Public performance piracy (e.g., in hotels, bars, restaurants, retail establishments) is also widespread for the music and sound recording industry.

**Corporate End-User Piracy of Business Software:** The business software industry reports that end-user software piracy rates have gradually declined in recent years due to an increase in laptop shipments and tablets which come preloaded with branded software.<sup>18</sup> There is also a decrease in the consumption of “white boxes” or assembled hardware, although as noted above, hard disk loading does remain an issue in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and sponsored by the Business Software Alliance (BSA), entitled Piracy

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(Bhubaneswar), CG Road (Ahmedabad), and retailers on leading streets in Gujarat. See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at [http://www.iipa.com/pdf/2011\\_Oct26\\_IIPA\\_Notorious\\_Markets\\_Submission.PDF](http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF).

<sup>15</sup>There reportedly remain dozens of optical disc factories in India which have a capacity to produce millions of discs per year. To ensure all factories reproduce only legitimate discs, in recent years, industry presented draft optical disc legislation which would regulate the plants' activities, but a major company in India, Moser Baer, opposed the legislation and its inclusion of blank disc licensing. The music industry reports three factory cases which have been brought but are still pending.

<sup>16</sup>Calicut (Kerala), Belgaum (Karnataka), Gulbarga (Karnataka), Nagpur (Dhantoli), Tilak Road (Pune), Canada Corner (Nasik), Golani Market (Jalgaon), Nehru Place (Delhi), Naza Market (Lucknow), Agra, Ludhina Market (Ludhiana) contain a tremendous number of computer resellers, retailers and assemblers selling tens of thousands of computers pre-loaded with pirated operating system software. It has been estimated that between 70-90% of all computers sold in these markets have infringing software on their hard drives.

<sup>17</sup>The industry reports that “mod chip” to modify consoles for pirate game play are generally imported from the Middle East and China and sell for around Rs.200 (US\$4.39) to Rs.700 (US\$15.35) per chip.

<sup>18</sup>BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com). In 2010, the software piracy rate in India was 64% (down from 65% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$1.37 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

Impact Study: Economic Benefits of Reducing Software Piracy, found that decreasing India's PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

The progress for the software industry in reducing piracy in India is due in part to Indian Government and industry efforts on raising awareness about the risks of using pirated software. Most notably, BSA and the Ministry of Communications and IT entered into a partnership to undertake joint efforts to reduce software piracy and conduct co-branded awareness programs for private enterprises and government departments to promote the use of legal software. A co-branded report was released highlighting this partnership in November 2011. These efforts will continue through 2012. There appears to be heightened judicial awareness about software IP issues as well. BSA filed 41 civil end-user piracy cases in 2011, out of which 34 were settled, with several BSA members filing their own individual cases in addition to these. BSA further reports continued good relationships with local enforcement authorities in 2011. The civil end-user enforcement program relies upon Anton Piller orders from the courts to preserve the element of surprise and ensure that evidence is preserved. In 2011, BSA successfully obtained 36 Anton Piller orders against corporate end-users.

Unfortunately, it remains the case that the enforcement authorities do not generally take any independent action on software piracy cases, due to inadequate familiarity with IP issues; lack of requisite training on how to conduct an end-user software piracy action; lack of technical knowledge of which software is pirated; an undermanned police force (e.g., the IPR cell in the Delhi Economic Offences Wing (EOW), dealing with a territory of about 200 square kilometers, has five officers); lack of special EOWs in many cities, and lack of clear jurisdiction of the various teams within an EOW. As an example of the problem, in the Delhi EOW, there are six or seven sections dealing with a range of economic offenses including cheating, fraud, cyber crime, and IPR. In particular, there exists a division between IPR actions and cyber crimes, and there are no clear guidelines about which EOW section should be addressing software piracy cases. Finally, IPR crimes are still considered to be of a low priority compared with perceived cyber security threats. More awareness and training programs for the benefit of enforcement agencies would be helpful, as would clarification of jurisdictional issues. There also remain some unique procedural problems for software right holders in terms of obtaining effective action against end-user software piracy. First, if any action is to be taken against an end-user target, the evidence being required by the authorities is extremely high, and right holders must usually gather this evidence on their own, since most police forces do not have the manpower or training to conduct surveys, check computers, and take them into custody. Although the Delhi High Court is extremely supportive in granting *ex parte* orders in civil actions in cases of software piracy and gradually the Chennai High Court is also demonstrating a willingness to openly grant such orders, obtaining clearly independent enforcement by state level law enforcement wings against software piracy is a significant challenge that does not receive adequate priority from the central or state governments.

**Camcording Piracy:** Camcording piracy has emerged in India as a harmful activity to both Hollywood and Bollywood (as well as Tollywood - Telugu films, and Kollywood - Tamil films).<sup>19</sup> MPAA reports that in 2011, it identified 33 forensic matches of its members' films, up from 23 in 2009. Illegal camcording harms both U.S. and Indian films and the Indian Government needs to enact a measure to outlaw the practice. The cooperation of the Indian industry with U.S. industry will hopefully spur passage of anti-camcording legislation and more enforcement.<sup>20</sup> In 2011, there were two interdictions and two arrests of individuals illegally recording films in Indian cinemas. In November 2011, the police in Thane arrested an individual camcording *The Adventures of Tin Tin* on the opening day of its theatrical release in India. The industry reports some awareness activities on "source" piracy have been helpful, and that the cinema owners are showing slides in cinema halls and placing messages on tickets conveying that illegal camcording is not allowed.

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<sup>19</sup>The independent film industry notes that camcording is particularly damaging in India because it has fueled physical and online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate distribution.

<sup>20</sup>In November 2010, the City of Los Angeles and Indian producers made a Joint Declaration by which they agreed "to develop and strengthen motion picture production, distribution, technology, content protection and commercial cooperation between the two filmmaking communities." See Motion Picture Association, *Historic Cooperation Pact Between Hollywood And Bollywood: City of Los Angeles and Indian Producers To Encourage Joint Film Production and Commercial Cooperation*, November 10, 2010, at <http://www.mpda.in/press/Immediate%20Release%20-%20LAIndian%20Film%20industry%20Joint%20Declaration%20signing.pdf>.

**Pirate Printing and Photocopying of Books and Journals:** Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continues to harm the publishing industry in India. Book piracy occurs in a variety of ways in the country: unauthorized photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on sites created and maintained by university students. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues on and around university campuses and in libraries, sometimes even condoned by the institutions. Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of course packs, or “self instructional material” (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. Industry continues to wait, apparently in vain, for the Ministry of Human Resources and Development (MHRD) to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses. India-only editions, low-priced versions intended only for distribution in the Indian market, are being exported to Africa, the U.S., the United Kingdom and other European markets. The low-priced edition program was intended to benefit and meet the specific needs of the Indian market, but unfortunately, the export of such editions out of India is now adversely affecting more developed markets of the member publishers of the Association of American Publishers (AAP).

**Enforcement Through State Cells in India Should be Enhanced Further Through National Coordination:** The Indian Government, in its 2010 Special 301 Submission, indicated, “[e]nforcement Cells have been set by the state governments in their respective police headquarters. Nodal officers have been appointed by the state governments to handle IPR related offences.”<sup>21</sup> However, there remains no Federal Government-led initiative to coordinate enforcement with and between the state governments. A national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state cells and Nodal officers should be established forthwith. The state cells, first established in 2002, are apparently starting to run more significant numbers of *suo moto* raids against piracy.<sup>22</sup> The industries all report good working relationships with the state cell in Delhi, while one or more industries reports good working relationships and effective assistance from Tamil Nadu, Kerala, Punjab, Mumbai, Bangalore, Chennai, and Hyderabad.<sup>23</sup> BSA has urged specific states already having or considering having state specific anti-piracy legislation to ensure inclusion of software within the scope of the legislation, and submissions were made to state governments of Delhi, Punjab, Tamil Nadu, and Maharashtra in this regard. The State Government of Delhi has so far been the most receptive and indicated that software would be included in the legislation.

**Civil and Criminal Courts Beginning to Show Some Signs of Improvement:** The record in India in terms of the courts improved in 2011, likely due to increasing numbers of cases in which imprisonment was imposed (the music industry reported just over 200 prison sentences in 2011). The industry also reported that from January to November 2011, 175 music piracy cases settled through plea bargaining. These included awards totaling Rs.42 lakhs (US\$84,800) in two cases in Delhi, and a settlement for Rs.32 lakhs (US\$64,600) in one civil case. Of the criminal convictions, 84 resulted in fines, although most fines were in the US\$500 to US\$1,000 range. BSA reports that the criminal courts oversaw the first ever plea-bargained sentences in three BSA-led criminal matters pertaining to software piracy, resulting in fines. The Delhi High Court is improving and is perhaps the most copyright-cognizant bench in the country, leading the effort to fashion remedies to promote IP enforcement, such as John Doe orders.

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<sup>21</sup>See Government of India, Ministry of Human Resource Development, Department of Higher Education, Copyright Office, *State-wise Nodal Officers for Enforcement of Copyright: List of the Nodal Officers nominated by States/UTs*, at <http://copyright.gov.in/frmStateWiseListNodalOfficers.aspx>. There was even an anti-piracy coordination cell launched in October 2010 by FICCI.

<sup>22</sup>A 2009 raid involved the largest ever seizure of pirated academic and scientific, technical and medical (STM) books in India. During the last quarter of 2009, a raid in Delhi against a printer, binder and distributor producing pirated academic and STM books revealed 80,000 prints and 124 negatives of a single publisher’s titles on hand. This led to raids on two warehouses belonging to the distributor, leading to at least 160,000 more suspected pirated titles. The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

<sup>23</sup>The Mumbai police have both a copyright cell, dealing with OD and other piracy, and a cybercrime cell which deals with software piracy. *Mumbai Police: Organization and Functions*, at [http://www.mumbaiipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaiipolice.org/%5Cspecial%5Corg_fun5.htm). See *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See *Anti-Piracy Raids Seize Close to 15000 Pirated Discs Mumbai Police Along With AA Khan and Associates Conduct Raids Across the City*, *Thaindian News*, May 13, 2010, at [http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city\\_100363186.html](http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city_100363186.html).

Notwithstanding these successes, problems remain. First, fines are invariably low with most falling under US\$1,000. Second, while the number of criminal convictions has gone up, the sheer number of piracy cases still pending (music piracy cases alone number more than 20,000) indicates that much more needs to be done to effect judicial reform and speed dockets. In addition, many courts outside Delhi remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. For these reasons, IIPA continues to urge the Indian Government to establish special IP courts throughout the country with expert judges and prosecutors.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in India is governed by the Copyright Act, 1957 as amended last in 1999, and related laws and regulations.<sup>24</sup> Amendments to the Copyright Act have been considered for many years. In late 2011, the Copyright Bill 2010, with amendments proposed to the Bill in 2011,<sup>25</sup> was introduced into the Rajya Sabha, but it ultimately stalled there. There is no indication whether the Bill will be re-introduced as is or with further changes. IIPA and many other stakeholders submitted extensive comments to the 2010 Bill, and comments have also been provided on the Bill as consolidated (i.e., including the 2011 amendments). The Bill as amended in 2011 constituted an improvement over the previous draft,<sup>26</sup> although there remain some concerns. Of particular concern were: 1) provisions on the protection of TPMs against unlawful circumvention as well as trafficking in circumvention devices and services, 2) provisions restricting the ability of right holders to transfer rights; and 3) certain exceptions and limitations as well as expanded compulsory license provisions. In addition, the Bill did not properly address online infringement/Internet piracy or contain adequate measures promoting ISP responsibility and fostering cooperation with right holders to combat such infringements. The following outlines key issues remaining in the Copyright (Amendment) Bill 2010, as amended in 2011:

**Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention:** The Bill left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT and WPPT. While India has not yet ratified these treaties, the amendments have always been intended to address the WCT and WPPT issues to make India ready for such ratification. The proposed Section 65A remains of concern, and if enacted in its present form would be incompatible with the WCT and WPPT. The provision:

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<sup>24</sup>According to the explanation of the Indian Government in its 2010 Special 301 Submission, Chapter XIII of the Indian Copyright Act, 1957 provides for penalties for offences committed under the Copyright Act and empowers the police to take necessary action. These are the following:

- Imprisonment for a term of six months to three years and a fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for the offence of infringement of copyright or other rights under the Act. (Section 63).
- Imprisonment for a term of one year to three years and with fine of Rs. 100,000 (US\$2,192) to Rs. 200,000 (US\$4,385) on second and subsequent convictions. (Section 63 A).
- Imprisonment for a term of 7 days to three years and with fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for knowingly using an infringing copy of the computer programme (Section 63 B).
- Seizure of infringing copies (Section 64).
- Imprisonment for a term up to 2 years and with fine for possession of plates for purpose of making infringing copies (Section 65).
- Disposal of infringing copies or plates used for making infringing copies (Section 66).
- Imprisonment for a term up to one year or fine or both for making false entries in the register (Section 67).
- Imprisonment for a term up to one year or fine or both for making false statements for the purpose of deceiving or influencing any authority or officer (Section 68).
- Imprisonment for a term up to three years and with fine for publication of a sound recording or video film in contravention of provisions of Section 52A (Section 68 A).

Government of India. *Submission by India Under Special 301 for 2010*, February 26, 2010, at 5 (on file with IIPA). The Submission also indicates, "The provisions on IP protection in these laws are further supplemented by appropriate provisions for border measures in the Customs Act, 1962, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 and the Department of Revenue Notification No. 49/2007-CUSTOMS (N.T.) dated 8th May, 2007 notified under section 11 of the Customs Act, 1962." *Id.* at 9. The Submission indicates, "The Customs authorities are also empowered to take action on their own initiative suspending clearance of goods where they have prima facie evidence or reason to believe that the imported goods are infringing the IP rights of any right holder," and notes "In 2008-09, there were 28 cases of suspension of clearance of imported goods on account of IPR infringements. In 2009-10, the number of cases increased to 55."

<sup>25</sup>"Notice of Amendments, The Copyright (Amendment) Bill 2010."

<sup>26</sup>Among improvements accomplished by the "Notice of Amendments" are the following: 1) it resolves satisfactorily an issue raised in the previous draft related to authorship of cinematographic works, although it retains troublesome provisions on "first ownership" of such works, discussed below; 2) it resolves satisfactorily a proposed change that would have damaged the Indian national exhaustion (parallel imports) regime; 3) it narrows the availability of a loophole to the prohibition on unauthorized rental to "a non-profit library or non-profit educational institution" which is defined as "a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-Tax Act, 1961."

- does not cover access controls as is required by the treaties;
- covers only the “act” of circumvention and only when the person engaging in circumvention activities acts “with the intention of infringing” only the exercise of exclusive rights;
- does not prohibit the manufacture, importing or trafficking in circumvention devices or services and merely requires that person to keep a “record” of the names and addresses and other “particulars” of the person using such device or service to circumvent;<sup>27</sup>
- does not define an “effective technological measure;”
- would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby almost completely eviscerating any protection);
- creates other overbroad exceptions;<sup>28</sup> and
- provides for only criminal and not civil remedies.

The Standing Committee in effect approved this provision as drafted, suggesting that the judiciary could evolve the law to ensure that access to works was facilitated (but not that trafficking would be deterred). IIPA has proposed some changes to the Bill to make it fully consistent with the WCT and WPPT.<sup>29</sup>

**Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility:** A sound approach to this issue of dealing with online infringements and the role of intermediaries is contained in the Information Technology Act, 2000, which provides for power to intercept or decrypt information through any computer

<sup>27</sup>With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, a “record keeping” obligation can not come close to meeting the treaties obligation to provide “adequate legal protection and effective legal remedies” against circumvention of TPMs.

<sup>28</sup>It is critical that any exceptions or limitations be narrowly tailored to avoid a scenario in which an exception effectively “swallows” the rule. . The currently drafted 65A(2)(a) is, therefore, not an appropriate starting place, since it exempts all acts of circumvention “for a purpose not expressly prohibited by this act” which would seem to subsume all limitations and exceptions. By contrast, the U.S. law provides narrowly tailored exceptions designed to facilitate specific uses , and also provides for a triennial rulemaking undertaken “to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls.” Since 2001, only a few narrowly tailored classes of works have been identified. The EU approach is to ensure that “rightsholders make available” the “means of benefiting from” a certain narrow list of exceptions, and have special provisions related to private use, with appropriate safeguards in place with respect to limiting the number of copies that can be made and with regard to the Berne three-step test.

<sup>29</sup>A proposed amendment to section 65A in the current Bill might look like this (bolded language is added to the current draft provision; struck out text would be deleted from the current proposal):

65A. (1) Any person who

**(a) knowingly, or having reasonable grounds to know, circumvents an effective technological measure applied for the purpose of controlling access to any work, broadcast or performance or protecting any of the rights conferred by this Act; or**

**(b) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, components, or technologies, or offers to the public or provides services, that:**

**(i) are promoted, advertised, or marketed by that person, or by another person acting in concert with, and with the knowledge of, that person, for the purpose of circumvention of any effective technological measure;**

**(ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or**

**(iii) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.**

~~with the intention of infringing such rights,~~ shall be **liable for the remedies provided under Chapter XII as if it was an infringement, and** punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person **from circumventing an effective technological measure in the following cases—**

~~(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:~~

Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

~~(ba) doing lawfully authorized activities~~ anything necessary to **and for the sole purpose of** conducting encryption research using a lawfully obtained encrypted copy; or

~~(cb) conducting any lawful investigations~~ **carried out by government employees, agents, or contractors for the purpose of law enforcement;** or

~~(dc) doing lawfully authorized activities~~ anything necessary **and for the sole purpose of testing the security of a computer system or a computer network with the authorisation of its owner or operator;** or

~~(e) operator; or~~

~~(fd) doing lawfully authorized activities~~ anything necessary to **and for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information** ~~circumvent technological measures intended for identification or surveillance of a user;~~ or

~~(ge) taking lawfully authorized~~ measures, **carried out by government employees, agents, or contractors,** necessary in the interest of national security.

**Effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.**

source on certain grounds mentioned therein.<sup>30</sup> The IT Act provides that local ISPs bear responsibility for infringements on their networks after they have been put on notice and have knowledge of infringement. In 2010, the Parliamentary Committee urged that the Copyright Bill be aligned with the principles laid out in the IT Act, recommending that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. In April 2011, the Information Technology (Intermediaries Guidelines) Rules, 2011<sup>31</sup> were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, setting takedown times for detected copyright infringements online to 36 hours. Unfortunately, the Rules seem to require “actual knowledge” for removal of infringing materials or links and do not appear to provide for red-flag notice (i.e., where the “intermediary” is aware of facts or circumstances from which an infringement is apparent). Also, since they carve out from the notice and takedown certain transient reproductions without regard to whether the transaction taking place is an authorized one, questions remain as to how effective the Rules along with the IT Act will be in addressing infringements in the non-hosted environment.<sup>32</sup>

Taken in this context, the Copyright Bill (as amended by the “Notice”) was essentially a further modification of the Rules,<sup>33</sup> but did not deal comprehensively with the issue of online infringement and the role to be played by ISPs over infringements of third parties. First, as drafted, the provisions in the Bill created a blanket exemption. Second, the scope of activities covered was unclear, including “transient and incidental storage” undertaken “for the purpose of providing electronic links, access or integration,” which suggests some coverage of information location tools and facilitating access to infringing materials, which are some, but not all, of the activities for which an effective response is needed to online infringement. The only conditions on the application of the blanket exemption were if the “right holder” ... “expressly prohibit[s]” the provision of “such links, access or integration,” which suggests a notice, or if the “person responsible” (undefined) has knowledge or constructive belief (“is aware or has reasonable grounds for believing”) that “such storage is of an infringing copy.” The proviso now contains a takedown period lasting 21 days, but requires the right holder to obtain a court order within that 21 days to avoid “put back” of the infringing material. Now that the legislation has stalled, attempts should be made to improve the legislation, providing for expeditious remedies to remove infringing material, including provisions encouraging ISPs to cooperate with right holders in dealing with online infringements through fair and effective policies to deal with non-hosted infringements and repeat infringers. Clarity on such issues is indispensable to the fight against online piracy.

**Extension to Foreign Works of, and Addition of New, Compulsory Licenses:** The Bill extended two existing compulsory licenses, which are currently applicable only to Indian-origin works, to include all foreign works. The first, Section 31, involves a compulsory license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work for which the right holder has “refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public,” as well as any work for which the right holder “has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.” Section 31A, a limited “orphan works” provision, provided for a compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished Indian works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found.” The Bill extended this compulsory license to all “unpublished or published works” that are being “withheld from the public.” The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne

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<sup>30</sup>The IT Act 2000 also provides the power, but not the duty, to monitor information through any computer source on certain grounds mentioned therein. IIPA does not support any duty to monitor computer systems or services.

<sup>31</sup>*Information Technology (Intermediaries Guidelines) 2011*, April 11, 2011 (on file with IIPA).

<sup>32</sup>The Information Technology (Intermediaries Guidelines) Rules, 2011 provide that an “intermediary” (as defined in the Information Technology Act, 2000) is not deemed to be directly liable for certain “temporary or transient storage” regardless of knowledge or red-flag knowledge and without regard to the legality of the temporary or transient storage, or of the transaction taking place across its network. Specifically, Section 3(3)(a) essentially provides that a service provider shall not be directly liable for the “temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

<sup>33</sup>Section 52(1)(c) of the Bill (as amended) provided an exception for “transient and 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 such storage is of an infringing copy.” The amended Bill contained the language, “Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one day or till [sic] he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

and TRIPS obligations. The Standing Committee was also concerned about the international implications of these provisions and recommended they be reviewed.

Two new compulsory licenses (Sections 31B and 31D) were proposed for the benefit of the disabled and for the broadcast of literary works, music and sound recordings, respectively. Section 31B fails to contain necessary protections to ensure that such works are limited solely to the disabled and that they otherwise fully meet the three-step test. The proposed change to Section 31B in the “Notice” makes the situation even worse, since it extends the availability of the compulsory license to “[a]ny person working for the benefit of persons with disability on a profit basis or for business....” The broadcast compulsory license in Section 31D is unprecedented, but was narrowed by the “Notice” so that now it covers only “communication to the public by way of a radio broadcast of a literary or musical work and sound recording.” It remains objectionable within that narrower scope.

**Overly Broad Exceptions:** The proposed changes to Section 52 in the Bill would have created a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. The Bill also leaves in place other exceptions which have troubling implications and India’s Berne and TRIPS compliance, especially if extended into the digital environment. These include: a) a new broad “private or personal use” exception (proposed Section 53(a)(1));<sup>34</sup> b) existing 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 (Section 52(1)(ad)); and c) an exception permitting the performance of films in educational contexts and in “clubs” (Section 52(1)(i)). These and certain other exceptions must be scrutinized in conjunction with India’s obligations under the Berne Convention and the TRIPS Agreement.

**Assignment of Copyright (Sections 18 and 19):** Several recent Indian court decisions concluded that musical works included in audiovisual works or in sound recordings are not subject to payment of public performance royalties, i.e., the public performance rights in such musical works are deemed assigned to the producers of sound recordings or the audiovisual works in which they are used. These court decisions deny right holders in musical compositions the ability to enjoy their exclusive rights and run counter to India’s compliance with its international obligations under the Berne Convention and the TRIPS Agreement. The Bill contained several changes which may have fixed the problems created by the court decisions. In Section 18(1), two new provisos indicate the author of a literary or musical work shall not be deemed to have assigned or waived “the right to receive royalties to be shared on an equal basis with the assignee of copyright” in two cases: 1) when included in a “cinematograph film” for all “utilization” other than “the communication to the public of the work along with the cinematograph film in a cinema hall”; and 2) when “included in the sound recording but not forming part of any cinematograph film.” Section 19(8) and (9) of the Bill would preserve the right of the author “to claim an equal share of royalties” as to: 1) “utilization” of “any work” in a cinematograph film in any form other than “for the communication to the public of the work, along with the cinematograph film in a cinema hall”; and 2) “utilization” of “any work” in “a sound recording which does not form part of any cinematograph film.”

Mere inclusion of works in an audiovisual work or sound recording should not deem assigned or waived the rights of the authors of those works, or deny them the ability to negotiate and receive payments for the utilization of those works, e.g., public performances of musical works, or the exercise of other exclusive rights. At the same time, the new provisions should not limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works. We are also concerned about the attempt to ascribe the exact percentages or amounts to be paid to such authors, such as the Section 18 proviso that the royalties be shared with the assignee “on an equal basis,” or the Section 19 mandate of “an equal share.” This text is unclear, as it does not specify the basis on which an “equal share” is calculated. These provisions would also undermine the freedom of contract and the

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<sup>34</sup>The industries are concerned that the proposed exception in Section 52(1)(a)(1) could be interpreted in overly broad ways, for example, to permit the making of camcorder copies in theaters under the pretext of the copies being made for private and personal use. It appears that HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theaters 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,” must still comply with 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, we strongly urges the HRD to further revise this Section to explicitly incorporate the three-step test into the law and remove any potential for such broad interpretations.

flexibility of parties to negotiate other agreements on royalties' distribution which could be more beneficial or appropriate under the circumstances. Finally, the scope of application of this provision is unclear, and as it is not specifically limited to works created after the effective date of the law, may upset existing freely-negotiated contractual relationships, and may hinder the ability of right holders in such films or sound recordings to distribute their works without fear of disputes over conflicts between such arrangements and the statutory mandates.

Other parts of the Bill unfortunately provided for significant limitations on assignments of works. Under the proposed amendments, assignments are deemed invalid as to "any medium or mode of exploitation of the work which did not exist or was not in commercial use" at the time the assignment was made unless that medium or mode was "specifically" mentioned in the assignment. This change would have precluded "all rights" assignments which historically have been treated by both authors and publishers/producers as the norm in the business, wreaking havoc with existing distribution arrangements, in particular with respect to digital distribution. To the extent the provisions apply retroactively, they would also undoubtedly be subject to constitutional challenge. The software industry is also concerned about this provision, which would severely limit the scope of a possible assignment of copyright in any work including software; given technological advances, it is not realistic to expect that the modes and media of exploitation can be fully spelled out in a contract as this provision would require.

**Ownership Issues (Section 17):** Certain changes to India's ownership provisions threatened to undermine the rights of filmmakers and other right holders and their longstanding commercial arrangements. For example, a new Section 17(f) was proposed, by which the "film director" and "producer" are to be considered "joint first owners" of the copyright for films produced after the effective date of the new law (once enacted).<sup>35</sup> Under the current law, and in line with the well regarded best practice, the producer, as the one providing "valuable consideration" for the production of the film, is deemed the "first owner of the copyright therein." This new provision could have seriously undermined the ability of a film producer to pull together all the elements that need to be incorporated in such film and severely hamper the distribution of that film since separate license agreements would need to be made with each such author for each specific use to which the film is put. In addition, the second proviso to a new subsection (g) states, "in case of any work incorporated in a cinematograph work nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13." Clause (b) establishes default ownership rules for certain works (photographs, artistic works), and clause (c) is India's work for hire rule for non-publications (i.e., not a work being published in a "newspaper, magazine or similar periodical"). This clause therefore would seem to create a new default for the authors of "original literary, dramatic, musical and artistic works," and would seem to nullify the work for hire provision.

**India Should Adopt an Anti-Camcording Provision:** With the increase in illegal camcording of movies in theaters in India, the Indian Government should adopt national legislation making it unlawful to use an audiovisual recording device (such as a video camera or other device) to make (or attempt to make) a copy, in whole or in part, of a motion picture while inside a theater, and to prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcordered copy. The U.S. has such a federal statute, and several other countries have statutes or are considering bills prohibiting illegal camcording.

**Unclear Protection for Temporary Copies:** It appears that the reproduction right under the Copyright Act is intended to cover temporary copies, such as those made in the random access memory of a computer or other electronic device. The IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. For the sake of clarity and certainty the Copyright Bill should state this expressly (e.g., in the statutory definition of "reproduction"). The Copyright Bill defined the reproduction right to include copies "stored" in a computer, and contains a "transient and incidental" copy exception, implying that such temporary copies fall under the reproduction right. Sections 52(b) and (c) provide for exceptions from the exclusive right of reproduction for the

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<sup>35</sup>It is also noteworthy that Section 26 of the Bill extends the term of copyright in cinematograph films from 60 to 70 years, but that only the principal director may enjoy the extended term, and according to Section 17(g), for films produced before the effective date of the Bill, the additional ten years of protection would be available only if the director entered into an agreement with the producer or copyright owner. This provision could create disruption in existing agreements between directors and producers or copyright owners, depending on how the Indian law is applied (e.g., it is unclear how the additional 10 years is to be considered in India in cases of foreign works whose country of origin has at least a 70 year or longer term (e.g., the U.S. 95 year term).

transient and incidental storage of works in certain circumstances, and applying the *a contrario* principle it would appear that all such copies, including those not subject to such exceptions, are protected as reproductions. We note that under Article 9(1) of the Berne Convention, Article 9.1 of the TRIPS Agreement, Article 1(4) of the WCT and Articles 7 and 11 of the WPPT, the right of reproduction covers all acts of reproduction “in any manner or form.” The Bill correctly refers to the storage of works in digital form in an electronic medium as an act of reproduction, as provided in these Articles and in the Agreed Statement to Article 1 of the WCT and Article 11 of the WPPT. Rather than rely on the language in the exceptions for implying the full scope of the reproduction right, it would be preferable not to leave this issue to judicial interpretation of the new provisions but to clarify the issue by including a specific definition of the right of reproduction that would refer to the storage of works in an electronic medium and include reference to transient, temporary and incidental reproductions directly.

**Other Issues:** The Indian Government should also achieve the following in amending its copyright laws and related regulations that would be beneficial to foreign and Indian right holders alike:

1) **deal with damaging “pre-release” piracy**, with provisions comparable to those adopted in the U.S. (the Family Entertainment and Copyright Act of 2005, containing effective civil and criminal provisions to deter online pre-release piracy),

2) **adopt statutory damages**, since proving actual damages, e.g., in end-user software piracy cases, can be difficult, and in order to expedite the slow civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and Anton Piller orders to deal with piracy,

3) provide that **seizure orders** should be granted to copyright owners as a matter of right in civil cases (they are currently discretionary),

4) add a provision to the Copyright Law that **refusal to comply with a court order shall result in a defendant being held in contempt**; at present, the only option a copyright owner has in the case of refusal to comply with a court order is to initiate contempt proceedings, which can lead to significant court delays and may not result positively,

5) **amend Indian tax laws to classify software piracy as a form of tax evasion** and define corresponding tax violation rules in line with international best practices. This could be done by, among other things, amending tax laws to a) specifically require that service tax paid on computer software be included in the service tax returns filed by registered companies and b) empowering service tax inspectors to audit companies based on their service tax returns and their disclosure of software expenses (if a regulation under the Companies Act requiring such disclosure is implemented, as recommended above),

6) **allow for restitution in criminal cases**, and

7) **adopt an effective optical disc law**, since India has a reported 36 optical disc factories. FICCI has been engaged in the drafting process and the copyright industries have weighed in. Adopting an effective OD law has long been delayed by the controversy over coverage of blank discs.

## **MARKET ACCESS ISSUES**

As described in detail in previous IIPA submissions, many market access barriers hinder copyright owners’ abilities to participate fully in the market in India. Below are just some of many barriers the creative industries face in India. Other barriers are set forth in documents such as the FICCI “Key recommendations for Media & Entertainment Sector presented to the Finance Ministry” (February 2011), and in general, we concur with FICCI’s findings therein.

**Motion Picture Barriers, Including Services Taxes and Discriminatory Entertainment Taxes:** The U.S. motion picture industry faces numerous market access barriers, including: 1) bans on exclusivity in the Pay TV sector and restrictions on the same in the Direct-to-Home (the reception of satellite programs with a personal dish in an

individual home) market; 2) price controls on Pay TV channels and “bouquets” of channels; 3) foreign ownership restrictions; 4) the imposition of a 10.3% service tax assessed against the “transfer” of intellectual property rights which amounts to double taxation; 5) inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film;<sup>36</sup> 6) price fixing on tickets in South India as well as quotas on the number of screenings per title per day; 7) onerous regulations on uplink and downlink of satellite signals beaming into India;<sup>37</sup> and 8) disruptive content control rules for television.<sup>38</sup>

- **TRAI Bans Exclusivity, Includes “Must Provide” in the Pay TV Sector; MIB Also Restricts “Direct-to-Home” Business:** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors)<sup>39</sup> combined with a “must provide” requirement (obligating broadcasters to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian Government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.
- **MIB Restrictions on DTH Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the Direct to Home (DTH) market. Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 49%. There is also a 20% sectoral cap on DTH platform ownership by foreign companies, while total direct and indirect foreign ownership of a satellite platform cannot exceed 49%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Service Tax on Transfer of IPR:** A service tax imposed by the Ministry of Finance against the transfer of intellectual property rights went into effect in July 2010. There is an amended Negative List issued by Central Board of Excise and Customs which lists items which are not subject to service taxes, but the temporary transfer

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<sup>36</sup>Any film not produced in the same language that is predominately spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice.

<sup>37</sup>Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, licensed by the government, and pay prescribed fees per channel beaming into India.

<sup>38</sup>In August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated “U” can be broadcast on TV channels, reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only “U” rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.

<sup>39</sup>Additionally, the MIB amended the Direct to Home (DTH) Guidelines to include, among other things: prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard.

of copyright is not included in the Negative List. The service tax against the transfer of intellectual property rights should be included in the Negative List. Under the service tax policy, the Indian distributor of foreign films must pay the service tax on payments made to the offshore film producers at the rate of 10.3%. The service tax raises the total amount of both central and state indirect taxes to between 30 to 60% and amounts to double taxation by both the state and national governments. Constitutional challenges were filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts and remain pending.

- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA's India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Government of India has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films.

**High Tariffs on Entertainment Software Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30-35%), console game products (with tariffs also as high as 30%), and game console hardware. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where penetration rates of unauthorized consoles are only a fraction of what they would be under less restrictive market conditions. There is also an excise duty assessed on PC and other locally replicated products. The current duty rate is at 8.24% 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 is severely hampered.

**Double Taxation of Business Software:** The packaged software industry in India continues to be doubly-taxed – attracting service tax at the central level and value-added tax at the state level due to a discrepancy between central and state level policies of treating software as a service or a good. The Finance Ministry has announced that taxation of packaged software will be clarified during the 2011 budget session of the Parliament.

**Technology and Procurement Mandates:** The Indian government is in the process of developing a number of policies that raise concerns they will be implemented in a manner that provides significant benefits and preferences, and potentially mandates, for products utilizing a particular technology or that have IP owned and/or developed in India. This includes the National Electronics Policy, the National IT Policy and the National Telecom Policy. IIPA believes that an open and competitive market is an essential component of a world-class IT sector and to fostering IP development. The Indian government should avoid policies that restrict market access through technology mandates or stringent procurement preferences.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to conduct training in 2011. BSA conducted capacity building workshops for India Customs entitled “Software Counterfeiting & Piracy and Product Identification,” covering all the five major ports, namely, Delhi, Mumbai, Kolkata, Chennai, and Bangalore. BSA also participated in a CII capacity building program called for IPR border enforcement officials sponsored by the National Academy of Customs, Excise & Narcotics (NACEN), presenting the software industry perspective. BSA further collaborated with the MHRD Chair on IPR at National Law University, Jodhpur on an “IPR Sensitization Program for Senior Police Officials and Public Prosecutors.” BSA conducted a workshop on the topic “Investigations & Challenges in Software Piracy” at the Rajasthan Police Academy (RPA), Jaipur, and Biju Patnaik State Police Academy, Odisha, Bhubaneswar - sponsored by the Bureau of Police Research and Development (BPR&D). BSA has also been involved in several workshops and programs to implement software asset management (SAM) in several of the states (Karnataka,

Andhra Pradesh, and Maharashtra) in 2010 and early 2011. BSA plans to be further involved in such training activities in 2012, including work with enforcement agencies, the judiciary, and including building greater partnerships with State and Central Government agencies to build capacity and raise awareness on software piracy issues. The motion picture industry was involved in training in several ways, and notes that in 2011, over 400 judges were trained, and MPAA's local program specifically engaged in training of 800 cinema managers in the "Make a Difference" program. The music industry also offered training programs to police personnel in Andhra Pradesh, Punjab, West Bengal, Kerala, Tamil Nadu, Maharashtra, Delhi and Mumbai. The publishing industry participated in a series of workshops for Customs officials at various ports, providing training on how to identify counterfeit or India-only (low-priced) editions destined for export (or in some cases, importation into India). Publishing sector representatives also regularly participate in workshops that provide training for other law enforcement personnel.

## **GENERALIZED SYSTEM OF PREFERENCES**

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. India has been a major beneficiary of the GSP program. During the first eleven months of 2011, more than US\$3.4 billion in imports to the U.S. from India enjoyed duty-free treatment under the GSP Program, or more than 10.2% of India's entire imports into the U.S.<sup>40</sup> Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). India needs to endeavor to meet these criteria under the statute to remain eligible to receive favorable treatment under the GSP Program.

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<sup>40</sup>During 2010, almost US\$3.5 billion in imports to the U.S. from India enjoyed duty-free treatment under the GSP Program, or more than 11.75% of India's entire imports into the U.S.