

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2013.<sup>1</sup>

**Executive Summary:** India can be one of the world's leading legitimate markets for the creative industries – both foreign and domestic. The country continues to produce the greatest number of films in the world (estimated at nearly 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> Other key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. Unfortunately, content theft negatively impacts the profitability of creators, as a recent study highlighting the film industry<sup>3</sup> and piracy's effects the livelihoods of the professionals and workers involved demonstrates.<sup>4</sup>

Physical, online, and mobile piracy (through both mobile uploading/downloading, as well as mobile applications being used to infringe), illegal camcording of movies from cinema screens, the unlicensed use of software by enterprises, print and photocopy piracy, circumvention of technological protection measures (TPMs), e.g., through the use of mod chips and game copiers, and pay-TV theft stifle the market for other creative sectors and keep India's creative economy from reaching its full potential. Market access barriers in India further stifle the film, software, and entertainment software industries' businesses in India, fueling piracy. Some effective approaches to physical piracy (such as the implementation of the Goondas Act in many of the states, though to be a truly comprehensive framework it should include piracy of books and software within its scope) and online piracy (mainly through the IT Act and ancillary regulations) have been taken in recent years, but these steps have not been enough to stem the tide of piracy.

The Copyright Law as amended in 2012 leaves some remaining issues, but it is hoped the new law along with the IT Act and ancillary regulations (in particular, the Information Technology (Intermediaries guidelines) Rules, 2011) will result in strengthened law enforcement and judicial enforcement in dealing with all forms of piracy. A National IPR Strategy is under development, offering a forum to make needed changes that can achieve results in line with Prime Minister Manmohan Singh's call for India to experience a "decade of innovation."

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement

- Implement a national anti-piracy task force to reduce piracy, *inter alia*, by working with state Nodal officers,<sup>5</sup> providing them with significantly increased resources; provide more accountability and power to the recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD). Our understanding is that the Task Force is now preparing recommendations to present to MHRD.

<sup>1</sup>For more details on India's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>For example, NASSCOM estimates that software and services revenues (excluding hardware) is expected to reach \$87 billion in fiscal year 2012, a 14.9% increase over 2011. Another 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. Employment generated by this industry is estimated at 1.83 million workers, most of whom are daily wage earners.

<sup>3</sup>A report issued by KPMG in March 2012 indicated India's film industry grew by 11.5% in 2011, to US\$1.85 billion (Rs93 billion). Liz Shackleton, *India's Film Industry Revenues Up 11% in 2011*, Screen Daily, March 13, 2012, at <http://www.screendaily.com/news/asia-pacific/indias-film-industry-revenues-up-11-in-2011/5039184.article>.

<sup>4</sup>A separate Ernst and Young study concluded that the Indian Film Industry lost US\$959 million and 571,896 jobs due to film piracy in 2008.

<sup>5</sup>Nodal officers in the Indian State enforcement system are designated contact individuals relevant to intake and response.



- 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.
- Ensure Anton Pillar orders are readily available in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as evidence can be preserved by court appointed commissioners.
- Issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets.

### Legislation

- Continue to pursue effective remedies through the IT Act and ancillary regulations (including the Information Technology (Intermediaries guidelines) Rules, 2011), to ensure fair and effective measures to address repeat infringers, and include effective mechanisms to disable infringing content on domestic and foreign websites.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.
- Establish enhanced penalties for “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- Adopt statutory damages in civil cases and allow restitution to be awarded in criminal cases.
- Provide that *ex parte* search and seizure orders should be granted to copyright owners as a matter of right in civil cases.
- 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.
- Amend state anti-piracy statutes laws (Goondas Acts) to include software and book piracy in addition to other forms of piracy.
- Provide tax benefits for associations involved in anti-piracy actions and capacity building.

### Market Access

- Eliminate significant market access barriers imposed on the motion picture industry including:
  - Bans on exclusivity in the pay-TV sector and similar restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home).
  - Price controls on the pay-TV sector.
  - Foreign ownership restrictions.
  - Inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film.
  - Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
  - Onerous regulations on uplink and downlink of satellite signals beaming into India.
  - Disruptive content control rules for television.
- Eliminate high tariffs on entertainment software products.
- Eliminate double taxation of software.

- Refrain from imposing technology or procurement preferences or mandates for products using technology or IP owned and developed in India.

## **PIRACY UPDATES IN INDIA**

Online and mobile device piracy have become serious problems in India as Internet and broadband penetration have widened. 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 \$431 million in 2012 (the largest percentage of that attributable to mobile device piracy, then physical piracy, Internet piracy, public performance piracy, and radio/TV broadcast piracy) and upwards of 90% music piracy online,<sup>6</sup> while the software industry reported a 63% rate of PC software piracy in 2011 with a commercial value of unlicensed software estimated to be over US\$2.9 billion. The motion picture industry continues to be hammered by a devastating combination of illegal camcording, Internet, and hard goods piracy, notwithstanding the launch of some legal services for audiovisual materials.<sup>7</sup>

**Internet and Mobile Piracy Devastating Creative Industries in India:** With the growth of Internet connectivity, and increasing mobile penetration, Internet and mobile device piracy have grown worse in 2012 for the copyright industries in India. Internet & Mobile Association of India (IAMAI) reports 150 million Internet users in India as of December 2012,<sup>8</sup> with 12.8 million fixed broadband connections,<sup>9</sup> and 78.7 million mobile Internet users as of October 2012.<sup>10</sup> Illegal downloading sites, P2P filesharing, BitTorrent trackers and indexes,<sup>11</sup> streaming sites, deep linking sites, blogs, forums, and social network sites directing users to infringing files, cyberlockers used to advertise massive amounts of infringing materials, and piracy through auction sites all continue to plague right holders in India. 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>12</sup> 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. There is no indication that this situation improved in 2012.<sup>13</sup> In 2012, the Entertainment Software

<sup>6</sup>The music piracy rate remains extremely high notwithstanding the recent launch of many legitimate services, including Saregama, Nokia Music, Flipkart, Cyworld, 7digital, Gaana, In, Indiaone, Meridhun, My Band, Raaga, Radio One, Saavn, Dhingana, Artist Aloud, Telugu One, and Smashits.

<sup>7</sup>Legitimate entertainment content is available through legitimate retail chains such as Landmark, Planet M, and Ezone. Online retailers such as Ebay.com and Flipkart.com also sell legitimate DVDs. There are more legitimate avenues available in India to watch movies and TV shows online than ever before. In India, iTunes, Movieflix.com, Rajshri.com, Eros Digital, BigFlix.com, Hungama.com, Indya.com, Bollywoodmoviemax.in and Myplex.com have all emerged as legitimate platforms to access legitimate entertainment content.

<sup>8</sup>Internet and Mobile Association of India, Vernacular Report 2012, January 9, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=avDLOK1zAl8=](http://www.iamai.in/rsh_pay.aspx?rid=avDLOK1zAl8=).

<sup>9</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>10</sup>Internet and Mobile Association of India, *Mobile Internet in India December 2012*, January 2, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=Yh0mbvBD9VI=](http://www.iamai.in/rsh_pay.aspx?rid=Yh0mbvBD9VI=).

<sup>11</sup>For example, the International Intellectual Property Alliance (IIPA) listed Canada-based *Torrentz.eu* as a notorious market in its 2012 submission to the U.S. Trade Representative in its Special 301 out-of-cycle review to identify notorious piracy markets. *Torrentz.eu* is ranked the 121st most popular site in the world, according to Alexa.com traffic rankings. The site is particularly highly ranked in the city of Calcutta (12th) and in all of India it is ranked as the 18th most visited site (it is ranked in the top 32 sites throughout South Asia). See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). IIPA also listed Ukraine-based *ExtraTorrent.com* (which claims it is "The World's Largest BitTorrent System") as a notorious market. That site claims, "Any torrents for FREE download. Download music, movies, games, software, iPod, anime, porn, adult, books, pictures and other torrents," and is particularly popular in South Asia, coming in, for example, as the 88th most visited site in all of India, according to Alexa.com. The Recording Industry Association of America cited in its notorious markets filing *exmasters.com* which it describes as "a web hosting company and is one of the biggest providers of services to BitTorrent trackers/indexing sites." While the site's servers are located in the Czech Republic, they have administrative control of more than 150 foreign websites whose primary function is to facilitate the download of illegal content, and the domain names for these websites are registered in India as well as Pakistan and elsewhere in Asia evidencing their global reach. See *RIAA Notorious Markets Submission*, *supra* note Error! Bookmark not defined.

<sup>12</sup>See PricewaterhouseCoopers Report, *supra* note 2.

<sup>13</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.

Association reports that India placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from seventh in 2011.<sup>14</sup>

The music industry reports a significant increase in 2012 of mobile chip 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).<sup>15</sup> In addition, there are numerous “apps” for mobile phones, for example, operating on iOS and Android phones, used to make available Indian and international music to mobile subscribers without authorization. For the software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download. For the motion picture industry, camcorded versions of a film hit the Internet on infringing websites through release groups within a few hours of a film’s release. The illegal online copy may be used further to produce hard goods for sale in key markets across India. The top ten illegal websites in India for piracy of motion pictures are: *Tamilwire.com*, *moviemobile.net*, *bharatmovies.com*, *tamilthunder.com*, *tamilcreation.com*, *bwtorrents.com*, *torrents.in*, *extratorrent.com*, *filestube.com*, *hindi5.com*, *movi91.com*, *fullmovies.com*, *moviespack.com*, *kat.ph*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in* and *dctorrents.com*. These sites cater to the demand for local language dubs of U.S. films as well as Indian films. Many of the illegal websites and other services affecting India operate from foreign servers including Ukraine, Canada, Russia, Pakistan, South Africa, Afghanistan, and the United States.

**Camcording Piracy Has Grown Out of Control in India:** Illegal camcords from India have been globally redistributed through release groups at least 32 times in 2012, and paired with audio tracks globally in 12 different languages.<sup>16</sup> There was a significant rise in the number of camcording incidents in India in 2012 (67), with India accounting for 53% of all forensic matches in the Asia Pacific region in 2012. Increased camcording incidents were observed from Ahmedabad (Gujarat), Indore (Madhya Pradesh), and Ghaziabad.

**Retail Piracy and Circumvention of TPMs Continue to Harm Right Holders:**<sup>17</sup> The predominant form of retail piracy in India consists of burned optical discs,<sup>18</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 software, entertainment software and books/reference materials. Some imported discs and factory-produced discs from India have reportedly still been detected in recent years.<sup>19</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>20</sup> There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy

<sup>14</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>15</sup>The local music industry association has launched MMX to license mobile chip practices with respect to music and has thereby been able to turn a loss into a relative gain. Nonetheless, illegitimate mobile piracy dwarfs such efforts to date. See <http://www.mmxindia.org/>.

<sup>16</sup>The motion picture industry identified 33 forensic matches of its members’ films in 2011 and 23 in 2009.

<sup>17</sup>The music industry alone reports losses due to hard goods piracy of Rs300 crores (US\$55.8 million).

<sup>18</sup> *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-dysp-sammy-tavares](http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dysp-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 three seconds, which translates to many thousands of discs per hour).

<sup>19</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 reported three factory cases brought which were settled through plea bargaining.

<sup>20</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.

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, with vendors openly selling circumvention devices on the Internet, in retail stores and kiosks, or selling game consoles that are already modified. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.<sup>21</sup>

**Signal Theft and Public Performance Piracy:** Pay-TV piracy is another problem which plagues the content industries. Unlicensed films/titles are aired by local cable operators. At times even new releases are broadcast over cable networks. In the past, cable operators in India routinely “under declared” the number of subscriptions for which they were being paid, so they paid right holders in movies and television content substantially less than they were rightfully owed. Given the size of the Indian market, the losses to the industry from such levels of underdeclaration were huge. Cable TV digitization, which has by now been implemented in the four primary metropolitan areas in India (and second and third tier metro areas now set to roll out as well) is expected to reduce the incidence of under-declaration. Up to the present, these practices resulted 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.

**Software Piracy:** The software industry reports that the rate of software piracy has continued to decline in India, though it remains high at a rate of 63% in 2011 (down from 69% in 2007), representing a commercial value of unlicensed software of almost US\$3 billion.<sup>22</sup> A key part of this problem remains the unlicensed use of software by enterprises in India. There have also been decreases in hard disk loading (the consumption of “white boxes” or assembled hardware with unlicensed software), although this remains a problem 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 BSA, entitled *Piracy 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 ten point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

Notably, in November 2011, BSA launched in India a new global program for certifying enterprises that meet International Organization for Standardization (ISO) standards for software asset management (SAM) – the “Certified in Standards-based SAM for Organizations (CSS(O))” program. Several Indian enterprises have completed or are in the process of obtaining this certification, which will recognize them as implementing SAM best practices. Also in November 2011, BSA and the Department of IT issued a joint report establishing a roadmap for promotion of SAM

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<sup>21</sup>In its December 2012 announcement, USTR cited Nehru Place (New Delhi, India) as “one of the many markets in major cities throughout India that are known for dealing in large volumes of pirated software, pirated optical media containing movies and music, and counterfeit goods.” See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. The Motion Picture Association of America (MPAA) recently identified in its Special 301 out-of-cycle review submission on “notorious markets” for piracy. Specifically cited were Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai). These Indian markets with clusters of street vendors attract significant pedestrian traffic and are known for their high volume of pirated DVDs and other counterfeit products. See Michael O’Leary, Motion Picture Association of America, *Request for Public Comment on the 2012 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2012-0011, September 14, 2012.

<sup>22</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in India was 63%, representing a commercial value of unlicensed software of over US\$2.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

best practices in government and private enterprises and collaborative efforts between government and industry continue under this framework. Both of these efforts offer promising opportunities to drive down unlicensed software uses by enterprises.

**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. While online piracy of trade books, textbooks, journals and reference books is beginning to rise, publishers' main problem in India remains hard goods piracy. Unauthorized photocopying as well as the compilation and sale of "course packs" are commonly seen in relation to textbooks used in educational institutes. Print piracy (off printing presses or reprints) affects academic titles as well as trade titles. Unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on websites created and maintained by university students are also on the rise in India. 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 MHRD to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

Another persistent problem continues to be the export of India-only, lower-priced editions of books intended only for distribution in the Indian market. Such India-only copies are being exported to countries in Africa, the U.S., the United Kingdom, and other European markets. The lower-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. In 2012, the publishing industry conducted a global investigation into the export of India-only editions. The investigation identified a known distributor which has since agreed to cease engaging in the infringing activity.

## **ENFORCEMENT UPDATES IN INDIA**

**Internet Enforcement Experiences Mixed in India:** The Internet enforcement situation in India demonstrates the complex nature of fighting piracy in India. The Copyright Law (both before and after the 2012 amendments) fails to provide a wholly adequate framework for a systematic and effective approach to Internet piracy.<sup>23</sup> As such, takedowns have been generally patchy and never entirely successful. The music industry reports a takedown rate in India of 30% to 40%, with better luck against established user generated content (UGC) sites with established takedown processes,<sup>24</sup> but only some relief in the case of court-mandated takedowns due to claimants' efforts to serve orders on ISPs, who comply for a short period of time after which compliance is an issue. One of the largest problems in India remains rogue foreign sites operating within the country, despite criminal cases having been filed against many of these sites. With ISPs taking the position that they will only take instructions from the Department of Telecommunications, and with no MOU in place with ISPs, there is no real remedy except for seeking to disable access to such foreign rogue sites.

It is against this backdrop that local right holders have requested courts to order the disabling of access to foreign rogue sites causing significant harm to their interests.<sup>25</sup> The latest instance involves the local music industry

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<sup>23</sup>The Copyright (Amendment) Act, 2012 now incorporates specific ISP safe harbor provisions requiring right owners to issue takedown notices, to which ISPs are required to remove identified content for a period of 21 days. Failure of the right owner to furnish a court order within a period of 21 days from issuance of takedown notice will allow the ISP to reinstate the content. This can only be a part – and a small one at that – of an adequate approach to online piracy.

<sup>24</sup>Difficulties in enforcing against Internet-based piracy in India are compounded by the difficulties right holders have finding correct IP addresses and the inability to locate pirate operating websites.

<sup>25</sup>In 2011, industry used John Doe orders (known locally as "Ashok Kumar" orders and 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 (...continued)

association obtaining orders from the Calcutta High Court directing all ISPs (387 in all) to disable access to 104 music sites from India (this included *songs.pk* mentioned in the 2011 IIPA report as particularly egregious, but many others with clear linkages to Bollywood, music or movies of India, or other indicia such as inclusion of words like “desi” or “tamil”).<sup>26</sup>

Where investigations reveal that websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One of these criminal cases was lodged in Rajkot Gujrat involving two websites (both shut down) and resulted in the arrest of two students in connection with running the websites; the case is ongoing. With respect to growing mobile device piracy, the Indian music industry is bringing to the police more than 500 mobile device piracy cases per month (up from 200 per month in 2011). However, cases such as these are not high on the agenda of Indian police, since they are instead focused principally on Internet or mobile cases involving credit card fraud or false names and addresses. 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>27</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 “webspace” or “place” to be used for sharing infringing materials. The local Indian record industry was involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites (many of which have been shut down as a result of the actions in Calcutta).

**Camcording and the Nexus to Internet and Hard-Goods Piracy:** For the motion picture industry, the strong nexus between illegal camcording in India, a problem which is growing out of control, and Internet piracy and even hard goods piracy involving motion pictures, requires a multi-faceted approach. Several actions were taken in 2012 against syndicates engaged in the illegal camcording of films and the release of those films on websites or on hard goods. For example, joint efforts between the MPA’s representative office in India, the Motion Picture Distributors Association (India) Pvt Ltd., and the Andhra Pradesh Film Chamber of Commerce (APFCC), resulted in arrests of four members of two major syndicates in southern India specializing in illegal camcording as well as online and hard goods piracy. The arrested operated out of Bangalore, Hyderabad, and Vijayawada and had links with syndicates in Delhi. The arrests led to the taking down of *spicyden.com*, *tollyzone.com*, and *desibuffer.com*. In another case during the fall of 2012, the arrests of three individuals distributing illegal copies of films online led to the takedown of *team-cc.com*, *rockerzone.com*, *southreels.com*, *southdownloads.com*, and *southcreations.com*. This latter operation was primarily initiated by the APFCC.<sup>28</sup> Industry reports some awareness activities on “source” piracy have been helpful, and that cinema owners are showing slides in cinema halls and placing messages on tickets conveying that illegal camcording is not allowed. Industry has also launched the “Make a Difference” campaign working directly with cinema owners, whose interest should include clamping down on illegal camcording.

**Some Retail Enforcement Ensues, But Piracy Remains a Low Priority Offense:** Some industries continued to experience good support from Indian authorities in 2012, with law enforcement generally willing to conduct complaint-based raids and, e.g., running *suo moto* raids for the music industry. The music industry reported

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(...continued)

(*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 disable access to its new film which was to be released two days later. Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*. 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 were helpful in ensuring those sites could be taken down as well, although industry has no confirmation as to the current status of the other four sites.

<sup>26</sup>The local music industry group adopted the strategy of highlighting that the infringing sites were operating without a copyright license, so even though the sites were outside India, the ISPs were deemed inside India and governed by Indian law, since revenues from users came from India.

<sup>27</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>28</sup>These actions follow others in 2011. For example, 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.

more than 2,260 raids during 2012 (up from 1,400 in 2011), many of which were run *suo moto*, while the number of piracy cases remaining in litigation stands at an estimated 18,000. Publishers, on the other hand, note that police rarely ever initiate *suo moto* raids to address book piracy, usually only taking action after receiving a right holder's formal complaint under Section 200 of the Code of Criminal Procedure. The motion picture industry notes a couple of raids in 2012 conducted in Nasik, involving illegal DVD manufacturing and retail stores where more than 10,000 DVDs were seized and two people were arrested. The second raid was conducted in a warehouse, and led to the seizure of 5,535 DVDs and one person being arrested. Major hurdles remain, given 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. Moreover, publishers report that there are often threats of violence against rights holder representatives engaged in anti-piracy activities.

**Enforcement Against Software End-User Piracy Improving:** Enforcement is improving against software enterprise end-user piracy due in large part to the impact of civil enforcement actions. Civil actions comprising injunctions and Anton Piller orders continue to have a significant impact. On the other hand software "channel piracy," i.e., the reproduction of infringing/counterfeit software on physical media remains largely the same in India. Criminal enforcement remains an ineffective means of combating end-user software piracy.

**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>29</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>30</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>31</sup> One issue that publishers have encountered, however, is that the jurisdiction of various teams are not clearly defined, leading to delays and confusion as to the most efficient approach for addressing instances of piracy. For example, in the Delhi Economic Offences Wing there are sections dealing with cyber crime and IPR. However, there are no clear guidelines about which section a right holder should approach.

**State Anti-Piracy Statutes:** Many states have enacted state anti-piracy laws (Goondas Acts) that recognize the link between piracy and organized crime. These statutes should cover all forms of piracy including software and books and journal piracy which are often not within the scope of these laws.

**Civil and Criminal Court Processes Remaining Somewhat Problematic:** Despite some positive case results in both civil and criminal cases in the past couple of years, industry notes some endemic problems. First, criminal fines (reportedly roughly 200 fines were meted out in copyright cases in 2012) are invariably low and non-deterrent, with most falling under US\$1,000. Second, while the number of criminal convictions has gone up in the

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<sup>29</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>30</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>31</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.mumbaipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaipolice.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).

past couple of years, the sheer number of piracy cases still pending indicates that much more needs to be done to effect judicial reform and speed dockets; the music industry reports roughly 18,000 pending cases. Third, many courts, particularly 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. Further problems involve unreasonable demands on right holders to produce copyright registration certificates, and demands for right holders to physically make witnesses available.<sup>32</sup> Even in civil cases, in which credible IP judges have developed in the High Court in Delhi, Chennai and Kolkata, the high pendency rate, low damages, and the years that it takes to enforce any kind of court judgment, remain problematic features of the legal system in India. 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 (Amendment) Act, 2012 In Force, Further Modernizing India's Copyright Law:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, effective June 21, 2012, and related laws and regulations. The Act (as amended) contains some improvements over the previous (2010) draft,<sup>33</sup> and largely leaves in place the enforcement structure of the Copyright Act, 1957 (as last amended), and related laws and regulations.<sup>34</sup> Nonetheless, the Act also leaves in place existing, and raises some new, concerns which can be summarized as follows:

- unprecedented ownership and assignment provisions that could unduly restrict existing commercial arrangements in India;
- expanded compulsory license provisions;
- inadequate provisions on the protection of technological protection measures (TPMs) against unlawful circumvention as well as trafficking in circumvention devices and services; and inadequate protection of rights management information (RMI);

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<sup>32</sup>Right holders have noted that some police departments have now begun asking for the presence of company officials in order to commence a criminal action. However, some right holders have also noted that courts are allowing cross-examination by video-conferencing, and would encourage the expansion of this practice to all IP cases.

<sup>33</sup>Among improvements accomplished by the "Notice of Amendments" are the following: 1) it resolves satisfactorily a proposed change that would have damaged the Indian exhaustion (parallel imports) regime; and 2) it narrows the availability of a loophole to the prohibition on unauthorized rental to "a non-profit library or non-profit educational institution."

<sup>34</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 a 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 seven days to three years and a 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 two years and a 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 a fine or both for making false entries in the register (Section 67).
- Imprisonment for a term up to one year or a 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 a 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."

- failure to address adequately online infringement/Internet piracy issues and to promote ISP responsibility and foster cooperation with right holders to combat such infringements; and
- some overly broad exceptions and limitations.

Additional issues of concern that were not addressed in the amendments include: 1) the lack of statutory damages; and 2) overbreadth of the statutory exemption for making copies of software in sections 52(1)(aa) and (ad) (there is no numerical limit on the number of copies).

In the fall of 2012, MHRD released the Draft Copyright Rules, 2012 (“Draft Rules”) for comment. IIPA provided comments to the Director & Registrar of Copyright on the Draft Rules. Herein below is a discussion of IIPA’s remaining concerns with the Act as amended, noting where the Draft Rules could be employed to address these concerns.

**Ownership Issues (Section 17), Assignment of Copyright (Sections 18 and 19):** Changes to the Indian Copyright Act restructure ownership and assignment issues, having the potential effect of undermining and upsetting longstanding commercial arrangements as to cinematographic works and sound recordings. First, under amended Section 17(e),<sup>35</sup> authors of “original literary, dramatic, musical and artistic works” incorporated into a cinematographic work are now deemed the original owners of copyright, and the default rules on works made “at the instance of any person” or on works for hire (employers) no longer apply to such works.<sup>36</sup> In effecting this change, the legislature has essentially overturned case law previously holding that the producer of a film is the first owner of copyright in the literary and musical works used in recorded songs which are synchronized for inclusion in a film, unless there is a contract to the contrary.<sup>37</sup> Note that this change also affects other works incorporated into a cinematographic work. The practical effects of this change are yet to be seen. It should be confirmed that this provision applies prospectively and not retroactively, and IIPA has requested confirmation of the prospective application of this provision (as well as Articles 18 and 19) in the Draft Rules.

The more far-reaching changes are effectuated in Section 18. 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 denied 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 Act fixes the problems created by the court decisions in some respects but creates new problems in the process.

In Section 18(1), 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.” New Sections 19(9) and (10) of the Act 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.”

<sup>35</sup>Section 17(e) provides, “Provided that 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.”

<sup>36</sup>As to copyright in works incorporated into a cinematographic work, this remains covered by Section 13(4) which provides, “The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.”

<sup>37</sup>See *Indian Performing Right Society v Eastern India Motion Picture Association*, AIR 1977 (2) SCC 820.

IIPA agrees that 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. IIPA is also concerned about the exact percentages or amounts ascribed 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 does not specify the basis on which an “equal share” is calculated, although reports indicate this will result in a “net” 50/50 share between the publisher/owner and author following deductions of collecting societies’ costs. These provisions undermine the freedom of contract and the flexibility of parties to negotiate other agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. It should be confirmed that the scope of application of this provision is specifically limited to works created after the effective date of the law and has requested confirmation of this in the Draft Rules. Otherwise, it would upset existing freely negotiated contractual relationships and 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 Act unfortunately provided for significant limitations on assignments of works. According to a Section 18 proviso, 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 precludes “all rights” assignments which historically have been treated by both authors and publishers/producers as the norm in the business, and could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution.<sup>38</sup> To the extent the provisions apply retroactively, they are also subject to possible constitutional challenge; IIPA has requested that in the Draft Rules it be confirmed that they do not apply retroactively. The software industry is also concerned about this provision, which severely limits 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.

Finally, IIPA has indicated to MHRD our operating assumption that the Act governs the relationship of the creative parties with respect to the production of works in India, and does not also convey an intention to interfere with the intention of contracting parties outside of India. IIPA has requested that the Draft Rules be modified to explicitly acknowledge that there is no intention for Articles 17 through 19 to affect the decisions of parties with respect to the creation of works outside of India, or their decisions about how to allocate revenue for the use of such non-Indian works in India.

**Extension to Foreign Works of, and Addition of New, Berne- and TRIPS-incompatible Compulsory Licenses:** The Act extends two existing compulsory licenses, which are currently applicable only to Indian-origin works, to include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne Convention and TRIPS obligations.<sup>39</sup> This is because the Berne/TRIPS framework permits compulsory licensing in only very limited and specific circumstances, including: 1) the recording of musical works under Article 13(1) of the Berne Convention;<sup>40</sup> and 2) the exclusive rights recognized under Article 11*bis*.<sup>41</sup> In

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<sup>38</sup>One industry group indicates that the “medium” and “mode” restrictions can be dealt with through careful drafting of assignments, e.g., through use of language such as “shall extend to and include, but are not limited to, the following modes and mediums of reproduction, performance, distribution and communication to the public of the works, which are in existence or which the parties anticipate may come into existence in future,” with a list of as many specific modes or mediums as possible. We remain skeptical that this can capture the limitation on coverage of modes or mediums that “did not exist or was not in commercial use” at the time of the assignment. It is also suggested that it may be possible, as a practical matter, to draft around this limitation by characterizing transactions as “exclusive licenses” rather than assignments, although it is uncertain whether courts would give any effect to such a characterization.

<sup>39</sup>In 2010, the Standing Committee was also concerned about the international implications of compulsory licenses and recommended they be reviewed.

<sup>40</sup>Article 13(1) of the Berne Convention provides,

Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize  
(...continued)

addition, the Berne Convention includes an Appendix containing compulsory licenses with respect to the translation and reproduction of works protected under the Convention that may be invoked under certain limited conditions by developing countries, notably for educational and developmental purposes. India has neither availed itself of the Berne Appendix, nor adhered to the stringent tests of the Berne Convention Appendix in crafting the new compulsory licenses.

- **Section 31:** 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:** Section 31A, an “orphan works” provision, provides 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 Act extends this compulsory license to all “unpublished or published works” that are being “withheld from the public.”
- **Section 31B:** Section 31B is included for the benefit of the disabled. 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 Berne Convention three-step test, and the 2011 amendments extend 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....”
- **Section 31D:** The broadcast compulsory license in Section 31D is unprecedented, covering both radio broadcasts and television broadcasts, and appears to be inconsistent with India’s Berne Convention and TRIPS obligations.<sup>42</sup> It is not limited on its face to those activities under Berne Article 11*bis* for which appropriate

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the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 28-30.

<sup>41</sup>Article 11*bis*(2) of the Berne Convention provides,

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 30-32.

<sup>42</sup>Specifically, Section 31D provides, in its entirety, the following:

“31D. (1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the copyright Board shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Copyright Board may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(...continued)

“conditions” may be set (and with respect to musical works and sound recordings, does not comport with Berne Article 13(1)). It does not indicate as a default that private contractual agreements shall govern. It threatens to throw existing copyright arrangements with respect to both audiovisual works, sound recordings, and musical compositions into chaos.<sup>43</sup>

The Section 31D compulsory license reads as far broader than the “conditions” permitted by Article 11 *bis* of the Berne Convention (and incorporated by reference into the TRIPS Agreement). The new provision does not provide for ability to freely contract, i.e., as a default, private contractual agreements should govern before the possibility of remuneration set by the “competent authority.” Section 31D also contains no such limitation on the kinds of broadcasts subject to the compulsory license, e.g., whether free-to-air television broadcasts (local or distant) or encrypted pay broadcasts, or whether by wire or wireless means.

The Draft Rules addressed the administration of some but not all of the compulsory licenses. The Draft Rules did not include provisions for the administration of the Section 31 license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work (or sound recording) for which such use has been refused by the right holder “on terms which the complainant considers reasonable.” The Draft Rules do address other compulsory licenses, such as the Section 31A compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished” ... [or] “published 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 Section 31B compulsory license included for the benefit of the disabled, and the Section 31D broadcast statutory license which covers both radio broadcasts and television broadcasts. While not endorsing the adoption of these licenses or their application to foreign subject matter, the Draft Rules should confirm a narrow scope and application of the licenses, and drafters can look to the Berne Appendix for guidance on ways of achieving this. As just some examples, drawing from the Berne Appendix, the Rules should at least confirm that:

- 1) any such licenses are only available when the applicant “has requested, and has been denied, authorization by the owner of the right” ... “or that, after due diligence on his part, he was unable to find the owner of the right”;
- 2) if the works or sound recordings in question are made available at “a price reasonably related to that normally charged in the country for comparable works,” the license is not available;
- 3) any such licenses apply to limited purposes, e.g., “only for the purpose of teaching, scholarship or research”;
- 4) if the author or right holder chooses (e.g., on artistic grounds) to “withdraw from circulation all copies of his work,” the license should automatically terminate;

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(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall —

(a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and

(b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.

(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.”

<sup>43</sup>In relation to the music industry, record producers and music composers enjoy an exclusive broadcasting right under Indian law. This right is seriously undermined by Section 31D. Under this license, broadcasters would not need permission to use works but simply need to notify their intention to broadcast the work and pay royalties as prescribed by the Copyright Board. The compulsory statutory license would diminish the exclusive nature of the broadcasting right, effectively turning it into a mere right to receive royalties. This would not only negatively impact on creators’ ability to negotiate license terms with broadcasters, but would also cause significant losses to right holders in terms of costs they will need to bear in Board proceedings. There are not even any limiting conditions, for example, a time period (e.g., of three years) before newly released recordings become subject to any license regime, the requirement that a license only be contemplated under the rare circumstances that right holders and broadcasters fail to achieve a negotiated agreement, or that “the rate paid by the broadcasters should reflect what would have been agreed between a willing seller and a willing buyer.” The intervention of the Copyright Board should only take place as a last resort.

5) six months must elapse between the sending, “by registered airmail,” of the application for a license and the granting of a license to the competent authority as well as “to the publisher whose name appears on the work and to any national or international information center which may have been designated” when the author or right holder cannot be found;

6) if copies of the work in question are already available to the general public “to the general public or in connection with systematic instructional activities” by the right holder or with his authorization, “at a price reasonably related to that normally charged in the country for comparable works,” any license granted shall be terminated; and

7) appropriate time limits are established (e.g., the Berne Appendix time frames are no longer than three or five years).

Without these safeguards and more, it will be difficult for the Indian government to ensure that its licenses do not run afoul of India’s international obligations under the Berne Convention and the TRIPS Agreement.

**Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention, and Rights Management Information (RMI):** The Act left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT (Article 11) and WPPT (Article 18). While India has not yet ratified these treaties, the amendments are intended to address the WCT and WPPT issues to make India ready for such ratification.

- **Technological protection measures:** Section 65A of the Act remains of concern as, on its face, it is incompatible with the WCT and WPPT. The provision falls short of international best practices without some clarifications and possibly revisions. IIPA has proposed certain of these through the Draft Rules process, as noted below.
  - The Act as amended does not expressly cover access controls as is required by the treaties.<sup>44</sup> It should define “effective technological measure” as “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” to ensure proper coverage. IIPA has recommended that the Rules could confirm this definition of “effective technological measure.”
  - The Act appears to cover only the “act” of circumvention and only when the person engaging in circumvention activities acts “with the intention of infringing” an exclusive right.
  - The Act does not expressly prohibit manufacturing, importing or trafficking in circumvention technologies, 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. This is highly unfortunate.<sup>45</sup> Working within the framework of the Act as amended, the Draft Rules, referring to Section 65A of the Act, impose a recordation requirement on entities that “facilitate[e] circumvention of technological protection measures for another person.” Without more far-reaching amendments to outlaw trafficking, such a recordation requirement is critical to ensuring that only individuals with a legitimate non-infringing objective will seek to make use of circumvention services. To ensure that this objective is not undermined, the recordation requirement should be extended to include:

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<sup>44</sup>Many digital rights management (DRM) and product activation systems, for example, function by controlling access to works, and it is essential that these be covered by the anti-circumvention provision.

<sup>45</sup>From a practical enforcement perspective it is more effective, and less intrusive, to target businesses that traffic in circumvention tools than to target individuals who carry out acts of circumvention. With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, a “record keeping” obligation cannot come close to meeting the treaties obligation to provide “adequate legal protection and effective legal remedies” against circumvention of TPMs.

- information about the tools used to circumvent;
- the provision under which the exception to the prohibition on circumvention is based;
- the underlying work and subject matter being accessed by virtue of the circumvention; and
- a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public.

The Rules should also provide for regular audits of such records by the Ministry of those facilitating circumvention. The Rules should in no case allow for indemnification of the person facilitating circumvention. Furthermore, the Draft Rules provide that the records being kept by the person “facilitating” circumvention may only be disclosed to police (“not below the rank of a sub-inspector of police”) upon a “court order.” The Rules should not limit disclosure in this way (especially within the government), and should provide a mechanism as well for right holders to obtain access to records where there is strong indication that circumvention is taking place contrary to the law.

- The Act does not define an “effective technological measure.”
- The Act would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby potentially eviscerating protection), and creates other overbroad exceptions.<sup>46</sup> While this exception provision clearly places India outside the scope of the “adequate and effective” protection needed regarding unlawful circumvention, there may be ways to limit the scope of this provision through the Draft Rules. The Draft Rules currently permit a person to “approach anyone who can assist him to circumvent the technological protection measures.” The Draft Rules should at the very least limit the scope of entities eligible to assist in circumvention, e.g., an approved list by the Ministry of those who it has verified will keep proper records and ensure that no act of circumvention is performed outside of any permitted purpose.
- The Act provides for criminal remedies, but not civil remedies.<sup>47</sup>

In addition to the above, IIPA has indicated that in no case should the Draft Rules condone the online provision of circumvention services due to elevated risk for abuse, and because of the likelihood that such services will be made available to individuals in countries where such conduct is proscribed by law. The Standing Committee in approving Section 65A suggested that the judiciary could evolve the law to cover TPMs applied to control access to works. It is hoped that this and other changes can be confirmed through future explanation or technical amendments, namely, to ensure that: 1) access controls are covered (e.g., through a proper definition of “effective technological measures”), 2) manufacturing, importing or otherwise trafficking in circumvention technologies, devices, or services are prohibited, 3) exceptions are limited to those which will preserve the adequacy and effectiveness of protection, and 4) civil as well as criminal remedies are available against unlawful circumvention.

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<sup>46</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, 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 “right holders 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>47</sup>Civil liability is important for several reasons. First, given limited law enforcement resources, private enforcement through civil litigation would be a critical adjunct to ensure the provision has the desired deterrent effect. Second, a civil cause of action is necessary to ensure that right holders are appropriately compensated for any losses they suffer as a result of circumvention.

- **Rights management information (RMI):**<sup>48</sup> The amendments define RMI to mean the title or other information identifying a work or performance, the name of the author or performer, the name and address of the owner of rights, terms and conditions regarding the use of the rights, and any number or code that represents this information (new Section 2(xa)). The definition expressly excludes any device or procedure intended to identify the user. The exclusion of devices or procedures intended to identify the user from the definition of RMI may hamper the ability of right holders to identify persons who have tampered with RMI, consistent with the WCT and WPPT.

**Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility:** A sound approach to this issue of dealing with online violations of law 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 source on certain grounds mentioned therein.<sup>49</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 Act 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>50</sup> were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, specifically mentioning “copyright” infringement as a trigger for a notice from an “intermediary,” and setting takedown times for detected violations online to 36 hours. The Rules indicate the trigger for “disabling” access is “actual knowledge” through a notice and they 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) which is unfortunate. Also, since they carve out from the notice and takedown requirement 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>51</sup>

Taken in this context, the Copyright Act (as amended by the “Notice”) is a missed opportunity to comprehensively deal with the issue of online infringement and the role to be played by ISPs over infringements of third parties, and leaves some important matters unclear. Section 52(1)(c) provides an exception for the following:

“transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing such storage is of an infringing copy.”<sup>52</sup>

A proviso states:

“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

<sup>48</sup>Article 65B provides a criminal remedy including up to two years imprisonment and/or a fine for violations involving rights management information.

<sup>49</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>50</sup>Information Technology (Intermediaries Guidelines) 2011, April 11, 2011 (on file with IIPA).

<sup>51</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>52</sup>This new exception appears to confirm that the reproduction right under the Copyright Act, 1957, covers 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 also appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. Sections 52(b) and (c) also provide for exceptions from the exclusive right of reproduction for the 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.

infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till 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.”

By crafting the ISP provision as an exception rather than establishing liability and creating safe harbors for ISPs that cooperate to remove or halt online infringements, the Act creates some ambiguity and uncertainty. The following is a summary of some of the issues raised by the Act, noting areas on which IIPA would seek clarity.

- **Scope of Activities Covered Should be Clarified:** The scope of activities covered is unclear, including “transient or incidental storage” undertaken “for the purpose of providing electronic links, access or integration.”<sup>53</sup> It would be helpful to confirm, perhaps through the Draft Rules process, that information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials are covered under the new provisions and subject to the knowledge and notice requirements.
- **Define “Person Responsible”:** The exception is not applicable if “the person responsible” has actual or constructive knowledge. It is unclear who is included as the “person responsible,” which presumably would include the service provider providing links, access or “integration.”
- **Define “Integration”:** It would be helpful to define the term “integration” to include information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials.
- **Notice in Addition to Actual or Constructive Knowledge Should Trigger Immediate Takedown Responsibility:** The exemption will not apply if the “right holder” ... “expressly prohibit[s]” the provision of “such links, access or integration,” or if the “person responsible” has actual or constructive knowledge that “such storage is of an infringing copy.” Notices, or knowledge or constructive knowledge, should trigger a responsibility on the part of the service provider (“person responsible”) to immediately take down infringing materials or disable links or access to infringing materials. This is especially important in the case of materials not yet released to the public, or so-called “pre-release” materials, or other materials at the beginning of their commercial life-cycles. We highlight that in such cases, takedowns should be carried out urgently, and certainly should not take days.
- **Need for Expedious Takedown, No Automatic Put Back:** The proviso contains a period lasting 21 days that the “person responsible” must “refrain from facilitating such access” and requires the right holder to obtain a court order within that 21 days to avoid the “person responsible” from “continu[ing] to provide the facility of such access” to the alleged infringement. There is nothing in the Act defining the speed with which a service provider must react to actual or constructive knowledge or a notice. Under the IT Act 2011 Rules, the takedown time for detected copyright infringements online is 36 hours (which is too long, especially with respect to content such as pre-release materials as noted above). In addition, there should be no automatic put back after 21 days, with put back occurring only if: 1) there is a counter notice; and 2) the right holder fails to obtain a court order or fails to provide a copyright registration certificate. Requiring the right holder to obtain a court order under any circumstances, even when there is no counter notice, imposes a significant burden.<sup>54</sup>
- **Fair and Effective Policies for Non-Hosted Infringements and to Address Infringements Affecting India Instigated from Domestic or Foreign Websites:** To the extent not covered in the current Act, the Indian

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<sup>53</sup>This list 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.

<sup>54</sup>In the U.S. and other jurisdictions, once allegedly infringing content is taken down in response to a right holder’s notice, the burden falls on the affected party to object to the takedown. Only then is it necessary for a right holder to seek a court order. This approach works well in practice, and is burdensome to neither the right holder nor the affected party.

government should implement fair and effective policies to deal with non-hosted infringements and repeat infringers, and include effective mechanisms to stop users accessing infringing content through domestic and foreign websites.

**National Exhaustion:** While the “Notice of Amendments” did resolve the exhaustion issue (i.e., it retains protection against unauthorized imports of works), publishers report that the National Council of Applied Economic Research (NCAER) is currently reviewing a provision that would damage the Indian exhaustion regime. Adopting such a provision would seriously undercut the current low-priced editions program that publishers offer to Indian students and consumers and would jeopardize the future of such a program. In addition, Indian publishers would be harmed by the volume of international books that could be imported into India from abroad and would lose control over the territorial reach of their own books, contrary to the traditional principles of copyright embodied in sections 19 and 30A of the Copyright Act (as amended).

**Overly Broad Exceptions:** The proposed changes to Section 52 in the Act create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. The Act also leaves in place other exceptions which have troubling implications on India’s Berne Convention and TRIPS compliance, especially if extended into the digital environment.

- **New Broad “Private or Personal Use” Exception (Section 53(a)(1)).** The industries are concerned that the exception in Section 52(1)(a)(1) could be interpreted in overly broad ways. We appreciate the Indian government’s explanations 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, we remain concerned that this narrowing of the language 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. It would be important to further limit the exception through an explicit recitation of the three-step test, and an explanation that the exception would rule out any act in which a use rendered a work or other protected subject matter available online or to anyone outside the person entitled to use under this exception, would certainly rule out copying of whole or part of a cinematographic work in a movie theater, and could be claimed only by the person who is entitled to a permitted use, and not by any other party or service.

Concerns also remain over existing overbroad exceptions for copying of computer programs for backup (Section 52(1)(aa)), including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy (Section 52(1)(ad)). IIPA proposes that the Draft Rules limit the number of copies which may be made under exceptions for copying of computer programs, for backup, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy. Concerns are also expressed over an exception permitting the performance of films in educational contexts and in “clubs” (Section 52(1)(i)); IIPA proposes that this exception be limited in the Draft Rules. IIPA expresses concern over the disability exception (Section 52(1)(zb)), e.g., the term “accessible format” includes “talking books” and “digital formats such as MS Word, pdf, epub etc.” as well as “all other formats that can be used by persons with disabilities.” The Draft Rules should limit the scope of this exception by ensuring that the beneficiaries of such exceptions are individuals who are eligible or who may qualify to receive books and other publications produced in specialized formats. These and certain other exceptions must be scrutinized in conjunction with India’s obligations under the Berne Convention and the TRIPS Agreement.

**Other Issues:** The Indian government missed some opportunities to further modernize the Copyright Act in this latest amendment process and should consider additional amendments to the Act and other laws that would be beneficial to foreign and Indian right holders alike:

**1) Confirm That Camcording of a Motion Picture is Illegal:** With the increase in illegal camcording of movies in theaters in India, the Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent 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 emerging trend is to provide explicit protection against this activity, and the U.S. and several other countries already have legislation in force, while other countries are considering bills which accomplish the same. We hope this activity will be prohibited in the Cinematograph Bill which emerged in 2010.

**2) Deal with Damaging “Pre-Release” Piracy:** It is exceedingly important to preserve the market for creative products in India prior to or during the first weeks of a product’s release. The Indian government should adopt provisions that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works.<sup>55</sup>

**3) Adopt Statutory Damages:** Proving actual damages, e.g., in end-user software, book publishing, and other piracy cases, can be difficult, and in order to expedite 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, India should adopt statutory damages at the election of the right holder.

**4) Allow Seizure Orders as a Matter of Right:** The Indian government should provide that seizure orders are granted to copyright owners as a matter of right in civil cases.

**5) Allow for Restitution in Criminal Cases.**

**6) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion:** A study conducted by research firm IDC examining the direct and indirect tax implications of software piracy in India found that it cost the State exchequer \$866 million in tax receipts in 2009. The Indian government should 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. Further, governmental tax inspectors and external and internal auditors should be empowered to check and account for genuine software licenses inside public and private companies.

**7) Enhance Corporate Audit and Disclosure Requirements:** The Indian government should amend the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply. Corporate disclosure rules should also be revised to require more specific disclosure of genuine software licenses.

**8) Adopt Policies to Ensure Legal Software Use and Software Asset Management (SAM) Best Practices in Government Agencies and Promote the Same With Private Enterprises:** The Indian government should issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in government, protect government system from security vulnerabilities and send a strong message about the importance of software license compliance to the private sector. The government should also adopt software asset management best practices and promote these with private enterprises.<sup>56</sup>

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<sup>55</sup>For example, the U.S. Family Entertainment and Copyright Act of 2005 contains effective civil and criminal provisions to deter online pre-release piracy.

<sup>56</sup>As noted above, BSA and the Department of IT established a roadmap for promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA’s new “Certified in Standards-based SAM for Organizations (CSS(O))” program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

**9) Patent Pendency:** The software industry faces a significant and long-standing backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The current backlog currently stands at approximately 100,000 applications across all industries. Due to this backlog, a significant portion of our members' intellectual property is not adequately protected in India. While we recognize that measures have been taken by the Indian government to address this backlog, including by the recent hiring of new examiners, we believe more needs to be done to address the significant increase in the number of patent applications in India, particularly in the ICT sector. As a result, there is a risk that the backlog may increase rather than decrease in the coming years, despite these measures. We urge the Indian government to address this backlog as a priority. Doing so is important to promote R&D investment, ICT innovation, and national competitiveness in India.

**10) Adopt an Effective Optical Disc Law:** Since India still has a reported 36 optical disc factories, industry along with FICCI have been engaged in the drafting process for an effective OD law. The issue has long been delayed by the controversy over coverage of blank discs, which some (including Moser Baer) oppose.

**National IPR Strategy:** During the fall of 2012, the Department of Industrial Policy and Promotion (DIPP), having established the Sectoral Innovation Council on IPR, initiated a process to review a *Draft National IPR Strategy*, inviting views of stakeholders. The SIC's stated goals of the National IPR Strategy were "for encouraging innovation with a view to adequately address the key concerns of sustainable development," as well as "to formulate the medium term policy objectives that can be the building blocks of the envisaged IPR strategy," and include recognition of the need to establish a National IP Enforcement Taskforce. IIPA and BSA submitted comments in the process. In IIPA's comments, we note the importance of properly defining intellectual property rights,<sup>57</sup> that copyright and creativity have long played an important role in India's economic development,<sup>58</sup> and the importance of providing adequate and effective levels of protection and enforcement in India as a means to achieve the goals of the IP system (citing the priority actions from the 2011 Special 301 report as guideposts). BSA's submission highlighted the need to, among other things, 1) cover software under the Goondas Acts which recognize the link between piracy and organized crime; and 2) make software-specific changes to the Copyright Act consistent with this report; 3) make changes to disclosure and audit requirements in the Companies Act, 1956, to ensure that companies are properly procuring and licensing software; 4) establish a "National Intellectual Property Council" under the Prime Minister's Office to monitor progress of the National IPR Strategy and for other purposes; 5) put into place a directive or strict policy guideline mandating all government departments across the country use legal software and follow due diligence while procuring software assets, including the adoption of latest software asset management (SAM) practices; and 6) not discriminate in procurement or adoption practices on the basis of their business model, their place of origin, or the type of technology they employ.

## **MARKET ACCESS ISSUES**

India currently imposes significant market access hurdles on the motion picture, entertainment software, book publishing, and software industries.<sup>59</sup> One reason for this is the various taxes and charges that are imposed on right holders at various points in the distribution or dissemination of creative product in India. One measure which the Indian Parliament is considering is the Goods and Services Tax (GST) expected to be taken up in the 2013 Parliamentary Budget Session. Some hurdles remain to achieving consensus on the GST, particularly in regard to the states' views on 1) fiscal autonomy, 2) revenue-neutral rates, and 3) which items will be included in the GST list.

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<sup>57</sup>The drafters defined an intellectual property right as "a private right recognized within the territory of a country and assigned to an individual or individuals for a specific period of time in return for making public, the results of their creativity or innovation." This description encompasses some key aspects of intellectual property, but IIPA suggested that the drafters refer to the World Intellectual Property Organization (WIPO) descriptions of intellectual property to ensure a complete description. WIPO defines intellectual property as "creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."

<sup>58</sup>Here we noted the UNCTAD, MPDA, and PricewaterhouseCoopers reports mentioned above.

<sup>59</sup>Many 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.

Nonetheless, adoption of the GST could resolve many issues below related to entertainment taxes, high tariffs on entertainment and double taxation.<sup>60</sup>

**Motion Picture Barriers:** The U.S. motion picture industry faces numerous market access barriers in India.

- ***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) 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.
- ***Restrictions on Direct-to-Home (DTH) Market:*** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an individual home). 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 74%. 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.
- ***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 Indian government 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.

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<sup>60</sup>CNBC-TV18, Budget 2013: GST stuck between states' demands, India Inc's pleas, SME Mentor, January 17, 2013, at <http://www.moneycontrol.com/smentor/news/indian-markets/budget-2013-gst-stuck-between-states-demands-india-incs-pleas-808898.html>.

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.

- **Price Fixing on Theatrical and Quotas:** The Indian government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.
- **Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.
- **Disruptive Content Control Rules for Television:** 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. This change was 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.
- **Service Taxes on Transfers of IP:** IIPA notes positively the addition of temporary transfers of IP rights to the Negative List, but also notes that litigation (Constitutional challenges filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts) remains pending for the 2010-2012 period. A further service tax has now been imposed on the “input”/production side (i.e., the services of actors, composers, and musicians) which cannot be offset, with negative effects on those who produce locally or are engaged in local co-productions.

**High Tariffs on Entertainment Software and Hardware Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products, console game products, game console hardware, and game activation cards. Additional taxes compound to create an environment where the market share of authorized hardware and software is only a fraction of what it would be under less restrictive market conditions. India maintains unbound tariffs on consoles and accessories, including activation and value cards used in software and online game transactions, creating an uncertain business climate for trade and investment in the Indian market.

**Taxation of Software:** An array of tax policies negatively impact market access for software goods and services in India. These include transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of certain software as both the sale of a good and service. IIPA urges that these and other problematic tax policies impacting market access for software be amended to be consistent with international practices.

**Technology and Procurement Mandates:** The Indian government has issued a number of policies that raise concerns they will be implemented in a manner that provides significant preferences and mandates for government procurement, and in some cases private sector procurement, of products and services that are locally manufactured, that utilize a particular technology, or that have IP owned and/or developed in India. These include the National Electronics Policy, the National IT Policy and the National Telecom Policy, all of which culminated in the February 2011 Preferential Market Access (PMA) policy and subsequent implementation guidelines. The PMA policy represents an unprecedented interference in the operations of U.S. IT and software companies in India by imposing onerous and discriminatory local content requirements on certain “electronic” goods and services. Importantly, the Policy imposes these requirements on both government and private sector procurements, which is clearly inconsistent with India’s WTO obligations. Moreover, the rules will apply to all “Managed Service Providers” operating in India.

As written, the PMA will capture software for a number of reasons: 1) the local content and value addition requirements will capture pre-installed software in relevant ICT hardware, including PCs, tablets, and printers that have already been notified for government procurement; 2) Indian government officials have verbally indicated to U.S. company representatives that software will be captured in some form by the policy, although they have not provided further details; 3) neither the February 2011 PMA document nor subsequent implementation guidelines create any clear distinction between hardware and software in local content/value addition calculations; and 4) the PMA policy's broad definition of an MSP as "a provider of Information Technology (IT) and Communications related services, who provide such services by establishing Information Technology (IT)/Communications infrastructure," could capture software and services. IIPA believes that an open and competitive market is an essential component of a world-class IT sector that fosters IP development. The Indian government should avoid policies that restrict market access through such mandates or stringent procurement preferences.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to conduct training in 2012. For example, the motion picture industry stepped up trainings, in particular, for movie theater employees at high-risk theaters, conducting "Make a Difference" trainings on investigative and enforcement techniques for over 1,200 theater staff. In addition, a roundtable discussion headed by the local Motion Picture Distribution Association (MPDA) was attended by Indian government authorities and representatives of the Multiplex Association of India to apprise the government and cinema industry of the alarming growth rate of illegal camcording in India. MPDA also made a presentation on the effects of piracy and the growing threat of online piracy to approximately 80 representatives of law enforcement at a conference jointly organized by the Central Bureau of Investigation (CBI) and Interpol. As in previous years, the local music industry and the International Federation of Phonographic Industries (IFPI) conducted several training programs for police and public prosecutors in Andhra Pradesh, Punjab, Mumbai, Delhi, West Bengal, Kerala, Tamil Nadu, Maharashtra, and also organized meetings with law enforcement and members of Parliament to discuss better implementation of IPR protections.

## **GENERALIZED SYSTEM OF PREFERENCES**

India enjoys preferential trade benefits under the Generalized System of Preferences trade program. 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). In 2011, India was the largest recipient of GSP preferences, with more than US\$3.73 billion worth of Indian goods entering the U.S. under the duty-free GSP code, accounting for almost 10.4% of its imports into the U.S. and around 20% of all U.S. imports under the program (US\$18.5 billion). In the first eleven months of 2012, more than US\$4.1 billion of India's exports to the U.S., or almost 11.1% of its total exports to the U.S., received duty-free treatment under the GSP code. India needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.