

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** Piracy and market access barriers are the chief reasons for the under-performance of both domestic and foreign copyright industries in India.<sup>2</sup> Problems include: massive and growing online, mobile (smart phone and tablet) piracy; unauthorized camcording of movies in the theaters; unauthorized use of software and published materials; lack of priority assigned to copyright piracy cases; lack of uniform enforcement procedures among different states' law enforcement authorities; and market access barriers such as high taxes, "must provide" requirements in the pay TV sector, and discriminatory procurement practices. The Copyright Act was amended in 2012 with some positive features. However, some aspects of that reform remain problematic, such as: inadequate protection for access control technological protection measures and against trafficking in circumvention technologies, devices, and services; ownership and assignment restrictions which threaten the fabric of longstanding business models; and TRIPS- and Berne-incompatible compulsory and statutory licenses. Copyright holders generally have positive relationships with Indian authorities, including the Ministry of Human Resources and Development (MHRD). Several effective court mechanisms remain viable, including Anton Piller (*ex parte* search), John Doe, and Mareva (asset freezing) orders, and police will often take enforcement action on their own recognition (so-called *suo moto* cognizance). Actions against "release" groups engaged in the unauthorized camcording of movies in cinemas, and court orders disabling access to dedicated piracy websites in India, have had a temporary ameliorative effect.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Immediately implement or revise the laws to deal nationwide with online and mobile piracy, including expeditious remedies against services built on copyright infringement.
- Strengthen state-based enforcement efforts, increasing the number and scope of *suo moto* raids to address all forms of piracy, and increasing the speed and efficacy of enforcement efforts in cities where piracy has migrated.
- Exert greater Indian Government resources to drive unauthorized camcording from the market.
- Amend state laws against organized crimes (Control of Goonda Acts) to include software and book piracy.
- Encourage establishment of special IP panels with expert judges and IP-devoted prosecutors to accelerate effective and deterrent adjudication processes in both civil and criminal cases; hold judicial trainings.
- Establish standard operating procedures for enforcement agencies, particularly police departments across the country, in relation to: 1) pre-raid documentation requirements for lodging complaints; and 2) evidence gathering during raids, adhering to safeguards and post-raid recordals to ensure predictability in enforcement processes.
- Have Indian Customs effectuate *ex officio* seizures, followed by destruction, of illegal exports as well as imports.

#### Legislation

- Include and adopt in India's Cinematograph Bill a measure making it an offense to use (or attempt to use) an audiovisual recording device in a cinema to make or transmit a copy of an audiovisual work in whole or in part.

<sup>1</sup>For more details on India's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of India's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>For example, India produces the greatest number of films in the world, but ranks only sixth in terms of box office. India also boasts a creative and diverse Indian and international music market and retains a prolific publishing industry. The Government of India should conduct a study, in line with the methodology devised by the World Intellectual Property Organization to ascertain the contribution of its copyright industries to the Indian economy. Such a study would help form a sound policy basis for strengthening India's copyright laws and enforcement response to piracy. WIPO has conducted over 40 contribution studies in other countries. See *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf), last accessed December 17, 2013.



- Further amend the Copyright Law to, among other things:
  - clarify prohibitions against circumvention of access control technological protection measures (TPMs), and of trafficking in circumvention technologies, devices, components or services.
  - remove burdensome restrictions on freedom of contract at odds with industry practices and the expectations of the creative parties.
  - remove or restrict the scope of statutory license provisions for broadcasters.
  - introduce a clear basis for fair and effective measures to address access to websites built on hosted or non-hosted infringements.
  - adopt statutory damages in civil cases and allow restitution to be awarded in criminal cases.
  - establish enhanced penalties for “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- 1) Amend the tax laws to make software piracy a form of tax evasion; 2) enhance corporate audit and disclosure requirements; and 3) adopt software asset management (SAM) policies to ensure legal software use in private enterprises and Indian Government agencies.
- Provide tax benefits for associations involved in anti-piracy and capacity building.
- Reduce patent pendency on software and technology patents.

### **Market Access**

- Eliminate significant market access barriers imposed on the motion picture industry as described in this submission, including the TRAI ban on exclusivity and imposition of “must provide” in the pay TV sector.
- Eliminate high tariffs on entertainment software products.
- Eliminate cascading effect of direct and indirect taxes, resulting in extremely high taxation rates for the motion picture and television industries.
- 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 AND ENFORCEMENT UPDATES IN INDIA**

Prior IIPA reports on India contain detailed discussion of piracy and enforcement issues.<sup>3</sup> This report serves only as an update and is not to be considered an exhaustive review of the issues.

**More Effective Enforcement Needed Against Internet and Mobile Piracy:** Within the next two years, India will be the second largest Internet market in the world, and the world’s leading English language market, with an estimated 330-370 million Internet users. Mobile penetration stands at around 70% with an increasing number of mobile (smart phone and tablet) users (estimated at around 22 million) having 3G Internet access.<sup>4</sup> The Indian Government continues investing in infrastructure to support this growth under its National Broadband Policy, and opportunities for expansion of India’s online marketplace for copyright content theoretically abound. However, without adequate legal protection and enforcement against illegal BitTorrent, cyberlocker, web-based file hosting, wireless access protocol (WAP), blogs, and online radio sites or services (catering to Indian demand for music, movies and television programming, software, games, and books), India’s legitimate online marketplace will remain stunted.<sup>5</sup>

A recent reported study tracking downloading IP-addresses on peer-to-peer (P2P) networks for films and television content found India to be in the top ten Internet piracy countries in the world.<sup>6</sup> In 2013, the Entertainment Software Association (ESA) reports that India once again placed sixth in the world in terms of the number of

<sup>3</sup>See, e.g., IIPA, *India*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>.

<sup>4</sup>See generally International Telecommunications Union, *Facts and Figures*, <http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>.

<sup>5</sup>Indian consumers have legitimate choices today, including BigFlix, Eros On Demand, Box TV, Rajshri, iTunes India, Yahoo India, YouTube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas of India, Biscoot Talkies. On top of these legitimate online platforms, retail chains such as Landmark, Crossword and Planet M now sell legitimate copies of films in DVD and VCD format.

<sup>6</sup>Utpal Borpujari, *India Major Online Film Piracy Hub*, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.

connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks. Pirated versions of movies often appear on the Internet in India within hours of their release in the movie theater, available through BitTorrent, cyberlocker, or web-based file hosting sites or services. The Internet piracy situation in India is fluid, as sites subject to enforcement or court orders merely migrate to avoid enforcement or further detection. Hundreds of sites target international and Indian movies and music, as well as other copyright materials.<sup>7</sup> The prevalence of these readily accessible sites indicates that local Indian creators are being harmed significantly by online piracy, a factor that the Indian Government should take into account.

A more centralized enforcement response to the proliferating online piracy problem is needed. In 2012 and again in 2013, the music industry association obtained civil court orders to take down more than 250 dedicated piracy sites. These orders are a helpful indicator of a nascent Indian Government willingness to address online infringement, but much more will be required to drive down online music piracy and create the space needed for the operation of legitimate music services. The motion picture industry notes some cooperation for takedowns of hosted content on traditional sites (e.g., user-generated content sites) but inadequate support from ISPs and law enforcement for taking down dedicated piracy sites. Since piracy sites and those offering the sale of pirated materials for mobile devices generally operate openly in India without fear of legal action, a much stronger enforcement response is needed on the part of all relevant agencies of the Government. If necessary, as discussed below, laws and regulations should be fine-tuned to permit effective action against online piracy services, beyond the basic structure established under the Copyright Act.<sup>8</sup> In addition, it is suggested that the Indian Government convene regularized communications between right holders and the major ISPs, or at least ensure that such meetings occur, to foster voluntary and mutual cooperative efforts.

Where investigations reveal that piracy 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, including ongoing cases against *songsdl.com* and *mp3don.com*. One court case, *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (2011),<sup>9</sup> may be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In that case, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webpace” or “place” to be used for sharing infringing materials.

**Despite Some Improvement, Unauthorized Camcording Situation Remains Severe:** IIPA’s 2013 Special 301 report noted an alarming proliferation of unauthorized camcording which drove not only online piracy but also harmed markets outside India. In 2012, there were 69 incidents of major U.S. motion pictures for which audio, video, or audio/video captures were detected as being sourced from Indian movie theaters.<sup>10</sup> That number dropped to 43 incidents in 2013. This is a slightly positive trend, but does not include unauthorized camcording of local Indian, foreign, or independent films. The local film industry and cinema owners are quickly coming to understand there is a need for urgent action. In the second quarter of 2013, joint efforts by the Motion Picture Distributors Association, MPAA, and the Andhra Pradesh Film Chamber of Commerce (APFCC) resulted in the arrest of members of two major criminal camcording syndicates operating in previously reported piracy hotbeds of Surat (Gujarat) and Indore (Madhya Pradesh).<sup>11</sup> As a consequence of these successful enforcement operations, there were no camcording incidents reported in these areas during the remainder of the year. IIPA also views as a positive development the

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<sup>7</sup>Many notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in India, and many websites, such as *exdesi.com*, *netload.in*, *bollyrulez.net*, *bollyzone.ch*, *cramit.in*, *gorillavid.in*, *daclips.in*, *djluv.in*, *ictorrents.com*, *moviespack.com*, *movpod.in*, and *mediafiremoviez.com*, have a nexus to and/or particularly target Indian audiovisual materials. Hundreds of additional sites such as *songspk3.in* target both international and Indian music repertoire.

<sup>8</sup>The Copyright Act provision on notice and takedown will not alone be adequate to address online piracy, since it only provides takedown for a period of 21 days, and failure of the right owner to furnish a court order within 21 days of the takedown notice allows the ISP to reinstate the content.

<sup>9</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>10</sup>In IIPA’s 2013 Special 301 report, we noted that 53% of all pirated versions of major U.S. releases detected in Asia were sourced to an Indian cinema.

<sup>11</sup>The first operation targeted a major camcording syndicate nicknamed ‘Yamraaj’ located in Indore during the release of ‘Ironman 3.’ The second operation, based on evidence linked to the first operation was against a major release group operating out of Surat in India nicknamed ‘NICKkkDon.’ The second camcording syndicate owned 33 websites and comprised 6000 members. Extensive seizures were made in both cases. These actions in 2013 followed four operations in 2012 in Bangalore, Hyderabad, and Vijayawada with links in Delhi, leading to the closure of eight dedicated piracy websites.

creation, with the assistance of the motion picture industry, of a mobile “app” launched in Andhra Pradesh to detect and report piracy and camcording incidents. Unfortunately, camcording incidents are now being reported in some of India’s smaller cities and towns and are exacerbated by the growth of multiplexes in these cities. Increased camcording incidents were observed in Bhopal (Madhya Pradesh), Lucknow, Noida, and Muzaffarnagar (Uttar Pradesh), and Aurangabad (Maharashtra). Amending the Cinematograph Act, 1952 to include a prohibition on unauthorized camcording will be critical to a more centralized and effective enforcement effort. Continued efforts by cinema owners (e.g., showing slides and placing messages on tickets and within theaters conveying that illegal camcording is not allowed), as well as industry initiatives like the “Make a Difference” campaign working directly with cinema owners, have raised awareness of this problem and hopefully provide some level of deterrence.

**More Coordinated Effort Among States Needed to Reduce Piracy:** The Indian Government has established various state enforcement cells in the state police headquarters, and the states have appointed nodal officers to handle IPR related offenses. In addition, the non-bailable nature of copyright offenses has traditionally been helpful, meaning the state cells can run raids on *suo moto* cognizance. This has proven over time to be a very effective and efficient means of enforcement, and IIPA encourages the Indian Government at the federal and state level to continue seeking such enforcement action. Many of the states also have laws against organized or immoral crimes (so-called ‘Control of Goonda Acts’), which have been helpful in addressing piracy, since the time frames for action are accelerated and the authority well spelled out in the various states. Use of the Goonda Acts should be expanded to address software and book piracy.<sup>12</sup>

At the same time, right holders continue to report some difficulties, including the lack of standard operating procedures among the states, leading to some delays and inefficiencies. First, there is often no clear delineation of the proper office to approach with respect to online piracy (i.e., cybercrimes) versus hard goods piracy. Second, time frames from registration of a “First Information Report” or criminal complaint, to the execution of a raid, are too slow to maintain enforcement momentum (sometimes taking three to four days), particularly against covert networks when speed of response, confidentiality, and adaptability are key factors. Law enforcement in smaller cities and towns, where piracy and pirate networks now percolate, must move in a more agile manner and without reluctance to address piracy as it emerges. Third, reports also indicate the concern over the high risk that information about the raid is being leaked. Publishers report that district police departments have differing procedures regarding pre-raid documentation requirements for lodging complaints, evidence gathering details during raids, safeguards during raids, and post-raid recordation. These differing procedures invariably lead to differing enforcement attitudes, inclinations, and awareness; duplication of efforts; and low conviction rates.

**Court Reform Needed to Address Piracy Issues in India:** Use of the courts in India remains a mixed experience, depending on the state and issue. Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as “courts of first instance”) do a creditable job in civil cases, and most positive civil relief and court orders emanate from these areas of the country. The experience in other regions, where District Courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright including: clogged dockets; delays due to archaic procedural laws, such as the failure to accept electronic documents and multiple opportunities for parties to delay proceedings; problems with retaining evidence (and lack of familiarity with the evidentiary requirements in relation to electronic evidence in online piracy cases); onerous requests to produce evidence of ownership and/or witnesses; failing to grant seizure orders to copyright owners as a matter of right in civil cases;<sup>13</sup> and difficulty enforcing civil court orders.<sup>14</sup> IIPA continues to urge the Indian Government to establish special IP courts throughout the country. Industry stands ready to develop appropriate briefings for judges on copyright piracy developments, stressing the serious commercial harm caused by various forms of piracy and the need for deterrence.

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<sup>12</sup>IIPA understands that several states like Madras and Karnataka have begun the process of seeking inclusion of “software piracy” under their state Goonda Acts. Book publishers would also be helped in this regard since they usually only get raids after lodging formal complaints under Section 200 of the Code of Criminal Procedure.

<sup>13</sup>IIPA recognizes that seizure orders in civil cases are discretionary, but believes that in clear-cut civil infringement cases seizure orders should be granted as a matter of right.

<sup>14</sup>Difficulties arise at times when defendants refuse entry to the Local Commissioner or police refuse to take action, citing lack of available personnel. Irregularities are also reported between police and infringers.

With fewer civil cases settling, judges increasingly must award adequate damages to compensate the right holder, and thus, adopting statutory damages in civil cases is critical. A recent report indicates the Delhi High Court has proposed higher court costs (up to 300% of current costs) for cases valued at Rs.20 million (US\$333,000). This would severely hamper anti-piracy efforts in India, since the Delhi High Court is one of the few to have IP specialist judges, and is often used by right holders in civil copyright cases. The Court should refrain from making this change.

Criminal cases are a different matter and unfortunately, most of the time, have not yielded effective and deterrent results. While copyright piracy is a non-bailable offence, in practice, bail is often secured on the first day after arrest. There are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be subject to seizure. Criminal prosecutions often take years, by which time relevant witnesses and officers are untraceable and in many cases evidence secured is also compromised, leading to acquittals. In plea bargains (the recording industry reports 80 plea bargains in 2013) or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. IIPA recommends allowing restitution to be awarded in all criminal cases for greater deterrent effect. Experiences of the industries with criminal cases differ by region, but overall, further training of prosecutors (there are no dedicated or IP expert prosecutors) and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful.

**Incremental Progress Noted Against Unauthorized Use of Software by Enterprises:** The software industry reports that the rate of PC software piracy has continued to decline gradually in India, though it remains high at a rate of 63% in 2011, representing a commercial value of unlicensed software used in India of nearly US\$3 billion.<sup>15</sup> The number of actions taken against enterprises using unlicensed software in India increased from 12 (in 2012) to 24 (in 2013). The courts effectively employ Anton Piller orders to preserve evidence and retain the element of surprise, which is critical for such enforcement actions. Still, the software industry would like to see *suo moto* cognizance raids which would have an even more deterrent effect (since it would obviate the need for a complaint or application for an order, as well as broaden the scope of the search). Unfortunately, many states and localities do not view unauthorized use of software by enterprises as a serious infringement, much less a crime. As a result, enterprise end-user software piracy has become acute in some parts of the country, e.g., commercial/ industrial hubs such as New Delhi, Mumbai, Bangalore, Coimbatore, Chennai, and Baroda. In addition, in certain cities in India, it is extremely difficult to get police support in civil end-user actions despite court orders. In such cases, instructions from the highest officers should be issued to provide unstinting support.

**Unauthorized Use of Books Continues to Plague Publishers; Export Monitoring Needed:** Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India. There has also been an increase in the availability of pirated trade (or consumer) books, which are often sold by itinerant (street) vendors to motorists in the middle of intersections. In efforts to combat rampant piracy, publishers long ago established the practice of creating market-specific low-priced textbooks editions to meet domestic demand – a significant benefit to Indian students and academics.

Two significant developments over the past year may portend major problems for U.S. and Indian publishers and distributors going forward. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In 2013, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. This threatens to adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. IIPA strongly urges the Indian Government to take immediate action to protect continued access by its students to textbooks by empowering Customs to take *ex officio* actions with respect to illegal exports as well as imports at the border. Doing so will send a positive signal to all publishers, including those printers and distributors who rely on copyright in the India-only editions for their livelihoods.

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<sup>15</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the premises of the university. The suit seeks to draw the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the activity concerned in this case – the commercial production of course packs which Delhi University has outsourced to a commercial, for-profit, copy shop. There is a major difference between the two activities, with the former falling within the scope of what may be permissible under global norms, and the latter falling squarely outside those strictures. Nonetheless, the highly charged case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the courts, namely, to enjoin the copy shop and the University from commercial acts of unauthorized photocopying, reproduction, and distribution of course packs without appropriate licenses from publishers. The courts can grant the injunction, preserving authors' rights against commercial reprography and requiring that licenses be granted with appropriate payments for course packs, while still preserving appropriate fair dealing. Doing so will also reaffirm the well-established three-step test which India must adhere to under the TRIPS Agreement and Berne Convention.

**Retail Piracy, Including Mobile Device Piracy, Must be Addressed:** Retail hard goods piracy continues to harm right holders, including: burned, factory, and imported optical discs containing all kinds of content;<sup>16</sup> mobile device piracy in which shops as an after-service offer to upload content to mobile device customers or sell flash or pen drives filled with pirated content; hard-disk loading of pirated software and content onto computers at the point of sale; pirate rental of motion pictures; and pirate sales of video games supported by sales of circumvention devices (in the market or online) and modification services for consoles. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials. IIPA’s latest notorious markets filing in November included the following markets: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika Bazaar, Gaffar Market, and Sarojini Nagar Market (Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Since much pirate material is “pre-release” (for example, Indian and international music records available on the streets before they are released legitimately to the public), the Government of India should establish enhanced penalties for dealing in pre-release piracy.

The most effective enforcement against these markets continues to be police raids taken on the basis of *suo moto* cognizance. Overall, the authorities continue to run thousands of raids on an annual basis. In a positive sign, legitimate resellers in Nehru Place in New Delhi have taken the initiative and complained to the responsible police unit, but reports of irregularities among the local police and leaks of raids hinder or even prevent enforcement activities. Even when raids take place and sellers of pirated material are arrested, the situation reverts within a few days, as the sources of the material may be based elsewhere (e.g., China, Pakistan, or Nepal) and are out of the reach of the authorities.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Confirm That Camcording of a Motion Picture is Illegal:** With the increase in unauthorized 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 transmit (or attempt to make or transmit) a copy, in whole or in part, of a motion picture while inside a theater. We understand the Ministry of Information & Broadcasting (MIB) is considering inclusion of an anti-camcording provision in the Cinematograph Bill to be considered by India’s Parliament. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of camcording have been reduced in several markets with relatively minimal enforcement. We

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<sup>16</sup>In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.

hope this activity will be fully covered in the Cinematograph Bill, and that passage and implementation of anti-camcording in India will mark the beginning of the end for this extremely damaging activity in the country.

**Copyright Rules, 2013 In Force; Act Remains Deficient in Certain Key Areas:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, and implemented in The Copyright Rules, 2013 (in force March 14, 2013). IIPA and several IIPA members have commented extensively on both the Act and the Rules while they were under consideration and after the Act was in force (previous Special 301 reports on India document in great detail the substance of IIPA positions). The Act (as amended) and Rules contain some improvements, while largely leaving in place the enforcement structure of the Copyright Act and related laws and regulations.

The Act and Rules (which, under the Constitution, as “delegated legislation” are limited in scope to supporting and prescribing the processes and formalities to implement the Act but never going beyond the Act) unfortunately also leave some important concerns unresolved and raise new concerns. Some of the issues with the Law and Rules may call into question India’s compliance with international obligations under the TRIPS Agreement and Berne Convention, and its conformity with the standards set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In summary terms, further changes to the Act should be contemplated to:

- Amend ownership and assignment provisions that are harming and altering existing commercial arrangements in India.<sup>17</sup>
- Ensure coverage in the law of access control TPMs, and ensure prohibition against both the act of circumvention of TPMs as well as the trafficking in circumvention technologies, devices, components, and services, and other changes, in full accord with the WCT and the WPPT.<sup>18</sup>
- Ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS Agreement.<sup>19</sup>
- Strengthen the statutory provisions regarding online infringements, so they permit for expeditious takedowns without automatic put-back, and address both hosted and non-hosted infringing activities and services.<sup>20</sup>

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<sup>17</sup>The Act now contains independent rights for authors of ‘underlying works’ incorporated in cinematograph films including granting ‘non-waivable’ & ‘non-assignable’ royalty rights in favor of authors (Sections 17, 18-3, 19). The Act also barred assignment of future rights in respect of modes and mediums of exploitation which have not been invented or are not in commercial use (Section 18-2). As IIPA has previously indicated, the new provisions limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works and set exact percentages or amounts ascribed to be paid to such authors, undermining the flexibility of parties to negotiate agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. To our knowledge, the Rules: 1) do not confirm only the prospective (i.e., non-retroactive) application of Articles 17-19; 2) retain the Section 18 proviso that 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, which could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution; 3) do not clarify that the Act governs the relationship of creative parties with respect to the production of works in India, and not contracting parties outside of India.

<sup>18</sup>The Act now contains a criminal (but not civil) prohibition, in Section 65A, of the act of circumvention of a technological protection measure (TPM) “with the intention of infringing” an exclusive right. The provision falls short of full WCT and WPPT compliance, as described in previous IIPA submissions. The exception on the act of circumvention remains too broad. For example, the Rules do not adequately require, in the case of an exception to circumvent, reporting of 1) information about the tools used to circumvent; 2) the provision under which the exception to the prohibition is based; 3) the underlying work and subject matter being accessed by virtue of the circumvention; and 4) 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. It is helpful that the reporting does include under Section 80(2)(c) the reason for the circumvention, but Section 80(2)(d) is not as helpful. While it requires the person circumventing to sign an undertaking to accept responsibility for infringement as a result of the circumvention, it imposes no liability on the party enabling the circumvention. Finally, civil as well as criminal relief should be available. As India is witnessing the roll out of the National Broadband Policy, and cable TV digitization is due for completion by December 2014, and the Internet subscriber base in India grows year on year, TPMs become very relevant both to curb online piracy levels and make space for new legitimate distribution models.

<sup>19</sup>The Rules unfortunately do not alter the fact that two existing compulsory licenses, which were applicable only to Indian-origin works, now 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>20</sup>The Act now includes a safe harbor provision for ISPs engaged in the ‘transient or incidental storage of ‘works’ with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51 (1) (c)). The Rules provide for takedown within 36 hours of a notice, but are otherwise problematic. While Rule 75(3) provides that the person responsible for the storage of the copy shall take measures to refrain from facilitating such access within 36 hours, this rule shifts the responsibility to right holders that have to comply with burdensome rules and requirements that may not be possible to meet in practice. For instance, according to Rule 75(2)(c) right holders must provide evidence that the copy of the work in question is not covered under a Section 52 or other exception, inappropriately shifting the burden of proof to the right holder. The exception for certain acts of transient and incidental storage of works should be narrowed to those that do not have an independent economic significance and the sole purpose for which is to enable transmission in a network between third parties by an intermediary for a lawful use. Further, while the Information Technology (Intermediaries Guidelines) Rules 2011 imposed due diligence requirements on ISPs, they do not effectively provide incentives for ISPs to assist in curbing online piracy, and carved out from their

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- Ensure any exceptions and limitations pass muster under the well-established Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a); and the software exceptions in Sections 52(1)(aa) and (ad)).
- Provide statutory damages, upon the election of the right holder, on a per-copy basis, adequate to compensate right holders in cases in which proof of infringing numbers of copies or distributions cannot be determined.
- Adopt provisions (such as those provided in the U.S. Family Entertainment and Copyright Act of 2005) that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works or other subject matter.

**Software Legalization Steps: 1) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion; 2) Enhance Corporate Audit and Disclosure Requirements; and 3) Adopt SAM Policies to Ensure Legal Software Use in Private Enterprises and Government Agencies:** There are several steps the Indian Government should take to enhance software protection in India. First, the 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. Tax inspectors and external and internal auditors should then be empowered to check and account for genuine software licenses inside public and private companies. It is estimated that by taking these steps, the Indian Government can recover hundreds of millions of dollars in lost direct and indirect taxes.<sup>21</sup> Second, 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. Third, the Indian Government should issue a directive or strict policy guidelines mandating that all Government departments across the country use legal software at all times and follow due diligence while procuring software assets. The Government can ensure this by adopting established software asset management (SAM) best practices and extending this requirement along its supply chain. BSA and the Department of IT established a roadmap for promoting SAM best practices in government and private enterprises in a joint report in November 2011. Additionally, BSA has worked with the software industry and other experts to develop educational and SAM management tools under the Verafirm umbrella.<sup>22</sup> These Verafirm programs are designed to help both governments and enterprises understand, manage, and certify their SAM practices.

**Provide Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building:** IIPA recommends that the Indian Government amend the tax code to provide exemptions for copyright associations involved in anti-piracy and capacity building activities. Providing this support will help create a win-win situation, since right holder groups will have the wherewithal to provide greater levels of support and capacity building. Such cooperative efforts will both raise awareness of the issues surrounding copyright protection in India as well as promote greater cooperation and more effective enforcement, to the benefit of local Indian as well as foreign creators and right holders.

**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 stands at approximately 100,000 applications across all industries. We urge the Indian Government to address this backlog as a priority, to promote R&D investment, ICT innovation, and national competitiveness in India.

**Patent Reform:** India recently issued draft *Guidelines for Examination of Computer Related Inventions*. The strict regime of patentability implemented by the draft *Guidelines* would disallow patent protection for innovations,

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due diligence requirements is whether the transaction taking place (in which the transient reproduction occurs) is an authorized one. In addition to gaps in the Copyright Act, the Department of Telecom (DOT) should enforce the conditions of its licenses with ISPs, and the current Information Technology (IT) Act and relevant Implementing Rules should be utilized to full effect to address online copyright infringements and infringing websites.

<sup>21</sup>A study by IDC estimates the Indian Exchequer lost US\$866 million in 2009 due to failure to capitalize on direct and indirect taxes which would have been owed in the absence of software piracy in India.

<sup>22</sup>See [www.verafirm.org](http://www.verafirm.org) for more details on the program.

including those having inventive technical character, in a vast segment of the computer-technology field. Thus, the *Guidelines* do not appear to be consistent with Article 27.1 of TRIPS, which states that patents shall be available for inventions in all fields of technology, assuming they satisfy the other criteria for patentability such as novelty, inventive step and industrial application. The regime implemented under the *Guidelines* would have a deleterious effect on the emerging software sector in India as well as on investment in India by multinational software companies.

## **MARKET ACCESS ISSUES**

IIPA has commented in previous submissions and in significant detail on market access barriers imposed on the motion picture, software, and publishing industries. Removing such barriers not only levels the playing field for all right holders, who otherwise have to compete with pirates who unfairly benefit since they do not pay taxes or follow rules, but is critical to reducing piracy, since their removal permits the advancement of legitimate business models bringing greater content to market on more diverse terms. Market access barriers previously addressed by IIPA, and remaining of concern, include:

- A ban on exclusivity including “must provide” requirement in the pay TV sector.
- Restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home).
- Price controls imposed in the pay TV sector.
- Inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film, other taxes such as value-added tax (VAT) and service taxes levied by the Indian Government; subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) will be preferred.
- 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.
- High tariffs on entertainment software and hardware products, including PC game products, console game products, game console hardware, and game activation cards.
- An array of software goods and services taxes, including transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of software as both a good and service.
- Government procurement preferences and product testing and certification requirements that favor domestic technology products.

One measure which the Indian Parliament is still rolling out is the GST. The rollout of GST and its impending implementation could help resolve issues related to entertainment taxes, high tariffs on entertainment software, and software double taxation issues.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to participate in training initiatives as well as public awareness and outreach with various constituencies in 2013. For example, the motion picture industry: 1) conducted more “Make a Difference” campaign events for movie theater employees at high-risk theaters, discussing investigative and enforcement techniques in cases of unauthorized camcording (around 1,200 staff in all participated in trainings); 2) conducted two successful training programs for multiplexes operators in Ahmedabad and Delhi in association with the United States Patent and Trademark Office and the Federation of Indian Chambers of Commerce and Industry (FICCI); 3) participated in awareness-raising activities on the need for specific laws to combat piracy in the film and entertainment industries in India at local film festivals such the Mumbai International Film Festival and the National Film Development Corporation’s Film Bazaar (with FICCI, the Confederation of Indian Industry (CII), the Film and Television Producers Guild of India (FTPGI) and the U.S.-India Business Council (USIBC)); 4) conducted training programs for prosecutors in Mumbai and Thane attended by about 60 officers each; 5) conducted programs for police in West Bengal attended by around 200 officers; 6) participated in a roundtable discussion attended by Indian Government officials and representatives of the Multiplex Association of India to discuss the alarming growth of illegal

camcording in India; and 7) 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. In 2013, MHRD in association with FICCI launched a subcommittee entitled the 'Copyright Enforcement Advisory Council' to deal with issues relating to enforcement of copyright in India. Industry has already weighed in with the CEAC on its specific concerns.