

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2015.¹

Executive Summary: Changes are afoot in India, with a new Administration and positive indicators that the government recognizes intellectual property as an important element of India's overall economic future. The drafting of a National IPR Policy, launched by a government-appointed IPR Think Tank, begins, "Creativity and Innovation are the forces which drive growth, development and progress in the knowledge economy," and dubs India's motto as "Creative India; Innovative India."² Meanwhile, India is witnessing expansive growth of Internet availability, via both wired and wireless networks, and using a plethora of devices, from computers to mobile phones and tablets. The expansion of Internet connectivity and increasing recognition by the Indian government of the importance of IP to its national economic policy should translate into significant new market opportunities for right holders. As an example of what is at stake for just one creative industry sector, a report released in 2014 indicated that the total gross output of the Indian film and TV industry in FY2013 is estimated at US\$18.5 billion, providing more than 1.8 million jobs.³

Despite these opportunities, evidenced by the launch of many legitimate services in India,⁴ copyright piracy,⁵ regulatory barriers, and market access barriers⁶ inhibit the continued growth of domestic and foreign copyright stakeholders in India. Pirate online services undermine not only the local Indian market but also the vast potential export market for the Indian creative industries. Indian content is often exported or licensed via global deals, reflecting the considerable demand internationally for accessing Indian creative works; and yet the value of licensing remains negatively affected by the availability of the same content via pirate sources. In addition to growing online and mobile piracy, unauthorized camcording of movies in the theaters, hard goods piracy including the unauthorized use of published materials, and signal piracy involving unauthorized distribution and/or receipt of pay-TV content, all harm creators in the Indian market.

While good cooperation is forthcoming against hosted content online, the IT Act should be amended to provide a more expeditious and effective remedy to seek orders to halt access to infringing materials through services (whether in India or not) built on infringement. The Cinematograph Bill should be amended with specific provisions to prohibit the unauthorized camcording of movies. The Copyright Act should ensure adequate protection against the circumvention of technological protection measures (TPMs) and trafficking in circumvention devices/technologies (to ensure full implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)). Rollout of new locally manufactured pay-TV set top boxes (STBs) as well as imported STBs must adopt adequate TPMs. Greater priority should be assigned to copyright piracy cases (both source and online) by police, prosecutors, and judges, to overturn the trend of low conviction rates and non-deterrence. Uniform enforcement procedures should be adopted by the states and subject to better national

¹For 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/2015SPEC301HISTORICALCHART.pdf>.

²National IPR Policy (First Draft), December 19, 2014. IIPA has commented on the First Draft with various suggestions, largely consistent with this filing.

³Deloitte, *Economic Contribution of the Indian Motion Picture and Television Industry*, March 2014.

⁴Legitimate platforms online in India include Big Flix, Eros on Demand, Box TV, iTunes India, Yahoo India, You Tube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas, Myplex, and Biscot Talkies. The Motion Picture Distributors' Association (MPDA), along with The Film and Television Producers Guild of India (FTPGI) launched an initiative www.findanymovie.in to help consumers find legitimate sites. In the physical marketplace, Landmark, Crossword, and Planet M sell legitimate Blu-ray discs, DVDs, and VCDs.

⁵For example, the local music industry estimates harm from music piracy alone in India at INR800 Crore (around US\$125 million).

⁶The United States International Trade Commission (USITC) notes in a December 2014 report on India, "The main policy barriers [adversely affecting U.S. companies doing business in India] include tariffs and customs procedures, foreign direct investment (FDI) restrictions, local-content restrictions, treatment of intellectual property (IP), taxes and financial regulations, regulatory uncertainty, and other nontariff measures." USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, at <http://www.usitc.gov/publications/332/pub4501.pdf>. The report further finds that "if tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double."



enforcement coordination. Steps should also be taken to ease market access and regulatory barriers such as high tariffs and taxes, “must provide” requirements in the pay-TV sector, and compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries.

PRIORITY ACTIONS REQUESTED IN 2015

Enforcement

- Hold regular consultations between copyright stakeholders and ISP and mobile networks to foster greater cooperation and expeditious and effective remedies against online and mobile infringements.
- Halt instances of unauthorized camcording and avoid export out of India of illegally sourced motion pictures.
- Introduce cybercrime law enforcement officers in all state police stations; add centralized IP crime unit under Central Bureau of Investigation (CBI) Cyber Crime Detective unit to ensure proper investigation of IP crimes, including Internet piracy, in a systematic, coordinated, and efficient manner.
- Establish standard operating procedures for enforcement agencies.
- 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.
- Have Indian Customs effectuate *ex officio* seizures, followed by destruction, of illegal exports as well as imports.

Legislation

- Immediately implement legislation to deal nationwide with online and mobile piracy, including providing a more robust legislative basis for courts to order ISPs to disable access to websites and services enabling infringement.
- Amend the IT Act to make copyright infringement a predicate offense, thereby providing authorities with power to order expeditious remedies against non-hosted online and mobile services built on copyright infringement.
- Enact amendments to India’s Cinematograph Bill making it an offense to possess an audiovisual recording device in a cinema intending to make or transmit a copy of an audiovisual work, in whole or in part.
- Complete the ratification process to carry out the intention behind the Copyright Act 2012 to join and ensure compliance with the WCT and WPPT.
- Further amend the Copyright Law to, among other things:
 - clarify prohibitions against circumvention of access control 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, which is negatively affecting the operation of market economics for audiovisual and musical works, and sound recordings.
 - establish enhanced penalties for “pre-release” piracy.
- Provide tax benefits for copyright associations so that they may use the tax savings for anti-piracy and capacity building activities in the country.
- Amend state organized crimes (Control of Goonda) laws to include book, music, and video game piracy.
- Conduct a study through WIPO on the contribution of India’s creative industries to the Indian economy.
- Ensure that adequate IP protection forms a crucial element of the forthcoming Digital India Policy.

Market Access

- Eliminate significant market access barriers imposed on the motion picture industry, including:
 - TRAI and government rules banning exclusivity and imposing “must provide” rules in the pay-TV sector.
 - Localization requirements and per-channel fees beaming into India.
 - Price caps for pay-TV channels that stifle the growth of the industry.
 - Foreign direct investment caps for radio/up-linking of news and current affairs TV channels, and pre-approval requirements for most other broadcasters to invest.
 - Ministry of Finance service taxes.
- Eliminate high tariffs on entertainment software and hardware products.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Prior IIPA reports on India contain detailed discussion of piracy and enforcement issues.⁷ This report serves only as an update and is not to be considered an exhaustive review of the issues.

Internet Connectivity Creates Opportunities But Also Challenges: India is now the second largest Internet market in the world, with an estimated 302 million Internet users as of December 2014, surpassing the United States.⁸ India boasted over 900 million mobile subscribers (nearly 75% penetration) as of the end of 2012 according to the Telecom Regulatory Authority of India (TRAI), with increasing 3G capabilities (according to IMRB-2012 and Nielsen-2013, India had over 100 million mobile Internet users, with 25 million from rural areas), and a “mobile first” approach that is coming to fruition. The Modi Administration is committed to an even greater “digital push,” including connecting 250,000 village level centers to a “National Broadband Grid” with speeds of at least 2 Mbps. As such, India’s online and mobile markets show enormous potential for commercial growth for creative industries into the future, whether Indian or non-Indian content, urban or rural, English or non-English.

With these increasing opportunities, however, come enormous challenges, including online and mobile piracy. Per indicators from Comscore’s analyses of the top 200 sites in India for copyright piracy, 21% are direct download sites, 21% are torrent sites, 17% are social networking sites, 13% are streaming/direct download sites, 8% are cyberlocker sites, 8% are streaming only sites, 4% are radio sites, 4% are blog sites, and 4% are wireless access protocol (WAP) sites.⁹ As of this writing, notorious piracy sites most accessed in India include *kickass.so* (26th most accessed site in India), *torrentz.eu* (51st), *extratorrent.cc* (66th, and linked with *desitorrents.com*), and *tamilrockers.com* (616th). Mobile phone downloading on memory cards and mobile apps for downloading and streaming are also on the rise, for tablets, smart phones, and other devices. In 2014, the Entertainment Software Association (ESA) reports that India placed fifth in the world (up from sixth in 2013) in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.

Given the scope of the challenge, it will be essential for the Indian government to establish proper prioritization to online and mobile piracy cases among authorities at all levels, and to ensure proper tools are in place to address both hosted and non-hosted infringements, as well as both domestic and foreign sites. In addition to adequate enforcement tools (which could be secured in part by an amendment to the IT Act to add copyright infringement as a predicate offense, allowing for actions against rogue websites located outside India), accountability among advertising companies (which provide much of the revenue generated by piracy sites that are not subscriber-fee based) and payment processors in India should also be explored. Understanding the organized criminal nature of these offenses will also be crucial to raising the profile of Internet and mobile piracy cases. For example, global organized “release groups” and “camcord brokers” may start in India by procuring from a downstream agent an illegal camcord or print of a motion picture, which is then supplied to a rogue website or another syndicate outside of India.

Industry continued to utilize the courts in 2014 to obtain orders to address the most egregious instances of online piracy. The Delhi High Court issued orders to disable access to 396 copyright infringing websites of audiovisual materials, through three separate John Doe orders.¹⁰ These actions follow on similar orders and good cooperation from ISPs in disabling access to well over 300 websites (containing illegal music files and enabling unauthorized streaming of music) based on similar court orders in 2013. In 2014, the music industry also settled over

⁷See, e.g., IIPA, *India*, 2014 Special 301 Report, February 7, 2014, at <http://www.iipa.com/rbc/2014/2014SPEC301INDIA.PDF>.

⁸See, e.g., India to Have More Internet Users Than US by December End: IAMAI, *The Times of India*, November 19, 2014, at <http://timesofindia.indiatimes.com/tech/tech-news/India-to-have-more-internet-users-than-US-by-December-end-IAMAI/articleshow/45205187.cms>.

⁹A 2013 study tracking IP-addresses using P2P networks to download films and television content found India to be in the top ten Internet piracy countries in the world. 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>.

¹⁰The ISPs in these cases regarded themselves as licensees of the Indian Department of Telecommunications (DOT), so DOT was made a party to the orders and DOT issued the instructions.

50 cases through plea bargaining.¹¹ Without changes to the IT Act, however, and in the continued absence of a Memorandum of Understanding (MOU) between stakeholders and service providers (ISPs), it may be difficult to make a permanent dent in combating the online piracy problem. It is suggested that, in addition to any changes to strengthen the current legal framework,¹² the Indian government should convene regular meetings between right holders and major ISPs, to foster more voluntary cooperative efforts.

Unauthorized Camcording Remains Severe: The past year saw a slight decrease in detections, from 43 in 2013 to 40 in 2014, of major U.S. motion pictures camcordered off theater screens in India.¹³ Of the 40 camcorders detected, 24 involved incidents of video camcorders from India which were distributed globally, paired with audio tracks in 12 different languages. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. The local film industry and cinema owners understand the need for urgent action, and some major arrests against camcording syndicates in Surat (Gujarat) and Indore (Madhya Pradesh) have made a dent against this damaging problem in these areas of the country.¹⁴ Unfortunately, Ghaziabad continues to be a hot bed, and is a difficult territory due to the prevailing notorious crime syndicates operating there, despite sensitization of the police. Bhopal is another area where industry is detecting unauthorized camcording activity. The latest instances of unauthorized camcording have spread through Tamil Nadu in the south. Industry has kept police informed of these developments throughout the year. The mobile “app” launched in Andhra Pradesh in 2013 has been helpful in detecting and obtaining reports of piracy and camcording incidents.

Camcording causes lasting damage to the global release window for films, as the “cams” end up online on rogue sites in India and spread throughout Asia and, indeed, to the world. Unauthorized cams appear on rogue sites within hours of the legitimate release of a movie, highlighting the urgent nature of seeking a solution to the problem. Amending the Cinematograph Act, 1952 to include a prohibition on unauthorized camcording will be a first critical step 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, have raised awareness of this problem, and hopefully these steps, along with the needed legal reform, can provide some level of deterrence.

Better State Coordination and National Cybercrime (Including IPR Crime) Strategy Sought: Indian authorities in the states continue to run thousands of raids per year (over 2,700 in 2014), and industry investigators report good cooperation with authorities. There are various state enforcement cells in the state police headquarters, and states have appointed nodal officers to handle IPR related offenses. The non-bailable nature of copyright offenses has traditionally been helpful, as state cells can run raids on *suo moto* cognizance. This has proven over time to be a very effective and efficient means of enforcement against physical piracy. Many of the states also have laws against organized or immoral crimes, including the Maharashtra Prevention of Dangerous Activities (MPDA) Act of 1981, and other “Control of Goonda” Acts.¹⁵ IIPA would like to see books, music, and video games included for coverage under these laws (to the extent they are not already). Without coverage, book publishers, for example, must lodge formal complaints under Section 200 of the Code of Criminal Procedure to obtain raids.

Increasingly, IP infringements online are tied to organized cybercrime activity and require an enforcement approach that recognizes this connection. For example, the Mumbai police reports that instances of cybercrime in Mumbai are up by 300% between 2013 and 2014.¹⁶ Unfortunately, the lack of attention to cybercriminal activity, and

¹¹Cases against *songsdl.com* and *mp3don.com*, reported in IIPA's 2014 Special 301 report, remain pending.

¹²The 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.

¹³In 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. In all, a total of 226 forensic matches of camcordered copies have been traced to Indian theaters between 2009 and 2014.

¹⁴The 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.

¹⁵The West Bengal government has recently enacted the West Bengal Prohibition of Audio-Video Piracy Bill 2013, which aims to strengthen antipiracy efforts within the state.

¹⁶*Indian Cybercrime Registers 300% Rise Since 2013*, The Paypers, November 17, 2014, at <http://www.thepappers.com/digital-identity-security-online-fraud/indian-cybercrime-registers-300-rise-since-2013/757366-26>.

the lack of familiarity, interest, and awareness in IP cases among certain Indian authorities, leave IP infringements in India as a low priority for law enforcement. In November 2014, Mumbai police announced they would add a cybercrime law enforcement officer to all police stations in Mumbai precincts, a welcome move, but this should be replicated in other localities. In addition, a long overdue centralized unit should be established under CBI to cover IPR infringements, with dedicated prosecutors. Both cybercrime officers and the centralized unit should receive training in IPR infringements, online transactions, cybercrimes, and evidentiary requirements in relation to electronic evidence. In conjunction with court reforms discussed below, and increased legal tools to address online piracy discussed above, it is hoped this better coordination will see better results in both civil claims (including those involving court orders to ISPs to address online infringements) and criminal cases (ensuring deterrence with respect to specific defendants and the penalties meted out).

Lack of Standard Operating Procedures Among States Hampers Right Holder Efforts: Right holders continue to report a 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 and source (including camcording) piracy. Second, time frames from registration of a “First Information Report” from the initial criminal complaint made by a right owner, to the execution of a raid, are too slow to maintain enforcement momentum (sometimes taking three to four days, or more), particularly against covert networks when speed of response, confidentiality, adaptability and gathering of evidence 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: Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as “courts of first instance”) do a creditable job in preliminary matters in civil cases involving copyright infringement, and most positive civil relief measures and court orders emanate from these courts.¹⁷ 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 electronic evidence; 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; and difficulty enforcing civil court orders.¹⁸ IIPA urges the Indian government to appoint special IP judges or panels in 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.

With respect to compensation, civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the right holder for the injury caused. An amendment bill for enhancing the district courts' pecuniary jurisdiction, which would result in higher court costs (up to 300% of current costs) for cases valued at INR20 million (US\$400,000), was introduced into Parliament in December 2014, per the recommendation of the Delhi High Court.¹⁹ Right holders are deeply concerned that this will severely hamper anti-piracy efforts in India. The Parliament should refrain from making this change.

¹⁷Innovative approaches have included Anton Piller Orders, John Doe Orders, Norwich Pharmacal Orders, and Mareva Injunctions, all of which have assisted IP owners in securing infringing goods, as well as assistance to the police in raids, sealing evidence, securing bank account details of defendants, as well as requiring the disclosure of passwords for IT resources etc.

¹⁸Difficulties 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.

¹⁹The Delhi High Court is one of the few to have IP specialist judges, and is often used by right holders in civil copyright cases.

Criminal copyright cases in India have generally not yielded effective and deterrent results. While copyright piracy is a non-bailable offense, 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 more than 50 plea bargains in 2014) or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. The 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.

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. In an effort to combat rampant piracy, publishers long ago established the practice of creating market-specific lower-priced editions of textbooks to meet domestic demand – a significant benefit to Indian students and academics. Unfortunately, these lower-priced editions which are intended only for the Indian market are being exported to more established markets, disrupting publisher sales into those markets.

IIPA continues to monitor two potentially troubling situations. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In recent years, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. This phenomenon threatens to adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. The Indian government should 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.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the University premises. 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. The former activity traditionally falls within the scope of what may be permissible under global norms, and the latter falls squarely outside those strictures. Nonetheless, the case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the court, 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 via the local reprographic rights collective licensing body recognized by the Indian government 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: In addition to online and mobile piracy, camcording, and book piracy, retail hard goods in India includes: burned, factory, and imported optical discs;²⁰ mobile device loading of content onto mobile devices, flash or pen drives as an after-service; unauthorized rental of motion pictures; and unauthorized sales of video games supported by sales of circumvention devices or technologies and modification services for consoles. This activity undermines innovative market-based solutions provided by right holders, such as the MXM Mobile Music Exchange (providing legitimate music to mobile phones in India). In 2014, IIPA members noted the following physical marketplaces in India as “notorious” for the availability of pirated/illegal materials: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika

²⁰In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.

Bazaar, and Sarojini Nagar Market (New 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 or motion pictures, available on the streets before they are released legitimately to the public), the Indian government should establish enhanced penalties for dealing in pre-release piracy. Police raids taken on the basis of *suo moto* cognizance raids continue to be the most effective enforcement against these markets, and authorities ran in the range of 2,700 raids in India in 2014. Still, the noted lack of criminal deterrence, along with physical pirated material being sourced from several locations (detected in recent years from China, Pakistan, Bangladesh, and Nepal), make physical piracy difficult to eradicate.

Signal Theft Issues: The audiovisual industry continues to have problems of signal theft by cable operators. Local cable operators often steal and redistribute content signals. There are, according to industry sources, approximately 60,000 cable systems in India that transmit IIPA member content without authorization. These cable systems affect legitimate audiovisual content business in India, including theatrical, home video, and legitimate television.²¹ Restraining orders issued by the Civil Court (Delhi High Court) against entire networks (including all franchisees, distributors and cable operators forming part of the network) as a result of civil actions brought by industry have been successful, but have not resolved the problem. The rollout of digital pay-TV should help the problem of cable signal theft, but India has delayed digital rollout due to its desire to localize the manufacture of set top boxes. Industry urges the Indian government to work with it to ensure that set top boxes locally manufactured, and those imported into India, have adequate TPMs. Unauthorized camcords of motion pictures feed into this form of piracy, since the unauthorized camcords often get retransmitted by these rogue cable or pay-TV systems.

Circumvention Services Proliferate in India: Circumvention services and activities are flourishing in India to gain unlawful access to or unlawfully copy (or otherwise utilize) copyright materials. Unfortunately, the Copyright Act as amended fails to adequately address such services or activities. The gap in the law (which essentially requires proof of a nexus between the circumvention and copyright infringement) should be addressed, so that those enabling users to obtain access to copyright materials without permission can be halted.

COPYRIGHT LAW AND RELATED ISSUES

Copyright 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 as implemented in The Copyright Rules, 2013 (in force March 14, 2013). The Act and Rules, which have been broadly subject to constitutional challenges, remain concerning in certain respects.²² At best, they represent a missed opportunity to strengthen the regime, support local and foreign creators adequately in the digital and online environment, and craft remedies adequate to keep rogue online piracy out of India. At worst, the Law and Rules may call into question India’s compliance with its international obligations under the TRIPS Agreement and Berne Convention, and may not be in conformity with the standards set out in the WCT and WPPT. In summary terms, further changes to the Act should be contemplated to:

²¹ See *Vishal Raids Cable Channels Telecasting Pirated Movies*, The Times of India, July 12, 2014, at <http://timesofindia.indiatimes.com/entertainment/tamil/movies/news/Vishal-raids-cable-channels-telecasting-pirated-movies/articleshow/38248019.cms>; *MSO in Belgaum Booked for Illegal Piracy of Zee TV Signals*, Indian Television.com, August 8, 2014, at <http://www.indiantelevision.com/cable-tv/msos/mso-in-belgaum-booked-for-illegal-piracy-of-zee-tv-signals-140808>; *Gang Involved in Satellite Signal Theft Busted; 4 Arrested*, Z News, June 30, 2014, at http://zeenews.india.com/news/nation/gang-involved-in-satellite-signal-theft-busted-4-arrested_943837.html; Amitabh Kumar, *Indian Television Industry Is Fighting Against Piracy for Global Revenues*, July 2014, at <http://www.broadcastandcablesat.co.in/indian-television-industry-is-fighting-against-piracy-for-global-revenues.html>.

²²The Indian Broadcasting Foundation (IBF), and an individual film producer, Anand Bhushan, have challenged the constitutional validity of Sections 17, 18, 19, 31, and 33 of the amended Copyright Act. Music company “Super Cassettes Industries Ltd.,” along with the sound recording society, Phonographic Performance Ltd. (PPL), have challenged the constitutional validity of the new statutory licensing provision, Section 31D. Various industry associations have intervened in both sets of proceedings before the high courts concerned.

- Amend ownership and assignment provisions that are harming and altering existing commercial arrangements in India.²³
- 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.²⁴
- Ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS Agreement. As written, any broadcasting organization (radio or television) would be able to apply to the Copyright Board for a statutory license, affecting the negotiating power of right owners. This change represents a serious regulatory and policy restriction on stakeholders, and it should not be permitted to go into effect with respect to non-Indian repertoire. The Indian government stated in 2012 that a new Copyright Board will be created and the rate of royalties determined, but to date, this has not occurred.
- 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, within and outside India.²⁵
- Ensure any exceptions and limitations comply with the Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a)).
- 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.

Confirm That Camcording of a Motion Picture is Illegal: The Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera, audio recording device, 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 from a theater. It is hoped and expected that the Modi Administration’s Ministry of Information & Broadcasting (MIB) will re-introduce an anti-camcording provision in the Cinematograph Bill, but this has yet to be put forward to India’s new 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

²³The Act 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; and 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.

²⁴The 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.

²⁵The 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 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.

through legislation; instances of camcording have been reduced in several markets with relatively minimal enforcement or government expenditure.

Amend IT Act to Provide Remedy Against Non-Hosted Infringements: As IIPA notes above, ISPs exhibit good cooperation when it comes to hosted content, but have not been as forthcoming when it comes to non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. Coverage of copyright infringement as a predicate offense under the IT Act, 2000 Rules, would largely go to solve the problem, since it would require ISPs to take measures to prevent communications infringing copyright or intellectual property rights from being carried on their networks.²⁶ Under this change, it would not matter where the infringing material emanated from, as long as its destination is India. In that case, the ISP must prevent that material's communication or availability (carriage) on its network. We are pleased that the Modi Administration is considering changes to the IT Act, and urge adoption of this important change.

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.

MARKET ACCESS ISSUES

Market access barriers imposed on the motion picture, video game, and publishing industries result in an unfair playing field for all right holders, forcing them to compete with pirates who already unfairly benefit since they do not pay taxes or follow rules. Addressing market access barriers is therefore 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:

- TRAI and government rules banning exclusivity and imposing "must provide" rules in the pay-TV sector.
- Localization requirements and per-channel fees beaming into India.
- Price caps for pay-TV channels that stifle the growth of the industry.²⁷
- Foreign direct investment caps for radio/up-linking of news and current affairs TV channels, and pre-approval requirements for most other broadcasters to invest.
- Ministry of Finance service taxes.
- Inordinately high and discriminatory entertainment taxes on theatrical admissions,²⁸ 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. These taxes can sometimes amount to 30-60%.²⁹ Subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) would be preferred.

²⁶The Indian government's current position is that copyright is not included in the IT ACT, 2000 Rules, which are limited to public order, threat to national security and breach of peace issues.

²⁷TRAI maintains price caps for pay channels in areas with set-top-boxes and also price bands for firms that offer bouquets (to ensure that the price per individual channels is not much higher than the price of a bouquet). TRAI says they will relax the price controls once other television platforms are widely adopted (satellite TV, Internet TV). Such rate regulation of a clearly competitive industry stifles its growth. TRAI should make a strong commitment to "adoption targets" for when they will relax price controls as the U.S. FCC did when the U.S. deregulated cable TV rates.

²⁸Entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, to 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to much needed cinema construction.

²⁹A service tax imposed by the Ministry of Finance against the temporary transfer of intellectual property rights went into effect in July 2010. Under the service tax policy, the Indian distributor of foreign films is liable to pay the service tax under reverse charge on the payments made to the offshore film producers at the revised rate of 16% (originally set at 10.3%, subsequently raised to 12.36%, and subject to two additional excess taxes totaling 3% on top of the service tax), raising the total amount of central, state, and municipal indirect taxes to between 30 to 60%, constituting double taxation by both the state and national government(s). Although service taxes against the temporary transfer of copyrights were subsequently placed on the Negative List with effect on July 2, 2012, constitutional challenges filed in the Delhi and Mumbai High Courts for the period under dispute remain pending.

- 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 video game products, console video game products, video game console hardware, and video game activation cards.

One measure which the Indian Parliament is still considering is the general Goods and Services Tax (GST), which could help resolve issues related to entertainment taxes and high tariffs on entertainment software. The tax, estimated to be around 16%, remains under consideration, but will require a constitutional amendment supported by at least two-thirds of Parliament and 50% of the individual states. IIPA supports this initiative as a means to reducing the regulatory burden imposed upon the copyright industries in India.

TRAINING AND PUBLIC AWARENESS

IIPA member associations continued to participate in training, public awareness, and policy initiatives with various constituencies in India in 2014. The following are some illustrative examples:

- The Motion Pictures Distributors' Association (MPDA), in association with the United States Patent and Trademark Office and the Federation of Indian Chambers of Commerce and Industry (FICCI), conducted further trainings of officials and employees of multiplexes in 2013.
- The "Be a Movie Cop" quiz, an initiative launched by MPDA, India, in association with the Andhra Pradesh Film Chamber of Commerce and leading multiplexes across India, was launched for multiplexes. The quiz is an online training initiative, which attempts to raise awareness on the threats and challenges of camcording in cinemas, while rewarding theater staff with prizes in recognition of their efforts to curb content theft in their cinemas. Over 1,600 theater staff across India have been trained through this innovative initiative/ platform.
- MPDA, in association with the Confederation of Indian Industries (CII), participated in a training for 50 senior law enforcement officials at the Tamil Nadu State Police Academy, Chennai.
- The music industry conducted training programs for police in West Bengal and Tamil Nadu.
- MPDA participated in a Judiciary training program organized by FICCI at the Chandigarh Judicial Academy attended by more than 150 trainees and sitting judges. The objective of the program was to highlight issues and challenges that the judiciary will encounter in resolving IP disputes in view of evolving technologies and trade policies.
- The Ministry of Human Resource Development (MHRD), in association with FICCI, launched a subcommittee, entitled the Copyright Enforcement Advisory Council (CEAC) to deal with issues relating to enforcement of copyright in India. MPDA shared inputs on the creation of a Standard Operating Procedures manual for law enforcement and the need for raising IP awareness and training to deal with IP cases.
- MPDA joined local screen associations such as FICCI, the Confederation of Indian Industry (CII), the Film and Television Producers Guild of India (FTPGI), FFI (Film Federation of India), American Chamber of Commerce (AmCham), Indo-American Chamber of Commerce (IACC) and the National Film Development Corporation's Film Bazaar to raise awareness on the need for specific laws to combat piracy in the film and entertainment industry in India.