

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2017.¹

Executive Summary: India remains a market with significant concerns for the copyright industries, but one with great potential given the large number of people using digital devices and creative content. In order to reach its potential, India must first undertake important legal reforms to improve its antiquated regime for the digital age. For example, India has neither acceded to, nor more importantly, implemented, the 1996 WIPO Digital Treaties—the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). India also lags behind other countries in adopting basic online enforcement tools and measures to encourage cooperation and meaningful engagement between rights holders and users of materials (including Internet Service Providers (ISPs), payment processors, advertisers and domain registrars), such as clear third party liability for inducing infringement, and more effective notice and takedown procedures. And much needs to be done to coordinate and improve India's fractured system of state-level enforcement to address online copyright piracy as well as the hard copy piracy that still plagues some copyright sectors.

India took one important step forward to improve its IPR regime in 2016. The Government of India (Ministry of Commerce and Industry) released its long-awaited “National Intellectual Property Rights Policy” in May 2016. The National IPR Policy outlines the government's long-term plans to improve IPR with seven key objectives, but it needs to be properly implemented with concrete steps. For the copyright industries, the plan, if well implemented, will improve the legal regime in India, strengthen enforcement (especially in the online environment), and modernize the government's administration, management and services related to IPR. The stated goal of the National IPR Policy is to protect India's large and vibrant creative sector; this will also benefit foreign (i.e., U.S.) creators and producers. A potentially significant development in the National IPR Policy is the decision to relocate copyright jurisdiction in the Ministry of Industry and Commerce's Department of Industrial Policy and Promotion (DIPP). This change offers the possibility of greatly improving both the visibility of, and resources available for, better copyright protection and enforcement if the DIPP delivers on its promised IPR reforms.

India's current judicial system is not up to the task of providing effective or efficient relief against piracy over the country's rapidly expanding online space. While some of the copyright industries continue to report good cooperation against the hosting of unauthorized content online, more work is needed, including the legal reforms (detailed below) as well as IP-specialized law enforcement within the police forces, the Central Bureau of Investigation (CBI), and, in the courts (including IP-dedicated prosecutors). Changes to the Copyright Act, the Information Technology Act, and the Cinematograph Bill (to address unauthorized camcording of motion pictures in theaters) are needed to allow enforcement actions to be swiftly initiated and resolved with deterrent penalties. As the U.S. Government noted when retaining India on the PWL in April 2016 it “encourages the Government of India to adopt effective measures to counter online piracy” noting the many existing deficiencies.

Other hurdles, not addressed in the National IPR Policy, are regulatory and market access barriers that inhibit the market growth for domestic and foreign copyright stakeholders. These barriers include: implementation of the national Goods and Services Tax (GST) with potentially high entertainment taxes (the GST was enacted in August 2016, and must be implemented by June 2017); a disjointed state tax structure; and several concerns in the television sector. India is currently the second largest mobile Internet market in the world after China, and has a huge segment of the population using creative content thus offering significant new market opportunities for domestic and

¹For more details on India's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of India's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



foreign copyright creators and producers. Instead, the lack of effective enforcement, pirate services online, illegal textbook copying businesses, problematic regulations, illegal camcording networks, illicit streaming devices (e.g., set-top boxes) and infringing cable operators, are undermining the Indian marketplace. In December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “[i]f 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.”²

PRIORITY ACTIONS REQUESTED IN 2017

The copyright industries recommend the following to the Government of India as priority enforcement steps and legal reforms for 2017:

Enforcement

- Establish a National Copyright Enforcement Task Force, including police and the CBI, directed at online and mobile copyright infringements. Further, within the CBI Cyber Crime Detectives unit establish a centralized IP crime unit to ensure proper investigation of IP crimes, including Internet piracy.
- Establish state-level cybercrime law enforcement officers and establish uniform enforcement procedures.

Legislation

- Accede and fully implement the WIPO Internet treaties—in the Copyright Law, and the Criminal and Criminal Procedure Codes, including the adoption of: (i) definitions and provisions on technological protection measures (TPMs) as well as civil and criminal penalties. The sanctions should apply to “acts” as well as trafficking in devices, components and services; (ii) definitions and sanctions for rights management information (RMI); (iii) adopt procedures for fair, efficient and effective injunctive relief to disable access to websites and services enabling infringement, including from sites outside India.
- Other key legislative reforms include: (i) amend the Information Technology Act to make copyright infringement a predicate offense; (ii) enact the Cinematograph Bill to make it unlawful to possess an audiovisual recording device to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility; (iii) adopt enhanced penalties for “pre-release” piracy and appropriate statutory damages for copyright piracy generally; (iv) amend state organized crime laws (Control of Goonda) to include book, music and video piracy; and (v) reverse the position taken in the September 2016 memorandum which opines that Section 31D applies to all online transmissions, placing all digital music services under a statutory license, in contravention to treaty obligations (WPPT and WTO TRIPS) and international norms.

Market Access

- Eliminate market access barriers, including: (i) the “must provide” rules in the pay-TV sector; (ii) compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries; and (iii) high tariffs on video game software and hardware.
- Implement new Goods and Services Tax (GST) rules by lowering levels of entertainment taxes and other related taxes (including for the distribution of motion picture and television content); the law requires implementation by September 2017.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Digital Marketplace: Under the Modi Administration’s “Digital India” initiative, there has been a rapid expansion of broadband and mobile Internet access across both urban and rural India. Over 462 million individuals in

²USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at <http://www.usitc.gov/publications/332/pub4501.pdf>.

India now have access to the Internet, a jump of over 30% in just the last year.³ As of January 2017, the Telecom Regulatory Authority of India (TRAI) reported 218.4 million broadband subscribers, a number that continues to grow exponentially, offering a great opportunity for the creative industries from both domestic and foreign sources.⁴

Unfortunately, the legal online marketplace (with many legitimate platforms, including Netflix and iTunes) faces stiff and unfair competition from illegal offerings that continue due to a weak IPR legal and enforcement regime. In a one month period, the motion picture industry estimates that 59 million visitors accessed the top five piracy websites (mostly torrent sites) in India for motion picture and television content, accounting for 300 million page views. The most successful anti-piracy event of 2016 was not an action taken by the Government of India; it was the arrest in Poland of one of the key operators of the notorious website *kickasstorrents (kat.cr)* and the resulting cessation of activities of that site in all countries including India. That website was one of the most popular in India. Even after court actions to disable access to several popular sites, hundreds of pirate sites remain. Torrent sites still dominate the marketplace in India, including: *torrentz2.eu*, *extratorrent.cc*, *extra.to*, *yts.ag*, *rarbg.to*, *torrentproject.se* and *thepiratebay.org*. There are also many popular video streaming sites, such as *movierulz.to* and *onlinemoviewatches.com*, as well as many cyberlinking sites (sites that index links to infringing cyberlocker files for download); lastly, there are mobile apps such as Movie Box that link to websites offering infringing content. The recorded music industry reports (IPSO Connect Report 2016) that revenues fell 29% between 2012 and 2015, after several years of growth. Thus, widespread piracy on traditional computers and mobile devices is clearly harming the legal market. Stream-ripping (websites offering Internet users the ability to make free permanent downloads of music from streaming video services) is a major problem. It is estimated that in 2016, 78% of Internet users in India had used stream-ripping in the previous six months (one such site is *savefrom.net*, the 58th most popular website in India according to the web-monitoring service Alexa). In addition, pre-release piracy is a recurring problem for the music and film industries.

Other forms of piracy include mobile phone downloading on memory cards and mobile apps for downloading and streaming and file-sharing through Bluetooth—for tablets, smart phones, and other devices. Also there are wireless application protocol (WAP) optimized sites. These sites typically store content directly on their servers and distribute files at very compressed sizes for older devices or slower Internet connections. Most of these sites rely entirely on advertising and use the India country code top-level domain. The video game industry reports that India placed fourth in the world in 2016 (up from fifth in 2015) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks, and India remains second in the world when it comes to mobile infringement of games.

Civil copyright infringement cases in India can drag on for years (some have lasted twelve years). In lieu of infringement cases, some right holders have been able to get limited relief through John Doe court orders taking down or disabling access to infringing sites. Many of the sites denied access were streaming or retransmitting live sports telecasts. Access has been denied to hundreds of motion picture and television-related sites over the years. Some copyright industries report good cooperation from ISPs in disabling access. Still there remain hundreds of sites in India which operate with impunity, feeding off the content owned by others to garner profits (and, there are also many mirror sites which are created after court orders, so that infringing material remains available).

Given the scope of the challenge, the Government of India should prioritize online and mobile piracy cases among the enforcement authorities at all levels, and ensure proper tools are in place to address both hosted and non-hosted infringements as well as both domestic and foreign sites. The newly amended Information Technology Act does not sufficiently clarify that copyright infringement is a predicate offense under section 69A. The IIPA recommends that the relevant statute be further amended to add copyright infringement as a predicate offense. This will expressly allow actions to disable access to infringing websites located outside India.

³Internet Users by Country available at <http://www.internetlivesstats.com>.

⁴Telecom Regulatory Authority of India (TRAI), January 2017 Report.

It is also important that India strengthen the current legal framework by instituting safeguards for TPMs and RMI, third party liability clarity for inducing infringement, and improved notice and takedown procedures. The proposed Copyright Act provisions on notice and takedown are not adequate to address online piracy. They only provide a 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. It also overlooks the rights holders' needs to safeguard the exclusive rights to authorize the distribution of on-demand content. The Government of India should convene regular meetings between rights holders and the major ISPs to foster more voluntary cooperation (with neutral intermediaries). Any discussion of third party liability should include the National Internet eXchange of India (NIXI), a non-profit organization designated to neutrally facilitate the exchange of domestic traffic between peering ISP members (intermediaries); it is also responsible for managing (since 2005) the .in ccTLD registry.

One recent case on third party liability may make it more difficult for rights holders to get cooperation from ISPs (at least in Delhi). On December 23, 2016 an appeals court bench (Delhi High Court) overturned an earlier decision (a single-judge bench ruling of the same court) involving the liability of the social networking site MySpace. In the initial ruling, the judge had ordered MySpace to stop hosting copyrighted works by Super Cassettes India Ltd. (SCIL), a company that produces and distributes music and video CDs (and tapes and cassettes). SCIL had sought a permanent injunction. Instead, the appeals court ruled that MySpace has no liability for posts of SCIL's content by MySpace users absent "actual knowledge" and a failure upon actual knowledge to remove the infringing posts. It relied for its ruling on the "safe harbors" of Section 79 of the Information Technology Act (and Section 51(a)(ii) of the Copyright Act—which requires knowledge). The lower court ruling had read these provisions to require a "general awareness" (of infringement) test, not actual knowledge. According to the order: "The remedy here is not to target intermediaries but to ensure that infringing material is removed in an orderly and reasonable manner" reassuring those who fear that requiring intermediaries to police their sites would have a "chilling effect" on speech. SCIL was ordered to provide MySpace with a "specific" list of copyrighted material. MySpace must remove the content within 36 hours in accordance with existing notice and takedown guidelines.

In addition to adequate enforcement tools, accountability among advertising companies who provide revenue for piracy sites that are not subscriber-fee based (although, in some instances, brands appear on these sites unknowingly) and payment processors in India should also be explored.

Criminal enforcement is also an important tool for online piracy operations, including against individuals or organizations that make illicit camcords and upload them, and would be especially effective if used against organized crime syndicates.

Unauthorized Camcording: A significant percentage of infringing copies of new release titles in India originate from illegal camcording at cinemas, appearing online within a few hours of a film's release. As the Motion Picture Distributors' Association (MPDA) India noted in a 2015 report, "[t]his affects the performance of the film, the distribution cycle and jobs." After a few years of decline in the detections of major U.S. motion pictures camcordered off theater screens in India, 2016 saw almost a doubling of the number of illicit camcords sourced from Indian theaters—32 in 2016 compared with 17 in 2015. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. In total, between 2011 and 2016, India was the source of 117 camcordered copies of films and/or audio materials. The incidents of illicit camcording have now shifted to theaters in different locations, although Ghaziabad continues to be major source, in large part due to the prevailing notorious crime syndicates operating there.

These are largely sophisticated criminal operations that require effective criminal enforcement. As an example, global organized "release groups" and "camcord brokers" begin their operations in India by procuring an illegal camcord of a motion picture from a downstream agent; that material is then supplied to a rogue website or another syndicate outside of India. Criminal enforcement can shut down these operations, if done properly.

In July 2015, law enforcement officials in Jabalpur in the state of Madhya Pradesh (with assistance from the motion picture industry and the Andhra Pradesh Film Chamber of Commerce), carried out a successful enforcement operation. It resulted in the arrest of a major camcord broker (Priyank Pardesh) operating as "Team Telly" in Pune, in the state of Maharashtra. The accused is alleged to have camcorded and distributed illegal copies of both Hollywood and local Indian content through associates in India and through international criminal camcording syndicates. The case is currently ongoing, but could take years to reach a final resolution. In spite of this arrest, India remains a major source of unauthorized camcorded material because of the absence of clear anti-camcording legislation and a lack of enforcement resources by local authorities.

The legislative "fix" would require an amendment to the Cinematograph Act (1952) to include a clear prohibition against unauthorized camcording. The law should make it unlawful to possess an audiovisual recording device (such as a video camera, audio recording device, or other device) to transmit or make a copy, in whole or in part, of a motion picture from a performance of such work in a motion picture exhibition facility. In addition, it is important for theater owners to augment the ongoing public information campaign by using slides before screenings, messages on theater tickets and the like. Such efforts have been undertaken and have raised awareness, but more needs to be done. The move by the national cinema owners (with the Central Board of Film Certification (CBFC)) away from DVDs to digital cinema packs (DCPs) for exhibition is also a positive step and should help to reduce release piracy.

State Coordination and a National Cybercrime (including IPR Crime) Strategy: The Government of India has now revealed its National IPR Policy. It next needs to fully and properly implement it (many details, including any deadlines for implementation, were not included in the Policy paper). Implementation should include: (i) a focus on inter-state operations of organized crime units engaged in piracy; (ii) the establishment of a National Copyright Enforcement Task Force; and (iii) enforcement task forces at the state level to work together in a coordinated, systematic and efficient manner. At present, India's fractured judicial system is not up to the task of maintaining an effective or efficient rule of law against piracy, especially in the country's rapidly expanding online marketplace.

State-level Indian authorities continue to run thousands of raids per year, and industry investigators report improvements in cooperation with authorities in 2016. There are various state enforcement cells in the state police headquarters, and states have appointed specialized lead officers to handle IPR related offenses. This has proven to be very effective and efficient, especially 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. IIPA recommends that books, music, and video games should be clearly covered under these laws. Without such clear coverage, book publishers, for example, must lodge formal complaints with the concerned Police Department and failing action by the Police, have to approach the local Magistrate under Section 200 of the Code of Criminal Procedure to obtain directions for the Police to conduct raids.

Online copyright infringements in India are often large-scale commercial operations tied to organized cybercrime activity. As a result, the proper enforcement approach is criminal enforcement. IPR enforcement has, however, been a low priority of law enforcement officials in India. This is a result of both a lack of attention to cybercriminal activity, and of familiarity, interest, and awareness in IP cases among certain Indian enforcement authorities. In 2014, the Mumbai police announced they would add a cybercrime law enforcement officer to all police stations in Mumbai precincts.

One positive enforcement development in 2016 was the establishment of the Telangana Intellectual Property Crime Unit (TIPCU). On June 24, 2016, the Telangana Government in association with the Telangana Film Chamber of Commerce, the Federation of Indian Chambers of Commerce and Industry (FICCI) and key industry stakeholders, launched this IPR crime unit. It is meant to bridge communications between industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, to fight piracy. The TIPCU will propose online content protection initiatives, with an initial focus on online film piracy. It will create a watch list of

pirate websites similar to the London police's (PIPCU) IWL (Infringing Website List) initiative, and an industry database to share intelligence on syndicates.

This and the 2014 Mumbai unit are welcome moves that should be replicated in other localities, not only to focus on criminal activities, but also to seek actions to disable access to infringing sites as well as working with ISPs to develop voluntary anti-piracy campaigns, including warning systems for infringing Internet users. In addition, a long overdue centralized unit should be established under CBI (or under the DIPP) to cover IPR infringements, with dedicated prosecutors. Under this proposal, a National Copyright Enforcement Task Force, that included police and the CBI, would focus on online and mobile copyright piracy. Further, the DIPP could empower the Cell for IP Promotion and Management (CIPAM) to serve as the Task Force coordinator to engage in regular consultations with stakeholders, develop mechanisms to counter online piracy, and share enforcement information. Last, the DIPP CIPAM should encourage states to create similar dedicated IP police units as well.

Training should be another priority. The cybercrime officers and the centralized units should receive training on IPR enforcement, including a focus on online transactions, cybercrime, and evidentiary requirements in relation to electronic evidence.

Standard Operating Procedures for States: Criminal enforcement in India is a state matter. Unfortunately, there is no enforcement coordination or standard operating procedure at the national level for IPR criminal cases. As a result, IPR rights holders face varying capabilities of enforcement officials and divergent outcomes on cases throughout the country.

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. Also, the police do not take *ex officio* actions, and, as noted, there are usually no dedicated police or prosecutors for copyright infringements. Often, the police refuse to act because of a lack of resources including available personnel. Second, the time from the registration of a "First Information Report" for an initial criminal complaint made by a rights holder to the execution of a raid is often too slow for effective enforcements (sometimes taking three to four days, or more), particularly against covert networks when speed of response, confidentiality, adaptability and the gathering of evidence are key factors. Where arrests are made, it can take police up to a year to prepare a charge sheet and the related post-arrest investigations are often cursory. Speed is even more important for law enforcement in smaller cities and towns, where piracy and pirate networks now flourish. Third, there are many reports of high risk targets receiving tips about forthcoming raids. Publishers report that district police departments have different requirements for pre-raid documentation to lodge complaints, as well as for gathering evidence during raids, safeguards during raids, and post-raid recordation. These differing procedures invariably lead to different results, often a duplication of efforts and low conviction rates. Finally, defendants can often resume business within three days—and in some states within three to six hours—of the initial arrest, with computers returned immediately for the resumption of business. If and when charge sheets are finally presented in court, cases are routinely dismissed.

Court Reforms: In general, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as "courts of first instance") have developed good civil law jurisprudence for copyright infringement; most of the favorable rulings, relief measures and court orders emanate from these courts.⁵ One exception is the Delhi High Court course pack case, which effectively broadened the scope of third party safe harbors (at least pertaining to the facts of that case); the case is on appeal. In addition, civil claims are dismissed frequently enough to deter rights holders from initiating cases even in these courts. The experience in other regions, where district courts are the courts of first instance for piracy issues, is even spottier. As noted, cases can take up to twelve years in the overburdened Indian court system, with endemic factors that prevent effective judicial enforcement of copyright, including, clogged dockets; problems and delays especially with respect to retaining electronic evidence (and a lack

⁵Innovative 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 assisting with police raids, sealing evidence, securing bank account details of defendants, and requiring the disclosure of passwords for IT resources.

of familiarity with the related evidentiary requirements); and, difficulty with enforcing civil court orders. Civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the rights holder for the harm, or to deter further infringing activity. Injunctions against rogue infringing websites are inconsistent and rarely successful given the complex, time-consuming, and expensive court procedures called for under the Copyright Act and the Information Technology Act. ISPs in India are likely to comply with take down requests only for a short time, if at all, taking the view that they are licensees of the Department of Telecom and as such will take instructions only from that authority.

In 2014, an amendment was introduced in Parliament to enhance 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\$293,772). The bill was introduced on the recommendation of the Delhi High Court (one of the few courts with IP judicial specialists). Rights holders are very concerned that, if enacted, this change will severely hamper anti-piracy efforts in India. IIPA recommends that the Parliament not adopt this amendment.

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 compromised, leading to acquittals. In plea bargains or even convictions, fines remain low and non-deterrent, with most falling under INR1500 (approximately US\$22).

The experiences of the copyright industries with criminal cases differs by region, but overall, further training of 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. In addition, there should be dedicated IP expert prosecutors. Last, IIPA recommends that the Government of India appoint special IP judges or panels in courts throughout the country and that these judges, like prosecutors, be properly trained (the copyright industries are willing to assist with training).

Unauthorized Book Copying: Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India. To combat rampant piracy, publishers long ago established practices to create 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 other markets.

IIPA continues to monitor two potentially troubling situations. First, the export of India-only, low-priced editions remains 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. Over the last few years, there has been an increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into the U.S. market. This phenomenon threatens not just the U.S. market, but also the longstanding system of providing less expensive reprints exclusively for the Indian market. The Government of India should take more robust action to protect continued access by its students to textbooks by empowering Customs officials to take *ex officio* actions with respect to illegal exports just as it has done with imports at the border. Doing so will send a positive signal to all publishers, including printers and distributors who rely on copyright in the India-only editions for their livelihoods.

A 2016 court ruling is another serious set-back for the publishing industry. In a case that commenced in 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 was intended 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 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.

On September 16, 2016, the Delhi High Court found that the reproduction and distribution by the photocopying services for students, fell within an exception of the Copyright Act of 1957. The court further held that the photocopy shop was allowed to make these copies (of excerpts), with no limit on the number of copies, because each student would have been similarly allowed to make copies for themselves. The publishers alleged that the university was inducing and encouraging the making of these course packs, which the court dismissed. The court could have, but did not take a middle ground to enjoin the copy shop and the Delhi University from commercial acts of unauthorized photocopying (reproduction) and distribution of course packs without appropriate licenses from publishers. Doing so would have required licenses via the local reprographic rights collective licensing body recognized by the Indian Government with appropriate payments for course packs, while still preserving appropriate fair dealing. The publisher plaintiffs appealed the high court division bench determination that the course packs do not infringe because the inclusion of the works in the course packs is justifiable (i.e., for instructional use by teachers in classrooms) provided the course packs are not published or sold for profit. The case has been referred back to the single judge for trial on the facts. The ruling exceeds the well-established three-step test to which India must adhere under the TRIPS Agreement and Berne Convention.

Fraud of print subscription orders for peer-reviewed scientific, technical, and medical journals continues to cause significant harm to publishers. Ordinarily, subscription agents are retained by institutional customers (such as universities, government agencies, corporations, and hospitals) to place journal orders with publishers on behalf of the institutions. In India, instead of ordering subscriptions at the applicable institutional customer rate, the agents fraudulently order subscriptions at deeply discounted individual rates intended for students, retirees, members of learned societies, and individual practitioners, for illegal resale to the institutional customers. This unlawful arbitrage ("subscription fraud") deprives publishers of significant revenues, and threatens the continued sustainability of scholarly communication of important scientific, technical, and medical research. IIPA urges the Government of India to work with the publishing industry in India to expel agent members engaged in this fraud, and to increase transparency on the orders placed by government agencies through subscription agents.

Retail Piracy: In addition to the various types of piracy already noted, piracy of retail hard goods in India takes many forms. These include optical discs either burned or factory produced in India, or made elsewhere and imported into India; the loading of illicit content onto mobile devices, flash or pen drives as an after-service; unauthorized rental of motion pictures; and the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles. These activities undermine innovative market-based solutions provided by right holders. For example, there is the MXM Mobile Music Exchange which provides legitimate music services for mobile phones in India. Retail piracy harms foreign and domestic creators, such as the films produced locally: Bollywood, Hindi, Tollywood, and South Indian movie titles, and titles in other regional languages.

In December 2016, the U.S. Government named three markets in India to its "Notorious Markets" list: Gandhi Nagar and Kashmere Gate in Delhi, and Burma Bazaar in Chennai. It noted Burma Bazaar, in particular, for its "pirated media discs" including CDs and DVDs. The U.S. Government said "[t]he United States encourages India to take sustained and coordinated enforcement actions at these and other previously-listed markets, as well as numerous other nominated [by industry] markets." In 2016, IIPA members noted the following physical marketplaces in India as "notorious" for the availability of illegal materials: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); Bara Bazaar (Kolkata); Chandini Chowk, Palika Bazaar, and Sarojini Nagar Market (New Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallupur 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).

Often the material in these retail markets 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 Government of India should amend its laws to 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.

Signal Theft and Illicit Streaming Device Piracy: The audiovisual industry continues to experience rampant signal theft by cable operators and under-reportage of actual subscribers where digitization has been completed. Local cable operators often steal and redistribute content signals. The approximately 40,000 cable systems in India often transmit Motion Picture Association of America (MPAA) member company products and other audiovisual content without authorization. These cable systems seriously affect legitimate businesses in India, including theatrical, home video, and legitimate television. Restraining orders issued by the Delhi High Court against entire networks (including franchisees, distributors and cable operators forming part of a network) as a result of civil actions brought by industry have proven to be a deterrent. However, the constant monitoring and initiation of new criminal prosecutions for copyright violation and contempt of court proceedings is costly and time consuming. In addition, often, unauthorized camcords are retransmitted by rogue cable or pay-TV systems.

Separately, the motion picture industry urges the Government of India to work with the private sector to effectively enforce against the use of illicit streaming devices (ISDs). ISDs are media boxes, set-top boxes or other devices that allow users, through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. These devices, which are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials, have emerged as a significant means of accessing pirated motion picture and television content in homes in India (and elsewhere in the world). The devices are promoted or advertised as facilitating easy access to remote online sources of unauthorized entertainment content, using the ISDs with these apps. The devices are either pre-loaded with the apps (prior to shipment, by vendors prior to sale, or as an after-sale service), or users can easily obtain the apps themselves to access infringing content. Enforcement against these devices is either through the use of anti-circumvention sanctions (technological protection measures) in the Copyright Act, via third party liability, or any other effective means. The enforcement focus should be aimed at key distribution points, piracy app producers, or those vendors who preload the devices with apps to facilitate infringement.

Circumvention Services: Circumvention services and activities that enable users to gain unlawful access to or unlawfully copy (or otherwise utilize) copyright materials, are flourishing in India. Unfortunately, the Copyright Act as amended fails to adequately address such services or activities with proper TPM provisions consistent with the WIPO Digital Treaties. 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.

COMPLIANCE WITH EXISTING TREATY OBLIGATIONS

India is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. India is neither a signatory to, nor has it acceded to, either of the WIPO Internet Treaties (the WCT and the WPPT).

To accede to the WIPO Internet Treaties, India needs to enact key elements required by the treaties and many other related provisions such as, effective online enforcement procedures. Some of the key missing elements are: (i) definitions and provisions on TPMs prohibiting acts of circumvention and the trafficking in tools, devices, components, or services that can be used to circumvent, along with civil and criminal remedies for violations; (ii) definitions of RMIs and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iii) definitions of key WPPT-compatible rights (making available and communication to the public).

The current law contains a criminal (but not civil) prohibition, in Section 65A (Copyright Act), of the act of circumvention of a TPM “with the intention of infringing” an exclusive right. The provision falls short of full WCT and WPPT compliance, and the exception for an “act” of circumvention is too broad (these and other deficiencies are fully described in prior IIPA filings). As noted, the interpretation of Section 31D of the Copyright Act—treating all digital music services, even if interactive, under a statutory license—is a violation of the WTO TRIPS and WPPT obligations (the TRIPS violation is in equating the exclusive reproduction right in Article 14(e)(1) of the Copyright Act as also falling within a statutory license).

In addition, India should strengthen statutory provisions regarding online infringements to permit effective enforcement against businesses actively engaged in (or inducing) unlicensed content distribution, as well as expeditious takedowns without automatic put-back (for true intermediaries), in order to address both hosted and non-hosted infringing activities and services, within and outside India. As noted, the Copyright Act currently 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 problematic (and interpreted broadly which is itself a concern). 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 shifts the responsibility to rights holders to comply with burdensome rules and requirements that may not be possible to meet in practice. Those rules allowing 36 hours, are incidentally, too long of a period to wait for some forms of piracy such as pre-release piracy.

COPYRIGHT LAW AND RELATED ISSUES

The Copyright Act of 1957 was last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013). The Act and Rules have been subject to constitutional challenges (for example, in a recent case by the Indian Broadcasting Foundation and individual broadcasters).

Copyright Law: In addition to the already-noted required reforms for WCT and WPPT compliance, and camcording enforcement (including remedies), other changes needed are: (1) to amend ownership and assignment provisions that are harming and altering commercial arrangements in India (as noted in prior IIPA filings); (2) to eliminate the broad compulsory license for broadcasters under Section 31D of the amended Copyright Act which undermines record producers’ exclusive broadcasting right under the existing law (also noted in prior IIPA filings); (3) to ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS. As written, any broadcasting organization (radio or television) could apply to the Copyright Board for a statutory license, affecting the negotiating power of right owners. This represents a serious regulatory and policy restriction on stakeholders, including for non-Indian repertoire (the law was enacted, effective in 2013). The Indian Government stated in 2012 that a new Copyright Board would be created and the rate of royalties determined (based on the economic value of the use), but to date, this has not occurred. It is expected to be undertaken in 2017. Rights holders should be able to fairly participate in any rate setting. Regarding the Section 31D compulsory license, the Government of India should withdraw its September 2016 memorandum which opines that Section 31D applies to all online transmissions. This position is incompatible with the obligations of the WPPT, and fails to account for the legal and commercial differences between broadcast and online digital music services.

In addition, the Copyright Act should ensure that any exceptions and limitations comply with the Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a)).

ISPs: As noted, ISPs are cooperating with takedown notices for hosted content, but have not been as cooperative regarding non-hosted infringements, including rogue sites or services targeting Indian consumers from outside of India. The current legislative framework, as noted, is not ideal even for hosted content. Until it is improved, any safe harbors should only apply to merely technical or passive ISPs. Coverage of copyright infringement as a predicate offense under the IT Act (2000 Rules) would largely help resolve this problem because it would require ISPs to take measures to prevent communications infringing copyright or intellectual property rights from being

carried on their networks (the Government takes the position that the IT Act currently does not cover copyright matters). With this change, it would not matter where the infringing material emanated from, as long as its destination is India, an ISP would be required to prevent the material being communicated or available (carriage) on its network.

Cable Piracy Legislation: Section 18 of the Cable Television Networks (Regulation) Act (1995) places an unnecessary burden on criminal enforcement. It provides a court cannot recognize any offense under the Act except upon a written complaint by an authorized officer. This requires the personal presence of the complainant at all relevant hearings throughout the subsequent prosecution which is a bar to most criminal piracy cases (because authorized officers are reluctant to become complainants).

Tax Benefits for Anti-Piracy Associations: IIPA recommends that India amend the tax code to provide exemptions for copyright associations involved in anti-piracy and capacity building activities. Providing this support will help support anti-piracy and capacity building efforts. 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 rights 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 rights holders. Addressing market access barriers is also critical to reducing piracy, since their removal permits the advancement of legitimate business models bringing greater content to the marketplace with a diversity of prices and terms. Market access barriers (most previously noted) 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.⁶
- 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,⁷ including unconstitutional taxes based on the language of a film, other taxes such as value-added tax (VAT) and service taxes levied by the Government of India. These taxes can sometimes amount to 30-60%. All taxes, except local taxes, were subsuming into the unified GST, enacted in August 2016. Local taxes (not subsumed by the GST) should not be allowed to rise above current levels.
- Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
- Burdensome regulations for cinema construction. Current law requires 70 different regulatory clearances (and the India marketplace already suffers from a very low screen density—only 8.7 screens per million people).
- 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. IIPA encourages India to join the expanded Information Technology Agreement which will reduce tariffs on goods that enhance digital trade in India.

⁶The Telecom Regulatory Authority (TRAI) 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 it 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 it will relax price controls as the U.S. Federal Communications Commission did when the U.S. deregulated cable TV rates.

⁷Entertainment taxes vary widely among Indian states, ranging from 15%–40% in some key markets, 40%–70% in other states, and in a small number of states, 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is estimated to be between 27%–36%, and constitutes a significant disincentive to much needed cinema construction.

The GST legislation must be implemented no later than September 2017. Once implemented it should reduce the regulatory burden imposed upon the copyright industries in India with a uniform rate.

TRAINING AND PUBLIC AWARENESS

IIPA member associations continued to participate in training, public awareness, and policy initiatives with various constituencies in India in 2016. For example, the Motion Pictures Distributors' Association (MPDA), with the Telugu Film Chamber of Commerce (TFCC, formerly APFCC) continued the training of theater staff, with over 2,884 staff, in 43 cities, trained. The focus of this training was on preventing camcording. In addition, the MPDA continued its outreach programs with the FICCI and the U.S. Patent and Trademark Office foreign visitor training programs.