

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2016.¹

Executive Summary: India, under the leadership of the Modi Administration, is poised to take some steps to protect its large and vibrant creative sector, which will benefit U.S. creators as well. The drafting of a National IPR Policy—a much-needed tool to coordinate and improve India’s fractured system of State-level enforcement—is reportedly nearly complete after stakeholders provided recommendations to the Ministry of Industry and Commerce’s Department of Industrial Policy and Promotion (DIPP), and should be released soon.² To be comprehensive, it is hoped the National IPR Policy in India will address growing online copyright piracy and vestigial physical piracy affecting some sectors. The National IPR Policy will not address the regulatory and market access barriers that inhibit the continued growth of domestic and foreign copyright stakeholders, including passage of the national Goods and Services Tax (GST) and more orderly State tax structures and market reforms in the television sector. The expansive growth of Internet availability, exemplified by India’s current status as the second largest mobile Internet market in the world after China, should also translate into significant new market opportunities for right holders. Instead, due to the lack of enforcement, pirate online services, illegal textbook copying businesses, illegal camcording networks, and infringing cable operators undermine not only the local Indian market but also the vast potential export market for the Indian creative industries.

While there were some positive enforcement developments in 2015, on the whole India’s judicial system is not up to the task of maintaining the rule of law against piracy over the country’s rapidly expanding online space. Good cooperation is forthcoming against the hosting of unauthorized content online, but more must be done. IP-Specialized law enforcement should be put in place within the police, the Central Bureau of Investigation (CBI) and in India’s courts. Changes to the Copyright Act, the Information Technology Act, and the Cinematograph Bill are needed to allow enforcement actions to be swiftly initiated and resolved with deterrent penalties. In order to fulfil the Indian Government’s intentions of bringing the law into line with the international treaties and promoting growth in the Indian creative industries, India should accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and review and update the existing law to ensure full compliance with the international treaties.

PRIORITY ACTIONS REQUESTED IN 2016

Enforcement

- Set up a National Copyright Enforcement Task Force, with duties to regularly consult with stakeholders toward effective remedies against online and mobile infringements.
- Introduce cybercrime law enforcement officers in all State police stations; add a centralized IP crime unit under CBI Cyber Crime Detective unit to ensure proper investigation of IP crimes, including Internet piracy, in a systematic, coordinated, and efficient manner.
- Establish uniform enforcement procedures within state enforcement agencies, under national coordination.
- Encourage establishment of special IP panels with expert judges, and IP-dedicated prosecutors, to accelerate effective and deterrent adjudication processes in both civil and criminal cases.

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/2016SPEC301HISTORICALCHART.pdf>.

²IIPA has commented on the First Draft (dated December 19, 2014) with various suggestions, largely consistent with this filing and IIPA’s 2015 Special 301 filing on India, available at <http://www.iipa.com/rbc/2015/2015SPEC301INDIA.pdf>.



Legislation

- Accede to WCT and WPPT at the earliest opportunity.
- 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, empowering authorities to order expeditious remedies against non-hosted online and mobile services built on copyright infringement.
- Enact the 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.
- Further amend the Copyright Act to ensure adequate protection against the circumvention of technological protection measures (TPMs) and trafficking in circumvention devices/technologies (to ensure full implementation of WCT and WPPT).
- Adopt regulations requiring domestic and imported Pay-TV set top boxes to adopt adequate TPMs.
- Establish enhanced penalties for “pre-release” piracy.
- Amend state organized crimes (Control of Goonda) laws to include book, music, and video game piracy.

Market Access

- Eliminate significant market access barriers, including “must provide” rules in the pay-TV sector, and compulsory and statutory remuneration schemes, which especially harm the music and audiovisual industries.
- Subsume state level entertainment taxes, and other taxes into the proposed GST once implemented.
- Eliminate high tariffs on entertainment software and hardware products.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Internet Connectivity Creates Opportunities but also Challenges: The rapid expansion of broadband and mobile Internet access across both urban and rural India, under the Modi Administration’s “Digital India” initiative, represents an enormous market opportunity for the creation and consumption of copyright works among the world’s second largest population of Internet users. India’s Telecom Regulatory Authority of India (TRAI) has reported that in the single fiscal year from 2013 to 2014, the total number of Internet subscribers in India increased by 34%, and the number of broadband subscribers in India quadrupled.³ As of November 2015, an estimated 375 million individuals in India have access to the Internet.⁴ Of the more than 900 million mobile subscriptions in the country, more than 46 million have wireless broadband access.⁵ 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.

Yet, the reality is that legitimate right holders face enormous challenges in the online marketplace which is crowded by illegal offerings. While some right holders have been able to get limited relief through court orders, by and large, online piracy and Internet-based sales of pirated Optical Discs dominate. There are numerous legitimate platforms online in India,⁶ but overall, online piracy through illegal file-sharing, rogue websites, piracy based cyberlockers, and topsites is pervasive. Cyber linking sites (or sites that index links to infringing cyberlocker files for download), are widespread. As of this writing, some of the most accessed piracy sites in India include the BitTorrent-based sites *kat.cr* (26th most accessed site in India), *torrentz.eu* (42nd), *extratorrent.cc* (150th), and *thepiratebay.la*

³Telecom Regulatory Authority of India (TRAI), 2013-2014 Report, pages 4 and 16 (December 2014), available at <http://www.trai.gov.in/WriteReadData/UserFiles/Documents/AnnualReports/TRAI-Annual-Report-%28English%29=01042015.pdf>. “The total broadband subscriber base of the country as on 31st March 2014 (as per the revised definition) is 60.87 million as per information available with TRAI, vis-a-vis 15.05 million as on 31st March 2013 (as per pre-revised definition).”

⁴*Internet World Stats*, available at <http://www.internetworldstats.com>.

⁵See the TRAI 2013-2014 Report, *supra* n. 3, at page 13.

⁶These include including Eros Now, Hot Star, Sony Live, Box TV, iTunes India, Yahoo India, You Tube India, Ditto TV, BSNL Hungama, Spuul, Google Play, Voot, Myplex, Amazon Live, Netflix, YuppTV, and Biscoot 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.

(247th); the streaming sites *movierulz.to* (367th, and *onlinemoviewatchs.com* (368th); and many others. Mobile phone downloading on memory cards and mobile apps for downloading and streaming and file-sharing through Bluetooth are also on the rise for tablets, smart phones, and other devices. The Entertainment Software Association (ESA) reports that India placed fifth in the world again in 2015 in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public peer-to-peer (P2P) networks, and India is second in the world when it comes to mobile piracy of games. The past year also was witness to a surge in the use of wireless application protocol (WAP) optimized sites, causing damage to the market rivaling other forms of online piracy. 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.

Given the scope of the challenge, it is essential for the Indian Government to establish proper prioritization of 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. While Indian courts have made some positive orders requiring Internet service providers to block users' access to some foreign websites, the scope of these actions remain unclear. The newly amended IT Act does not sufficiently clarify that copyright infringement is a predicate offence under section 69A. The IIPA would therefore recommend that the relevant statute be amended to add copyright infringement as a predicate offense, which will expressly allow actions to disable infringing websites located outside India. In addition to adequate enforcement tools, accountability among advertising companies (which provide much of the revenue generated by piracy sites that are not subscriber-fee based, often through high paying advertising, but also by enabling even reputable brands to appear, often unknowingly, on the sites) 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 take action in the courts in 2015 to obtain orders to address the most egregious instances of online piracy. The Delhi and Bombay High Courts have issued orders to disable access to over 180 copyright infringing websites of audiovisual materials, through separate John Doe orders in 2015.⁷ 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. Including broadcast copyright owners wishing to halt the unauthorized retransmission of sporting events, the courts in India have disabled access to over 900 sites. Still, since the courts in India move at a rather slow pace, cases almost never come before the courts. In 2014, the music industry also settled over 50 cases through plea bargaining.⁸ A more efficient and effective approach would be to amend the IT Act to add a specific measure to disable access to primarily infringing sites. IIPA suggests that, in addition to any changes to strengthen the current legal framework,⁹ the Indian Government should convene regular meetings between right holders and major ISPs, to foster more voluntary cooperative efforts.

Unauthorized Camcording Remains a Severe Problem: According to the Motion Picture Distributors' Association (MPDA) India, more than 90 percent 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 MPDA India points out, "This affects the performance of the film, the distribution cycle and jobs."¹⁰ After a slight decrease from 2013 to 2014 in detections of major U.S. motion pictures camcorded off theater screens in India, 2015 saw a sharper reduction of

⁷The 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.

⁸Cases remain pending against *songsdl.com* and *mp3don.com*, reported in IIPA's 2014 Special 301 report, available at <http://www.iipa.com/rbc/2014/2014SPEC301INDIA.PDF>.

⁹The 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.

¹⁰Content theft negatively impacts profitability, thus resulting in less investment capital: Uday Singh", IndianTelevision.com (May 18, 2015), available at <http://www.indiantelevision.com/regulators/people/content-theft-negatively-impacts-profitability-thus-resulting-in-less-investment-capital-uday-singh-150518>.

41%, with the number of forensic matches down to 19 in 2015 from 41 in 2014.¹¹ Of the camcords detected in 2015, thirteen involved incidents of video camcords from India and six were forensic matches of audio captures in India. These numbers do not include unauthorized camcording of local Indian, other foreign, or independent films. The incidents of illicit camcording have now shifted to theaters in new locations, although Ghaziabad has been and continues to be a difficult territory due to the prevailing notorious crime syndicates operating there, despite sensitization of the police.

On July 18, 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 that resulted in the arrest of a major camcord broker Priyank Pardeshi, operating by the name Team Telly in Pune, state of Maharashtra. The accused was allegedly responsible for camcording and distributing illegal copies of both Hollywood and local Indian content through his associates nationally and through his links to international criminal camcording syndicates. Unfortunately, despite this arrest and enforcement operations in 2013, the lack of specific anti-camcord legislation and enforcement resources from the local authorities means India will inevitably remain a hotbed of camcording for the near future.

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: The government should expeditiously roll out the National IPR Policy with a focus on the recommendations of the copyright industries, and with a clear view of inter-state operations of organized crime units engaged in piracy to ensure effective protection of intellectual property rights — both at source and online. There is an urgent need for setting up a National Copyright Enforcement Task Force, and enforcement task forces at State levels, to work together in a coordinated, systematic and efficient manner. While there are some positive developments to report in the area of enforcement, on the whole, India's fractured judicial system is still not up to the task of maintaining rule of law against piracy over the country's rapidly expanding online space.

Indian authorities in the states continue to run thousands of raids per year, and industry investigators report improvements in cooperation with authorities in the past year. There are various state enforcement cells in the state police headquarters, and states have appointed nodal officers to handle IPR related offenses. 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. IIPA would like to see books, music, and video games covered under these laws (to the extent they are not already). Without 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.

Increasingly, IP infringements online are tied to organized cybercrime activity and require an enforcement approach that recognizes this connection. Unfortunately, the lack of attention to cybercriminal activity, and 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.

¹¹In all, a total of 68 forensic matches of camcorded copies have been traced to Indian theaters between 2011 and 2015.

Both cybercrime officers and the centralized unit should receive training in IPR, online transactions, cybercrime, 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, this better coordination should produce better results in both civil claims (including 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: Because criminal enforcement in India is a state matter, and there is no enforcement coordination or standard operating procedures at the national level, right holders face a wide divergence in the capability of enforcement officials and outcomes throughout the country. 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. At the same time, police do not take *ex officio* actions and currently no dedicated police or prosecutors are involved in taking effective action against copyright infringers. Difficulties can also arise when police refuse to take action, citing lack of available personnel. 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. Where arrests are made, it can take police up to a year to prepare the charge sheet and the related post-arrest investigations are often cursory. 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 high risk that targets receive leaked information about forthcoming raids. 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. 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 to the returned for the resumption of business. If and when charge sheets are finally presented in court, cases are routinely dismissed.

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”) have developed credible jurisprudence in civil cases involving copyright infringement, and most positive civil relief measures and court orders emanate from these courts.¹² However, civil claims are dismissed frequently enough to deter right holders from initiating cases. The experience in other regions, where district courts are the courts of first instance for piracy issues, is even spottier. It can take up to 12 years for a case to proceed to conviction 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, including a lack of familiarity with the related evidentiary requirements; and difficulty with ultimately enforcing civil court orders. Civil awards, including even those involving punitive damages, are most often wholly inadequate to compensate the right holder for the injury caused 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.¹³ 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\$293,985), was introduced into Parliament in December 2014, per the recommendation of the Delhi High Court.¹⁴ Right holders are deeply concerned that this will severely hamper anti-piracy efforts in India. The Parliament should refrain from making this change.

¹²Innovative approaches have included Anton Pillar 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, requiring the disclosure of passwords for IT resources, etc.

¹³ISPs 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.

¹⁴The 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 or even convictions, fines remain low and non-deterrent, with most falling under INR 1500, which is equivalent to US\$22. 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.

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.

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 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 18 months, New Delhi has become the primary source of counterfeit knockoff U.S. editions, with thousands of books flowing from India into the U.S. market. This phenomenon also 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 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.

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 to which India must adhere under the TRIPS Agreement and Berne Convention. The court judgment in this case is still awaited.

Subscription fraud also continues to significantly harm publishers. Subscription agents continue to place a significant quantity of fraudulent print subscription orders for peer-reviewed scientific, technical, and medical journals, causing significant harm to publishers. Specifically, subscription agents are retained by institutional customers (such as universities, government agencies, corporations, and hospitals) to place orders on their behalf with publishers.

Instead of ordering subscriptions at the applicable institutional customer rate, the agents are fraudulently ordering subscriptions at the 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, i.e. subscription fraud, deprives the publishers of significant revenues, and threatens the continued publication of important scientific, technical, and medical research. The Industry urges the Indian Government to work with the Federation of Publishers' & Booksellers' Associations in India to expel agent members that engage in subscription fraud, and to increase transparency on the orders placed by government agencies through subscription agents.

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; loading of illicit 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 TPM 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). India's own creators are affected: for example, the hard goods market carries not only Hollywood titles, but also Bollywood, Hindi, Tollywood, and South Indian movie titles, and titles in other regional languages. In 2015, 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); 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 experience 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 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 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 proven to be a deterrent. However, the constant monitoring and initiation of new criminal prosecutions for copyright violation and contempt of court proceedings is a costly and time consuming process. Industry urges the Indian Government to work with the private sector to ensure that set top boxes locally manufactured, and those imported into India, have adequate TPMs. This can be achieved through regulations implementing the existing TPMs provisions of the Copyright Act. Unauthorized camcords of motion pictures feed into this form of piracy, since the unauthorized camcords are often retransmitted by these rogue cable or pay-TV systems.

Circumvention Services Proliferate in India: 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. 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

Together with the implementation of a nationally-coordinated approach to copyright enforcement, addressing key deficiencies in India's copyright and related laws is crucial to improving U.S.-India trade, for both of our nations: the U.S. International Trade Commission found in December 2014 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."¹⁵ IIPA's legislative concerns in 2015 largely reflect those cited in recent years, as detailed below.

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.¹⁶ 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 is not in conformity with the standards set out in WCT and WPPT. To fulfil the Indian Government's commitment to protect the IPR of all innovators and entrepreneurs, and to promote growth in the Indian music industry, the Indian Government is urged to accede to WCT and WPPT, and to review and update the existing law to ensure full compliance with the international treaties. In summary terms, further changes to the Act are needed to:

- Amend ownership and assignment provisions that are harming and altering commercial arrangements in India.¹⁷
- Remove 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.¹⁸
- 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 WCT and the WPPT.¹⁹

¹⁵USITC, *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>.

¹⁶The Indian Broadcasting Foundation (IBF), as well as individual broadcasters and members of IBF challenged the constitutional validity of Sections 17, 18, 19, 31, and 33 of the amended Copyright Act before the Bombay High Court. Music company "Super Cassettes Industries Ltd.," along with the sound recording society, Phonographic Performance Ltd. (PPL), challenged the constitutional validity of the new statutory licensing provision, Section 31D before the Calcutta High Court.

¹⁷The 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 IIPA's 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.

¹⁸Under the current Copyright Act, Section 14, record producers are granted exclusive broadcasting rights. However, Section 31D introduces a broad "compulsory license" for broadcasters, where permissions are not necessary for broadcasters to use works. Not only is this provision unwise as it relates to traditional broadcasting given the growing reliance on licensing access to music rather than selling products, but the current definition of broadcast under the existing law may be broadly interpreted to include transmissions that fall under the right of making available, for which no statutory license is permitted under international law. This "compulsory license" should be deleted and the exclusive nature of broadcasting rights should be maintained.

¹⁹The 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.

- 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) 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 statutory provisions regarding online infringements to permit expeditious takedowns without automatic put-back, and address both hosted and non-hosted infringing activities and services, within and outside India.²⁰
- 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. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of illicit camcording have been reduced in several markets with relatively minimal enforcement or government expenditure. As Parliament chose not to include anti-camcording provisions within its Copyright Act amendments, the Special Committee overseeing the review of this legislation agreed to address the issue in the Draft Cinematograph Bill of 2013, which is currently being reviewed by the Ministry of Information and Broadcasting.

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.²¹ 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.

Cable Piracy Legislation: Section 18 of the Cable Television Networks (Regulation) Act 1995 places an unnecessary burden on criminal procedures, by providing that no court can recognize any offense under the Act except upon a written complaint by an Authorized Officer. The provision is problematic because criminal procedure requires the personal presence of the complainant at all relevant hearings throughout the subsequent prosecution, and as a result the Authorized Officers are reluctant to become complainants.

²⁰The 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.

²¹The 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.

Provide Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building: 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 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.²²
- 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,²³ 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%.²⁴ Subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) would be preferred.
- Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
- Onerous regulations on uplink and downlink of satellite signals beaming into India.
- High tariffs on entertainment software and hardware products, including PC 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 GST, which could help resolve issues related to entertainment taxes and high tariffs on entertainment software. The tax, estimated to be around 18% or less, 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 2015. The following are some illustrative examples:

²²TRAI 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. FCC did when the U.S. deregulated cable TV rates.

²³Entertainment 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.

²⁴A 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.

- In 2015, the Motion Pictures Distributors' Association (MPDA), with the Telugu Film Chamber of Commerce (formerly APFCC) continued the training of multiplex staff through the *Be A Movie Cop Quiz* platform launched in 2014. The quiz is an online training initiative 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 cinemas.
- MPDA participated in sensitization programs for law enforcement in the cities of Lucknow, Pune, and Hyderabad, in addition to supporting a Judges Training program organized by the United States Patent and Trademark Office at the Judicial Academy in Bhopal.
- Between September 12-13, 2015, the Telugu Film industry and MPDA collaborated to launch an interactive campaign through *Comicorner* to raise awareness on the threats of online piracy at Comic Con, 2015 held in Hyderabad. More than 25,000 comic fans and enthusiasts attended the event.

The IMI has recently conducted 4 training programs in Chennai, Madurai, Kolkata and Silliguri respectively. These training programs were conducted for police officers who are empowered to conduct action for copyright infringement.