



January 30, 2014

Submitted Electronically via EDIS and in Copies to the Commission, Investigation Nos. 332-543

Lisa R. Barton
Acting Secretary to the Commission
United States International Trade Commission
500 E Street, SW
Washington, D.C. 20024

Re: IIPA Pre-Hearing Brief and Statement Related to: United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, 78 Fed. Reg. 54677, September 5, 2013.

To the International Trade Commission:

The International Intellectual Property Alliance (IIPA) hereby submits its Pre-Hearing Brief and Statement, plus Appendices, Related to: United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*. We understand the hearing is scheduled for February 13, 2014, and look forward to appearing before the Commission on that date.

Respectfully submitted,

Michael Schlesinger

Attachments



Pre-Hearing Brief and Statement of the International Intellectual Property Alliance (IIPA)¹ before the United States International Trade Commission Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy

The International Intellectual Property Alliance (IIPA),² a private sector coalition formed in 1984 of trade associations representing U.S. copyright-based industries, is pleased to submit its Pre-Hearing Brief and Statement Related to the United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy* investigation. As has been documented in the Federal Register notice (78 Fed. Reg. 54677, September 5, 2013), the Senate Committee on Finance and the House Committee on Ways and Means (Committees) have requested the above-referenced investigation which would result in delivery of a Commission report to the Committees scheduled for November 2014.

According to the USITC, the Commission has been asked to “conduct an investigation regarding Indian industrial policies that discriminate against U.S. imports and investment for the sake of supporting Indian domestic industries, and the effect that those barriers have on the U.S. economy and U.S. jobs.” The Commission will then, based on the results of its investigation, provide in its report, among other things: 1) An “overview of trends and policies in India affecting trade and foreign

¹ Appearing at the February 13, 2014 hearing will be Michael Schlesinger, Counsel to IIPA.

² The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).



direct investment in that country's ... service sectors, as well as the overall business environment," including "changes in tariff and nontariff measures, including measures related to the protection of intellectual property rights, and other actions taken by India's government to facilitate or restrict the inflow of trade and FDI"; 2) a "description of ... any significant restrictive trade and FDI policies currently maintained or recently adopted by India ...; ... the sectors in the U.S. economy most affected by these restrictive policies; and ... the general competitiveness of sectors in India's economy that are subject to the identified restrictions"; 3) "[t]o the extent feasible, a quantitative analysis of the economic effects of India's identified restrictive measures on the U.S. economy as a whole, on U.S. trade and investment, and on selected sectors of the U.S. economy"; and 4) "to the extent feasible, a summary of U.S. firms' perception of ... recent changes in India's trade and investment policies in selected sectors and ... the effects of these changes on U.S. firms' strategies towards India (e.g., reducing investment or altering product mix), and analysis of whether the effects of these policy changes differ by firms' characteristics, such as size, IP-intensiveness, or export status."

In this Pre-Hearing Brief and Statement, IIPA will endeavor to assist the Commission in the preparation of its report by providing concrete information pertaining to tariff and non-tariff barriers in India involving intellectual property rights or IP-intensive businesses, with a focus on IIPA members' core businesses.³ The key impediments to IIPA members' doing business in India are IP theft in the form of piracy and counterfeiting. In addition, India imposes market access and discriminatory barriers on IIPA members' businesses which hinder their entry into the market. In addition to this testimony and IIPA's previous report on India in the annual "Special 301" process submitted to the United States Trade Representative (and included herein as Appendix A), IIPA will also provide to the Commission

³ IIPA's previous reports, including in the annual "Special 301" process, may be relevant to these proceedings. See IIPA, *India*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF> (included herein as Appendix A).



prior reports by IIPA and others which present information for examining the effect of notable barriers and impediments to trade in IIPA members' core businesses in India.

1. Overview of Trends and Policies in India, Including Measures Related to IPR

India should provide fertile ground for trade in copyright-intensive goods and services. This is demonstrated by a large local industry. For example, India produces the greatest number of films in the world (estimated at more than 1,000 full-length feature films in 2013), boasts a creative and diverse Indian and international music market, retains a prolific publishing industry (estimated informally at 19,000 publishers producing 90,000 titles per year),⁴ and supports a vibrant software market (made up of distributors, but also IT and business process outsourcing, as the largest sources of revenues).

Unfortunately, content theft – piracy – and market access barriers, negatively impact the ability of domestic and foreign creators alike to fully enjoy their rights, resulting in significant under-performance. Problems include: massive and growing online and mobile (smart phone and tablet) piracy; unauthorized camcording of movies in the theaters; unauthorized use of software and published materials (including imports of pirate publications from locales like Bangladesh, and exports of India-only books throughout the world); lack of priority assigned to copyright piracy cases; lack of uniform enforcement procedures among different regions' law enforcement authorities; and market access barriers such as high taxes, “must provide” requirements in the pay TV sector, and discriminatory procurement practices.

⁴ *Publishing in India Today: 19,000 Publishers, 90,000 Titles, Many Opportunities*, Publishing Perspectives, July 6, 2011, at <http://publishingperspectives.com/2011/07/publishing-in-india-today-19000-publishers-90000-titles/>.



The Copyright Act was amended in 2012 with some positive features. However, some aspects of that reform remain problematic, such as: inadequate protection for access control technological protection measures and against trafficking in circumvention technologies, devices, and services; burdensome restrictions on freedom of contract that are at odds with industry practices and threaten the fabric of longstanding business models; and TRIPS- and Berne-incompatible compulsory and statutory licenses.

Copyright holders generally have positive relationships with Indian Government authorities, including the Ministry of Human Resources and Development (MHRD). The Indian Government runs significant numbers of raids (in the 1,000s) and several effective court mechanisms remain viable, including Anton Piller (*ex parte* search), John Doe, and Mareva (asset freezing) orders. Police will often take enforcement actions on their own recognizance (so-called *suo moto* cognizance). Actions against “release” groups engaged in the unauthorized camcording of movies in cinemas, and court orders disabling access to dedicated piracy websites in India, have had a temporary ameliorative effect, and while unauthorized camcording is down somewhat in 2013 (compared with 2012, when India-sourced camcords were responsible for 53% of all illegal detections of major U.S. motion pictures in the entire Asia region), Internet piracy and, to a lesser extent, mobile device (smart phone, tablet) piracy remain serious.

A developing National IPR Strategy in India offers a forum to achieve results in line with Prime Minister Singh’s call for India to experience a “decade of innovation.” However, an environment in which piracy persists, coupled with policies put into place to disfavor foreign right holders, results in a highly distorted marketplace. Examples of market access restrictions include:



- Bans on exclusivity in the pay TV sector and similar restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home), imposing “must provide” restrictions.
 - Price controls on the pay TV sector.
 - Inordinately high and discriminatory entertainment taxes on theatrical admissions, VAT taxes, services taxes, and unconstitutional localized taxes based on the language of the film.
 - Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
 - Onerous regulations on uplink and downlink of satellite signals beaming into India.
 - High tariffs on entertainment software and hardware products, including PC game products, console game products, game console hardware, and game activation cards.
 - An array of software goods and services taxes, including transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of software as both a good and service.
 - An array of technology and procurement mandates which capture software.

For many years, stakeholders have urged the Indian Government to take into account the important role IP and innovation play in the Indian economy. The World Intellectual Property Organization (WIPO) has worked with over 40 countries to conduct studies calculating the contribution of their copyright industries to their national economies.⁵ India’s MHRD and other

⁵ Linkages between copyright protection and economic development are documented by the World Intellectual Property Organization’s study, *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf, last accessed December 17, 2013. In 2003, the World Intellectual Property Organization (WIPO) published a guidebook on the economic parameters to develop such studies entitled *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication No. 893) (2003), at http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf. The Guide, developed by an experts’ group, describes



agencies are currently considering the feasibility of such a study. Other studies have measured the contribution of certain sectors to national economies, including India. For example, the Motion Picture Association Asia-Pacific has issued the study, *Economic Contribution of the Indian Film and Television Industry 2010* (a copy of that study is included as Appendix B).⁶ An update of that study is expected out soon. Further studies have measured the multiplier effects of reducing piracy on contribution to GDP, job growth, and tax revenues.⁷ For example, in 2010, BSA (now BSA | The Software Alliance) and IDC issued *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*. The India report from that Study concluded that “[r]educing the PC software piracy rate in India by 10 percentage points in four years [2009-2013] would deliver: US\$4.66 billion in new economic activity; 59,728 new IT jobs; and US\$512 million in additional tax revenues by 2013.”⁸ That report is included as Appendix C. India last conducted a nationwide review of the contribution of copyright to the Indian economy in 1995, finding that copyright made up over 5% of the economy.⁹

methodologies for measuring the role of copyright industries in domestic economies adopted in the latest overview. These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy. Studies include: Australia (2007), Bhutan (2011), Brunei (2012), Bulgaria (2011), Canada (2004), China (2011), Colombia (2010), Croatia (2010), Finland (2011), Hungary (2006), Jamaica (2008), Kenya (2011), Latvia (2006), Lebanon (2008), Malaysia (2011), Mexico (2008), Netherlands (2011), Pakistan (2011), Panama (2011), Peru (2011), Philippines (2008), Republic of Korea (2012), Romania (2010), Russia (2010), Singapore (2004), Slovenia (2011), South Africa (2012), Thailand (2012), Ukraine (2010), and United States (2011).

⁶ The India study can be accessed at Motion Picture Association Asia-Pacific, *Research and Statistics*, at http://mpa-i.org/index.php/research_statistics. Other studies have been conducted for Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), and Hong Kong (2009).

⁷ See, e.g., BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, 2010, at <http://portal.bsa.org/piracyimpact2010/>.

⁸ *Id.*, India, at http://portal.bsa.org/piracyimpact2010/cps/cp_india_english.pdf.

⁹ See IIPA, *Initial Survey of the Contribution of the Copyright Industries to Economic Development*, April 2005, at http://www.iipa.com/pdf/2005_Apr27_Economic_Development_Survey.pdf. IIPA noted (citing Shahid Alikhan, *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries* 61-63 (2000):

In 1995, Indian copyright industries accounted for 5.06% of that country’s GDP. This can be accounted for by the fact that India’s book publishing, film and music industries are among the largest in Asia. The Indian book publishing industry is among the largest in the world in terms of volume, turning out 57,400 titles in 1997. The Indian film industry makes roughly 800 films a year, contributing significantly to the local economy. India is also an enormous producer and consumer of recorded music. In 1997, the total unit sales reached nearly 412 million. The growth of the Indian software industry is likewise staggering. Between 1990 and 1997, the industry grew more than 50%. Exports in this area have grown from US \$225 million in 1992-93 to US \$1.7 billion in 1997-98. The domestic software industry grew from US \$490 million in 1995-96 to US \$1.25 billion in 1998-99.



All of these statistics help make the case for stronger support for IP-intensive industries in India as a driver of its own economic growth, and highlight the harm being caused by restrictive trade and FDI policies to India's own economic, social, and cultural well-being.

2. Detailed Description of Significant Restrictive Trade and FDI Policies Currently Maintained or Recently Adopted by India

IIPA has long reported on significant restrictive trade practices, including in the areas of IPR protection and market access or discriminatory impediments to the copyright industries' ability to avail itself of the Indian market on a level playing field. The following provides more detail on specific trade or market access barriers of note.

Internet and Mobile Piracy: Within the next two years, India will be the second largest Internet market in the world, and the world's leading English language market, with an estimated 330-370 million Internet users. Mobile penetration stands at around 70% with an increasing number of mobile (smart phone and tablet) users (estimated at around 22 million) having 3G Internet access.¹⁰ The Indian Government continues investing in infrastructure to support this growth under its National Broadband Policy, and opportunities for expansion of India's online marketplace for copyright content theoretically abound. However, without adequate legal protection and enforcement against illegal BitTorrent, cyberlocker, web-based file hosting, wireless access protocol (WAP), blogs, and online radio sites or services (catering to Indian demand for music, movies and television programming, software, games, and books), India's legitimate online marketplace will remain stunted.¹¹

¹⁰ See generally International Telecommunications Union, *Facts and Figures*, <http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>.

¹¹ Indian consumers have legitimate choices today, including BigFlix, Eros On Demand, Box TV, Rajshri, iTunes India, Yahoo India, YouTube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas of India, Biscot Talkies. On top of these legitimate online platforms, retail chains such as Landmark, Crossword and Planet M now sell legitimate copies of films in DVD and VCD format.



A recent reported study tracking downloading IP-addresses on P2P networks for films and television content found India to be in the top 10 Internet (P2P) piracy countries in the world.¹² In 2013, the Entertainment Software Association (ESA) reported that India once again placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks. Pirated versions of movies often appear on the Internet in India within hours of their release in the movie theater, available through BitTorrent, cyberlocker, or web-based file hosting sites or services. The Internet piracy situation in India is fluid, as sites subject to enforcement or court orders merely migrate to avoid enforcement or further detection. Currently, top international sites for accessing illegal content in India include *kickass.to* (the 43rd most accessed site in the country), *torrentz.eu* and *torrentz.in* (47th and 112th, respectively), *extratorrent.cc* (66th), *thepiratebay.se* (69th), and *4shared.com* (127th). In addition, many sites target local Indian audiovisual content, such as *exdesi.com*, *netload.in*, *bollyrulez.net*, *bollyzone.ch*, *cramit.in*, *gorillavid.in*, *daclips.in*, *djluv.in*, *ictorrents.com*, *moviespack.com*, *movpod.in*, *hdvdosongs.com*, *torrentz.cd*, *thefilmovie.com*, and *mediafiremoviez.com*. Hundreds of sites including some cited above and sites like *songspk3.in* target both international and Indian music repertoire. The prevalence of these readily accessible sites indicates that local Indian creators as well as foreign creators are being harmed significantly by online piracy, a factor that the Indian Government should take into account when devising its policies in this space.

Regarding enforcement, in 2012 and again in 2013, the music industry association obtained civil court orders against more than 250 dedicated piracy sites (operating through hundreds of ISPs). These orders are a helpful indicator of a nascent government willingness to address online

¹² Utpal Borpujari, *India Major Online Film Piracy Hub*, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.



infringement, but much more will be required to drive down online music piracy and create the space needed for the operation of legitimate music services. The motion picture industry notes some cooperation for takedowns of hosted content on traditional sites (e.g., user-generated content sites) but inadequate support from ISPs and law enforcement for disabling access to dedicated piracy sites. Piracy sites and those offering the sale of pirated materials for mobile devices generally operate openly in India without fear of legal action.

The Copyright Act provision on notice and takedown will not by itself 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. The Indian Government has also been asked to convene regularized communications between right holders and the major ISPs, or at least ensure that such meetings occur, to foster voluntary and mutual cooperative efforts.

Where investigations reveal that piracy websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One court case, *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (2011),¹³ may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In that case, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspaces” or “places” to be used for sharing infringing materials.

¹³ *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.



Unauthorized Camcording: There was an alarming proliferation of unauthorized camcording in 2012 which drove not only online piracy but also harmed markets outside India. In 2012, there were 69 incidents of major U.S. motion pictures for which audio, video, or audio/video captures were detected as being sourced from Indian movie theaters.¹⁴ That number dropped to 43 incidents in 2013. This is a positive indicator, but does not include unauthorized camcording of local Indian, foreign, or independent films. The local film industry and cinema owners are quickly coming to understand there is a dire need for urgent action. Recent joint efforts in the first half of 2013 by the Motion Picture Distributors Association, MPAA, and the Andhra Pradesh Film Chamber of Commerce (APFCC) resulted in the arrest of members of two major criminal camcording syndicates operating in previously reported piracy hotbeds of Surat (Gujarat) and Indore (Madhya Pradesh).¹⁵ As a consequence of these successful enforcement operations, there were no camcording incidents reported in these areas during the latter part of 2013. Another positive development was the creation, with the assistance of the motion picture industry, of a mobile “app” launched in Andhra Pradesh to detect and report piracy and camcording incidents. Unfortunately, camcording incidents are now being reported in some of India’s smaller cities and towns and are exacerbated by the growth of multiplexes in these cities. Increased camcording incidents were observed in Bhopal (Madhya Pradesh), Lucknow, Noida, and Muzaffarnagar (Uttar Pradesh), and Aurangabad (Maharashtra).

The Indian Government Ministry of Information & Broadcasting (MIB) is planning to amend the Cinematograph Act, 1952, and has been urged to include a prohibition on unauthorized

¹⁴ In IIPA’s 2013 Special 301 report on India, IIPA reported that 53% of all pirated versions of major U.S. releases detected in Asia were sourced to an Indian cinema.

¹⁵ The first operation targeted a major camcording syndicate nicknamed ‘Yamraaj’ located in Indore during the release of ‘Ironman 3.’ The second operation, based on evidence linked to the first operation was against a major release group operating out of Surat in India nicknamed ‘NICKkkDon.’ The second camcording syndicate owned 33 websites and comprised 6000 members. Extensive seizures were made in both cases.



camcording, specifically, making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make or transmit (or attempt to make or transmit) a copy, in whole or in part, of a motion picture while inside a theater. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of camcording have been reduced in several markets with relatively minimal devotion of Government resources – a true win-win. Continued efforts by cinema owners (e.g., showing slides and placing messages on tickets and within theater premises conveying that illegal camcording is not allowed), as well as industry initiatives like the “Make a Difference” campaign working directly with cinema owners, have raised awareness of this problem and may provide some level of deterrence.

Suo Moto Raids by State Cells and Investigations of Sophisticated Computer Piracy Networks: The Indian Government has established various state enforcement cells in the state police headquarters, and the states have appointed nodal officers to handle IPR related offenses. In addition, the non-bailable nature of copyright offenses has traditionally been helpful, meaning the state cells can run raids on *suo moto* cognizance (such has not been the case for book publishers, however, who usually only get a raid after lodging a formal complaint under Section 200 of the Code of Criminal Procedure). It has been difficult for right holders to get clearly delineated information as to the proper office to approach with respect to either online piracy (a form of cybercrime) or physical forms of piracy. Time frames from registration of “First Information Report” or criminal complaints to the execution of a raid have not been swift enough to maintain enforcement momentum, particularly against covert networks where speed of response, confidentiality, and adaptability are key factors. Law enforcement in smaller cities and towns, where piracy and pirate networks now percolate, reportedly



take up to three or four days from complaint to raid. Reports also indicate the concern over the high risk that information about the raid is being leaked. Many of the states also have laws against organized or immoral crimes (so-called ‘Control of Goonda Acts’), which have been helpful in addressing piracy. The Goonda Acts have not to date been used to address software and book piracy.

The publishing industry notes that the lack of a central standard operating procedure in relation to piracy cases across Indian enforcement authorities (i.e., district police departments among the states) in relation to pre-raid documentation requirements for lodging complaints, evidence gathering details during raids, including adhering to required safeguards and post-raid recordation, is a hurdle for effective anti-piracy enforcement, leading to differing enforcement attitudes/inclinations, awareness, and processes. These hurdles invariably lead to duplication of efforts and low conviction rates.

Court Reform to Address Piracy Issues in India: Use of the courts in India remains a mixed experience, depending on the state and issue. Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as “courts of first instance”) do a creditable job in civil cases, and most positive civil relief and court orders emanate from these areas of the country. The experience in other courts, where district courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright including:

- clogged dockets;
- procedural delays due to archaic procedural laws;
- problems with retaining evidence (and lack of familiarity with the evidentiary requirements in relation to electronic evidence in online piracy cases);
- onerous requests to produce evidence of ownership and/or witnesses;



- failing to grant seizure orders to copyright owners as a matter of right in civil cases; and
- difficulty enforcing civil court orders.

Discussion has ensued on establishing special IP courts throughout the country, not just in Delhi. In addition, with fewer civil cases settling, discussion has ensued on the need for more adequate damage awards to fully compensate right holders for injury suffered (a TRIPS requirement), and the desirability of adopting pre-established (statutory) damages, elected by the right holder, in civil cases. A disturbing report indicates the Delhi High Court has proposed higher court costs (up to 300% of the current costs) for cases valued at Rs.20 million (US\$333,000). This would be a serious blow to anti-piracy efforts in India, since the Delhi High Court is one of the few to have IP specialist judges and is often used by right holders in civil copyright cases.

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



Unauthorized Use of Software by Enterprises: The software industry reports that the rate of software piracy has continued to decline gradually in India, though it remains high at a rate of 61% in 2013 (down from 63% in 2011, and 69% in 2007), representing a commercial value of unlicensed software used in India of well over US\$2 billion.¹⁶ The number of actions taken against unauthorized end-users in India increased from 12 (in 2012) to 24 (in 2013). The courts effectively employ Anton Piller orders to preserve evidence and retain the element of surprise, which is critical in the software space. Still, more *suo moto* cognizance raids would have a greater deterrent effect (since it would obviate the need for a complaint or application for an order, as well as broaden the scope of the search). Unfortunately, many states and localities do not view unauthorized use of software by enterprises as a serious infringement, much less a crime. As a result, software piracy has become acute in some parts of the country, e.g., commercial/industrial hubs such as Coimbatore, Chennai, and Baroda. In addition, in certain cities in India, it is extremely difficult to get police cover in civil end-user actions despite court orders. In such cases, instructions from the highest officers should be issued to provide unstinting support.

The Indian Government has been urged to amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices. Tax inspectors and external and internal auditors would then be empowered to check and account for genuine software licenses inside public and private companies, allowing the recovery of hundreds of millions of dollars in lost direct and indirect taxes.¹⁷ The Government has also been asked

¹⁶ Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at <http://www.bsa.org/globalstudy>. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

¹⁷ A study by IDC estimates the Indian Exchequer lost US\$866 million in 2009 due to failure to capitalize on direct and indirect taxes which would have been owed in the absence of software piracy in India.



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

The Indian Government has been urged to issue a directive or strict policy guidelines mandating that all Government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in Government, protect Government systems from security vulnerabilities, and send a strong message to the private sector about the importance of software license compliance. The Government has also been urged to adopt software asset management (SAM) best practices and promote these with private enterprises. BSA and the Department of IT established a roadmap for the promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA's "Certified in Standards-based SAM for Organizations (CSS(O))" program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

Unauthorized Use of Books and Lack of 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.¹⁸ There has also been an increase in the availability of pirated trade (or consumer) books, which are often sold by

¹⁸ Some local publishers in East India report piratical imports coming in from Bangladesh, and have asked for support of Indian Customs to curtail this problem; however, porous borders pose hurdles to being able to eradicate the entirety of the problem, meaning the Bangladeshi authorities must also take accountability over pirate exports from their territory. While judgments from the Indian High Courts (for example in *John Wiley & Sons v. Prabhat Kumar*) have clarified that the export of Indian editions outside of territories prescribed by the copyright owner would amount to an infringement of copyright, the Copyright Act, 1957 does not expressly include "exports" in the provision defining acts of infringement. This issue needs clarity so that right holders' interests continue to be protected while also ensuring that low-cost India-only editions continue to be available to the population of India.



itinerant (street) vendors to motorists in the middle of intersections. In efforts to combat rampant piracy, publishers long ago established the practice of creating market-specific low-priced textbooks editions to meet domestic demand – a significant benefit to Indian students and academics.

Two significant developments over the past year may portend major problems for U.S. and Indian publishers and distributors going forward. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In 2013, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. The United States Supreme Court decision in *Kirtsaeng v. John Wiley & Sons, Inc.* (568 U.S. ___) (2013), deeming legal the import into the U.S. of books lawfully made and distributed in Thailand, threatens to exacerbate this problem, and adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. The Indian Government has been urged to take immediate action to protect continued access by its students to textbooks by empowering Customs to take *ex officio* actions with respect to illegal exports as well as imports at the border. This would send a positive signal to all publishers, including those printers and distributors who rely on copyright in the India-only editions for their livelihoods. It should also be pointed out that, notwithstanding the U.S. decision, exporting the India-only reprints remains illegal in much of the world.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the premises of the university. The suit seeks to draw the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the activity concerned in this case – the commercial production of course packs which Delhi



University has outsourced to a commercial, for-profit, copy shop. There is a major difference between the two activities, with the former falling within the scope of what may be permissible under global norms, and the latter falling squarely outside those strictures. Nonetheless, the highly charged case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the courts, namely, to enjoin the copy shop and the University from commercial acts of unauthorized photocopying, reproduction, and distribution of course packs without appropriate licenses from publishers. The courts can grant the injunction, preserving authors' rights against commercial reprography and requiring that licenses be granted with appropriate payments for course packs, while still preserving appropriate fair dealing. Doing so will also reaffirm the well-established three-step test which India must adhere to under the TRIPS Agreement and Berne Convention.

Retail Piracy, Including Mobile Device Piracy: Retail physical piracy continues to harm right holders, including: burned, factory, and imported optical disks containing all kinds of content;¹⁹ mobile device piracy in which shops as an after-service offer to upload content to mobile device customers or sell flash or pen drives filled with content; hard-disk loading of pirated software and content onto computers at the point of sale; pirate rental of motion pictures; and pirate sales of games supported by sales of circumvention devices (in the market or online) and modification services for consoles. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials. IIPA’s latest notorious markets filing in November 2013 included the following markets: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika Bazaar, Gaffar Market, and Sarojini Nagar

¹⁹ In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.



Market (Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Much pirate material is “pre-release” (for example, Indian and international music records available on the streets before they are released legitimately to the public), causing significant harm to such works/materials. The Government of India has been urged to establish enhanced penalties for this highly damaging activity.

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

Copyright Law (and Rules): Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, and implemented in The Copyright Rules, 2013 (in force March 14, 2013). The Act (as amended) and Rules contain some improvements, and largely leave in place the enforcement structure of the Copyright Act and related laws and regulations.

The Act (and Rules which, under the Constitution, as “delegated legislation,” are limited in scope to supporting and prescribing the processes and formalities to implement the Act but never going beyond the Act) unfortunately leave some important concerns unresolved and raise new



concerns, some which call into question India's conformity with its international obligations under the TRIPS Agreement and Berne Convention, and conformity with the standards set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In summary terms, problems include;

- Ownership and assignment provisions that are harming and altering existing commercial arrangements in India.²⁰
- No express coverage of access control technological protection measures (TPMs) and no prohibition on trafficking in circumvention technologies, devices, components, and services, in full accord with the WCT and the WPPT.²¹
- Compulsory or statutory licenses that do not meet the provisions of the Berne Convention and TRIPS Agreement.²²

²⁰ The Act now contains independent rights for authors of 'underlying works' incorporated in cinematograph films including granting 'non-waivable' & 'non-assignable' royalty rights in favor of authors (Sections 17, 18-3, 19). The Act also barred assignment of future rights in respect of modes and mediums of exploitation which have not been invented or are not in commercial use (Section 18-2). As IIPA has previously indicated, the new provisions limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works and set exact percentages or amounts ascribed to be paid to such authors, undermining the flexibility of parties to negotiate agreements on royalties' distribution which could be more beneficial or appropriate under the circumstances. To our knowledge, the Rules: 1) do not confirm only the prospective (i.e., non-retroactive) application of Articles 17-19; 2) retain the Section 18 proviso that assignments are deemed invalid as to "any medium or mode of exploitation of the work which did not exist or was not in commercial use" at the time the assignment was made unless that medium or mode was "specifically" mentioned in the assignment, which could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution; 3) do not clarify that the Act governs the relationship of creative parties with respect to the production of works in India, and not contracting parties outside of India.

²¹ The Act now contains a criminal (but not civil) prohibition, in Section 65A, of the act of circumvention of a technological protection measure (TPM) "with the intention of infringing" an exclusive right. The provision falls short of full WCT and WPPT compliance. 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.

²² The Rules unfortunately do not alter the fact that two existing compulsory licenses, which were applicable only to Indian-origin works, now include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India's Berne Convention and TRIPS obligations.



- The absence of statutory provisions regarding online infringements to permit expeditious takedowns without automatic put-back and address both hosted and non-hosted infringing activities and services.²³
- Exceptions and limitations that may not meet the well-established Berne three-step test (e.g., the “private or personal use” exception in Section 52(a)(1); the software exceptions in Sections 52(1)(aa) and (ad)).
- No provision of statutory damages, upon the election of the right holder, on a per-copy basis, adequate to compensate right holders in cases in which proof of infringing numbers of copies or distributions cannot be determined.
- No 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.

Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building: The Indian Government is urged to 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

²³ The Act now includes a safe harbor provision for ISPs engaged in the ‘transient or incidental storage of ‘works’ with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51 (1) (c)). The Rules provide for takedown within 36 hours of a notice but is 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 met in practice. For instance, according to Rule 75(2)(c) right holders have to 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, it does not effectively provide incentives for them to assist in curbing online piracy, and carved out from their due diligence requirements certain transient reproductions without regard to whether the transaction taking place is an authorized one. In addition to gaps in the Copyright Act, the Department of Telecom (DOT) should enforce the conditions of their 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.



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.

Patent Pendency: The software industry faces a significant and longstanding backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The backlog as of late 2012 currently stands at approximately 100,000 applications across all industries. Addressing the backlog as a priority will promote R&D investment, ICT innovation, and national competitiveness in India.

Ban on Exclusivity Including “Must Provide” Requirement in the Pay TV Sector: A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters of audio-visual content from granting exclusive contracts with any distributors) combined with a “must provide” requirement (obligating broadcasters of audio-visual content to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights.”

Restrictions on Direct-to-Home (DTH) Market: MIB has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an



individual home). Specifically, it issued a set of guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.

Price Controls on Pay TV Sector: TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector.

Onerous, Arbitrary, and Sometimes Discriminatory Entertainment Taxes: Entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film, vary widely among Indian states, ranging from 15% to 40% in some key markets, and from 40 to 70% in other states. The average tax rate, computed on a country-wide basis, is estimated to be between 27% to 36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the federal and various state governments to rationalize the high taxation levels and the Indian Government has also stepped in to persuade various state governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films. Any film not produced in the same language that is predominately



spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice. Subsuming all taxes into a unified tax such as the GST will rationalize practices.

Price Fixing on Tickets in South India and Theatrical Exhibition Quotas: The Indian Government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.

Onerous Restrictions on Satellite Services: For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.

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

Taxation of Software: An array of tax policies negatively impact market access for software goods and services in India. These include transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of certain software as both the sale of a good and service.



Technology and Procurement Mandates: The Indian Government has issued a number of policies that raise concerns they will be implemented in a manner that provides significant preferences and mandates for procurement of products and services that are locally manufactured, that utilize a particular technology, or that have IP owned and/or developed in India. These include the National Electronics Policy, the National IT Policy and the National Telecom Policy, and the Preferential Market Access (PMA) policy for domestically manufactured electronic products. The Indian Government recently announced that the PMA policy would not apply to procurement by Government licensees and other private sector enterprises as it had originally intended. This is a step in the right direction, but IIPA remains troubled by the implementation of policies that would provide significant mandates and preferences for local products in government procurement. Such policies not only impede sales of foreign software and other technology products, but deny the Indian Government the ability to choose the best available products and services for its needs.

3. Quantitative Analysis of the Economic Effects of India's Identified Restrictive Measures

The USITC has indicated that the Commission report will provide, “[t]o the extent feasible, a quantitative analysis of the economic effects of India’s identified restrictive measures on the U.S. economy as a whole, on U.S. trade and investment, and on selected sectors of the U.S. economy.” IIPA does not compile such quantitative analyses, in part because the nature of digital, online, mobile, and other forms of piracy (e.g., pay TV piracy, which may involve unauthorized tapping, head end, or under-declaration), are not susceptible to exact loss estimates or substitution rates.

Independent studies support with quantitative data that, overall, piracy remains a damaging barrier to trade in copyright goods and services. A study released by BASCAP (Frontier Economics),



Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy (February 2011),²⁴ estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015. On January 14, 2014, the United Nations Office on Drugs and Crime (UNODC) launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeit goods.²⁵ Rampant piracy and counterfeiting not only impedes the evolution of legitimate channels for distribution, but also threatens to damage permanently or displace existing and authorized distribution channels which are unable to compete with infringing business models. Market access barriers, investment barriers, and discriminatory treatment make it difficult to compete in foreign markets on a level playing field, and all efforts to crack down on piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand.

Regarding India specifically, the software industry has compiled data about the quantitative effects of piracy. In 2013, 61% of software used by enterprises in India is estimated to be unlicensed, representing a commercial value of unlicensed software used in India of well over US\$2 billion. This number is slightly down from 63% in 2011, when the value of unlicensed software was estimated to be US\$2.9 billion. These numbers do not include quantitative estimates due to other forms of piracy such as hard-disk loading of software onto computers at the point of sale, or counterfeiting of software. Other quantitative estimates may be gleaned from the BSA piracy impact study, mentioned above,

²⁴ Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy* (2008))

²⁵ See 'Counterfeit: Don't buy into organized crime' - UNODC launches new outreach campaign on \$250 billion a year counterfeit business, UNODC website, January 14, 2014, at <http://www.unodc.org/unodc/en/frontpage/2014/January/counterfeit-dont-buy-into-organized-crime---unodc-launches-new-outreach-campaign-on-250-billion-a-year-counterfeit-business.html?ref=fs2>, accessed January 24, 2014. The campaign, *Counterfeit: Don't buy into organized crime*, informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk and contributes to other ethical and environmental concerns



showing that “[r]educing the PC software piracy rate in India by 10 percentage points in four years [2009-2013] would deliver: US\$4.66 billion in new economic activity; 59,728 new IT jobs; and US\$512 million in additional tax revenues by 2013.”²⁶ Further quantitative evidence may be deduced from Entertainment Software Association (ESA) figures on the download of select ESA member game titles. Among major countries surveyed, India ranked 6th in 2013 in sheer numbers of complete downloads of select ESA member titles through P2P file sharing protocols.

4. Summary of Perception of Recent Changes and Effect of Those Changes on Strategies

Finally, the USITC indicates the Commission report will provide, “to the extent feasible, a summary of U.S. firms’ perception of ... recent changes in India’s trade and investment policies in selected sectors and ... the effects of these changes on U.S. firms’ strategies towards India (e.g., reducing investment or altering product mix), and analysis of whether the effects of these policy changes differ by firms’ characteristics, such as size, IP-intensiveness, or export status.” Copyright industries have much at stake in the development of India’s IP and market access climate over the coming years. India has the potential to be one of the world’s leading legitimate markets for the creative industries – both foreign and domestic. India’s policies in recent years demonstrate an understanding of the important economic, social, and cultural development components that are at stake. However, the piracy situation in India remains extremely difficult, with new challenges such as online and mobile forms of piracy, unauthorized camcording and a changing business and legal environment for publishers not being met with speed by the Indian Government. Market access barriers – many of them longstanding (such as those imposed on broadcasters), but some newly

²⁶ See *supra* note 8.



imposed as a reaction to perceived weaknesses within the Indian marketplace (such as those which impose transfers of IP, put into place domestic preferences for technology and software services) – and other structural difficulties (e.g., patent pendency) just fuel uncertainty. This uncertainty has real-world repercussions in terms of firms’ decision-making in FDI and onward engagement in the country. It is hoped that IIPA’s situational updates provided herein will assist the Commission in achieving a comprehensive plan for India to reduce piracy and address market access and structural difficulties identified in this brief.

Conclusion

IIPA appreciates the opportunity to provide the Commission with the perspectives of the U.S. creative industries on the issues presented in this investigation, and we look forward to continued work with the Commission to address the barriers and impediments in India’s trade, investment, and industrial policies identified herein.



APPENDIX A

International Intellectual Property Alliance, *India*, 2013 Special 301 Report,
February 7, 2013, available at
<http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>.

INDIA

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

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2013.¹

Executive Summary: India can be one of the world's leading legitimate markets for the creative industries – both foreign and domestic. The country continues to produce the greatest number of films in the world (estimated at nearly 1,000 full-length feature films per year), boasts a creative and diverse music market, a prolific publishing industry (19,000 publishers producing 90,000 titles per year), and a vibrant software market.² Other key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. Unfortunately, content theft negatively impacts the profitability of creators, as a recent study highlighting the film industry³ and piracy's effects the livelihoods of the professionals and workers involved demonstrates.⁴

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

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

PRIORITY ACTIONS REQUESTED IN 2013

Enforcement

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

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

²For example, NASSCOM estimates that software and services revenues (excluding hardware) is expected to reach \$87 billion in fiscal year 2012, a 14.9% increase over 2011. Another recent industry report pegged the Indian film and television industry's total gross output at US\$20.4 billion, higher than the advertising industry. PricewaterhouseCoopers, *Economic Contribution of the Indian Film and Television Industry*, March 2010. Employment generated by this industry is estimated at 1.83 million workers, most of whom are daily wage earners.

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

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

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



- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.
- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.
- Ensure Anton Pillar orders are readily available in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as evidence can be preserved by court appointed commissioners.
- Issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets.

Legislation

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

Market Access

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

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

PIRACY UPDATES IN INDIA

Online and mobile device piracy have become serious problems in India as Internet and broadband penetration have widened. The ubiquitous use of mobile devices and the rapid expansion of mobile and console-based game playing have led to new opportunities for right holders but unfortunately also to new challenges, as evidenced by the spread of mobile device piracy and modification chips for circumventing TPMs used to protect console-based games. Losses are very difficult to calculate for most industries, but for example, the music industry estimates a total loss of \$431 million in 2012 (the largest percentage of that attributable to mobile device piracy, then physical piracy, Internet piracy, public performance piracy, and radio/TV broadcast piracy) and upwards of 90% music piracy online,⁶ while the software industry reported a 63% rate of PC software piracy in 2011 with a commercial value of unlicensed software estimated to be over US\$2.9 billion. The motion picture industry continues to be hammered by a devastating combination of illegal camcording, Internet, and hard goods piracy, notwithstanding the launch of some legal services for audiovisual materials.⁷

Internet and Mobile Piracy Devastating Creative Industries in India: With the growth of Internet connectivity, and increasing mobile penetration, Internet and mobile device piracy have grown worse in 2012 for the copyright industries in India. Internet & Mobile Association of India (IAMAI) reports 150 million Internet users in India as of December 2012,⁸ with 12.8 million fixed broadband connections,⁹ and 78.7 million mobile Internet users as of October 2012.¹⁰ Illegal downloading sites, P2P filesharing, BitTorrent trackers and indexes,¹¹ streaming sites, deep linking sites, blogs, forums, and social network sites directing users to infringing files, cyberlockers used to advertise massive amounts of infringing materials, and piracy through auction sites all continue to plague right holders in India. A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy, as pirated films out of India appear on the Internet in an average of 3.15 days.¹² During 2011, Peer Media Technologies reported that users initiated over 25 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in India. There is no indication that this situation improved in 2012.¹³ In 2012, the Entertainment Software

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

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

⁸Internet and Mobile Association of India, Vernacular Report 2012, January 9, 2013, at http://www.iamai.in/rsh_pay.aspx?rid=avDLOK1zAl8=.

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

¹⁰Internet and Mobile Association of India, *Mobile Internet in India December 2012*, January 2, 2013, at http://www.iamai.in/rsh_pay.aspx?rid=Yh0mbvBD9VI=.

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

¹²See PricewaterhouseCoopers Report, *supra* note 2.

¹³The independent film and television segment of the motion picture industry (IFTA) reports that Internet piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors in India to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with pirates. Internet piracy also prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions.

Association reports that India placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from seventh in 2011.¹⁴

The music industry reports a significant increase in 2012 of mobile chip piracy, in which retail establishments sell or offer for free flash cards or other storage devices (or chips) for mobile phones preloaded with music to customers (sourced either from pirate or legitimate CDs or downloaded from pirate websites or through P2P filesharing services).¹⁵ In addition, there are numerous “apps” for mobile phones, for example, operating on iOS and Android phones, used to make available Indian and international music to mobile subscribers without authorization. For the software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download. For the motion picture industry, camcorded versions of a film hit the Internet on infringing websites through release groups within a few hours of a film’s release. The illegal online copy may be used further to produce hard goods for sale in key markets across India. The top ten illegal websites in India for piracy of motion pictures are: *Tamilwire.com*, *moviemobile.net*, *bharatmovies.com*, *tamilthunder.com*, *tamilcreation.com*, *bwtorrents.com*, *torrents.in*, *extratorrent.com*, *filestube.com*, *hindi5.com*, *movi91.com*, *fullmovies.com*, *moviespack.com*, *kat.ph*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in* and *dctorrents.com*. These sites cater to the demand for local language dubs of U.S. films as well as Indian films. Many of the illegal websites and other services affecting India operate from foreign servers including Ukraine, Canada, Russia, Pakistan, South Africa, Afghanistan, and the United States.

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

Retail Piracy and Circumvention of TPMs Continue to Harm Right Holders:¹⁷ The predominant form of retail piracy in India consists of burned optical discs,¹⁸ with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of software, entertainment software and books/reference materials. Some imported discs and factory-produced discs from India have reportedly still been detected in recent years.¹⁹ Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard disk loading piracy) is also prevalent in India.²⁰ There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy

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

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

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

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

¹⁸ *Accused Arrested in Mapusa Pirated CDs Case Out on Bail*, The Times of India – Goa, December 22, 2011, at http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dy-sammy-tavares (in which the shop “Suresh Music” at the Mapusa municipal market was raided, resulting in seizure of around 5,000 pirated CDs and a CD writer; the complaint was laid by famous *tiatr* artist Francis de Tuem, after finding a pirated CD of his latest *tiatr* titled *Illegal*, with the Mapusa police. See also *Pirated CDs Seized from House in Beemapally*, January 29, 2012, BuzzExpress, at <http://expressbuzz.com/cities/thiruvananthapuram/pirated-cds-seized-from-house-in-beemapally/358030.html> (reporting the seizure of massive numbers of DVD covers and hundreds of DVD-Rs burned with content, mostly pornographic, as well as burners; the accused was apparently able to produce 60 discs in a period of three seconds, which translates to many thousands of discs per hour).

¹⁹There reportedly remain dozens of optical disc factories in India which have a capacity to produce millions of discs per year. To ensure all factories reproduce only legitimate discs, in recent years, industry presented draft optical disc legislation which would regulate the plants’ activities, but a major company in India, Moser Baer, opposed the legislation and its inclusion of blank disc licensing. The music industry reported three factory cases brought which were settled through plea bargaining.

²⁰Calicut (Kerala), Belgaum (Karnataka), Gulbarga (Karnataka), Nagpur (Dhantoli), Tilak Road (Pune), Canada Corner (Nasik), Golani Market (Jalgaon), Nehru Place (Delhi), Naza Market (Lucknow), Agra, Ludhina Market (Ludhiana) contain a tremendous number of computer resellers, retailers and assemblers selling tens of thousands of computers pre-loaded with pirated operating system software. It has been estimated that between 70-90% of all computers sold in these markets have infringing software on their hard drives.

hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkatta, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs, with vendors openly selling circumvention devices on the Internet, in retail stores and kiosks, or selling game consoles that are already modified. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.²¹

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

Software Piracy: The software industry reports that the rate of software piracy has continued to decline in India, though it remains high at a rate of 63% in 2011 (down from 69% in 2007), representing a commercial value of unlicensed software of almost US\$3 billion.²² A key part of this problem remains the unlicensed use of software by enterprises in India. There have also been decreases in hard disk loading (the consumption of “white boxes” or assembled hardware with unlicensed software), although this remains a problem in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and sponsored by BSA, entitled *Piracy Impact Study: Economic Benefits of Reducing Software Piracy*, found that decreasing India’s PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the ten point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

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

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

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

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

Pirate Printing and Photocopying of Books and Journals: Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continues to harm the publishing industry in India. Book piracy occurs in a variety of ways in the country. While online piracy of trade books, textbooks, journals and reference books is beginning to rise, publishers' main problem in India remains hard goods piracy. Unauthorized photocopying as well as the compilation and sale of "course packs" are commonly seen in relation to textbooks used in educational institutes. Print piracy (off printing presses or reprints) affects academic titles as well as trade titles. Unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on websites created and maintained by university students are also on the rise in India. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues on and around university campuses and in libraries, sometimes even condoned by the institutions. Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of course packs, or "self instructional material" (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. Industry continues to wait, apparently in vain, for the MHRD to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

Another persistent problem continues to be the export of India-only, lower-priced editions of books intended only for distribution in the Indian market. Such India-only copies are being exported to countries in Africa, the U.S., the United Kingdom, and other European markets. The lower-priced edition program was intended to benefit and meet the specific needs of the Indian market, but unfortunately, the export of such editions out of India is now adversely affecting more developed markets. In 2012, the publishing industry conducted a global investigation into the export of India-only editions. The investigation identified a known distributor which has since agreed to cease engaging in the infringing activity.

ENFORCEMENT UPDATES IN INDIA

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

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

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

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

²⁵In 2011, industry used John Doe orders (known locally as "Ashok Kumar" orders and commonly used in India to target individual sellers and cable TV operators) to have ISPs disable access to infringing materials. In July 2011, a local Indian film studio (Reliance) in the process of releasing a major Indian film (...continued)

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

Where investigations reveal that websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One of these criminal cases was lodged in Rajkot Gujrat involving two websites (both shut down) and resulted in the arrest of two students in connection with running the websites; the case is ongoing. With respect to growing mobile device piracy, the Indian music industry is bringing to the police more than 500 mobile device piracy cases per month (up from 200 per month in 2011). However, cases such as these are not high on the agenda of Indian police, since they are instead focused principally on Internet or mobile cases involving credit card fraud or false names and addresses. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*,²⁷ decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspace” or “place” to be used for sharing infringing materials. The local Indian record industry was involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites (many of which have been shut down as a result of the actions in Calcutta).

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

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

(...continued)

(*Singham*) in the market, and following up on a similar request by another film studio (having released another major Indian motion picture earlier in the year), obtained an “Ashok Kumar” Order, allowing it to send cease and desist notices to disable access to its new film which was to be released two days later. Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*. Shortly thereafter the ISPs started some limited disabling of access to various notorious sites including *Megaupload.com*, *Mediafire.com*, and *Megavideo.com*. Other successful industry actions included one initiated in 2010 by Alliance Against Copyright Theft (AACT) (MPA allied with the local Hindi film industry). In July 2011, the Mumbai Cyber Police arrested two suspected operators of the site *moviemax.in* in Gujarat, which was one of five locally based sites (among 99 notified to police), and the police were helpful in ensuring those sites could be taken down as well, although industry has no confirmation as to the current status of the other four sites.

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

²⁷*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

²⁸These actions follow others in 2011. For example, in 2011, there were two interdictions and two arrests of individuals illegally recording films in Indian cinemas. In November 2011, the police in Thane arrested an individual camcording *The Adventures of Tin Tin* on the opening day of its theatrical release in India.

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

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

Enforcement Through State Cells in India Should be Enhanced Further Through National Coordination: The Indian government, in its 2010 Special 301 Submission, indicated, "[e]nforcement Cells have been set by the state governments in their respective police headquarters. Nodal officers have been appointed by the state governments to handle IPR related offences."²⁹ However, there remains no Federal government-led initiative to coordinate enforcement with and between the state governments. A national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state cells and Nodal officers should be established forthwith. The state cells, first established in 2002, are apparently starting to run more significant numbers of *suo moto* raids against piracy.³⁰ The industries all report good working relationships with the state cell in Delhi, while one or more industries reports good working relationships and effective assistance from Tamil Nadu, Kerala, Punjab, Mumbai, Bangalore, Chennai, and Hyderabad.³¹ One issue that publishers have encountered, however, is that the jurisdiction of various teams are not clearly defined, leading to delays and confusion as to the most efficient approach for addressing instances of piracy. For example, in the Delhi Economic Offences Wing there are sections dealing with cyber crime and IPR. However, there are no clear guidelines about which section a right holder should approach.

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

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

²⁹ See Government of India, Ministry of Human Resource Development, Department of Higher Education, Copyright Office, *State-wise Nodal Officers for Enforcement of Copyright: List of the Nodal Officers nominated by States/UTs*, at <http://copyright.gov.in/frmStateWiseListNodalOfficers.aspx>. There was even an anti-piracy coordination cell launched in October 2010 by FICCI.

³⁰ A 2009 raid involved the largest ever seizure of pirated academic and scientific, technical and medical (STM) books in India. During the last quarter of 2009, a raid in Delhi against a printer, binder and distributor producing pirated academic and STM books revealed 80,000 prints and 124 negatives of a single publisher's titles on hand. This led to raids on two warehouses belonging to the distributor, leading to at least 160,000 more suspected pirated titles. The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

³¹ The Mumbai police have both a copyright cell, dealing with OD and other piracy, and a cybercrime cell which deals with software piracy. *Mumbai Police: Organization and Functions*, at http://www.mumbaipolice.org/%5Cspecial%5Corg_fun5.htm. See *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See *Anti-Piracy Raids Seize Close to 15000 Pirated Discs Mumbai Police Along With AA Khan and Associates Conduct Raids Across the City*, Thaindian News, May 13, 2010, at http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city_100363186.html.

past couple of years, the sheer number of piracy cases still pending indicates that much more needs to be done to effect judicial reform and speed dockets; the music industry reports roughly 18,000 pending cases. Third, many courts, particularly outside Delhi, remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. Further problems involve unreasonable demands on right holders to produce copyright registration certificates, and demands for right holders to physically make witnesses available.³² Even in civil cases, in which credible IP judges have developed in the High Court in Delhi, Chennai and Kolkata, the high pendency rate, low damages, and the years that it takes to enforce any kind of court judgment, remain problematic features of the legal system in India. For these reasons, IIPA continues to urge the Indian government to establish special IP courts throughout the country with expert judges and prosecutors.

COPYRIGHT LAW AND RELATED ISSUES

Copyright (Amendment) Act, 2012 In Force, Further Modernizing India's Copyright Law: Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, effective June 21, 2012, and related laws and regulations. The Act (as amended) contains some improvements over the previous (2010) draft,³³ and largely leaves in place the enforcement structure of the Copyright Act, 1957 (as last amended), and related laws and regulations.³⁴ Nonetheless, the Act also leaves in place existing, and raises some new, concerns which can be summarized as follows:

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

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

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

³⁴According to the explanation of the Indian government in its 2010 Special 301 Submission, Chapter XIII of the Indian Copyright Act, 1957 provides for penalties for offences committed under the Copyright Act and empowers the police to take necessary action. These are the following:

- Imprisonment for a term of six months to three years and a fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for the offence of infringement of copyright or other rights under the Act. (Section 63).
- Imprisonment for a term of one year to three years and a fine of Rs. 100,000 (US\$2,192) to Rs. 200,000 (US\$4,385) on second and subsequent convictions. (Section 63 A).
- Imprisonment for a term of seven days to three years and a fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for knowingly using an infringing copy of the computer programme (Section 63 B).
- Seizure of infringing copies (Section 64).
- Imprisonment for a term up to two years and a fine for possession of plates for purpose of making infringing copies (Section 65).
- Disposal of infringing copies or plates used for making infringing copies (Section 66).
- Imprisonment for a term up to one year or a fine or both for making false entries in the register (Section 67).
- Imprisonment for a term up to one year or a fine or both for making false statements for the purpose of deceiving or influencing any authority or officer (Section 68).
- Imprisonment for a term up to three years and a fine for publication of a sound recording or video film in contravention of provisions of Section 52A (Section 68 A).

Government of India. *Submission by India Under Special 301 for 2010*, February 26, 2010, at 5 (on file with IIPA). The Submission also indicates, "The provisions on IP protection in these laws are further supplemented by appropriate provisions for border measures in the Customs Act, 1962, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 and the Department of Revenue Notification No. 49/2007-CUSTOMS (N.T.) dated 8th May, 2007 notified under section 11 of the Customs Act, 1962." *Id.* at 9. The Submission indicates, "The Customs authorities are also empowered to take action on their own initiative suspending clearance of goods where they have prima facie evidence or reason to believe that the imported goods are infringing the IP rights of any right holder."

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

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

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

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

The more far-reaching changes are effectuated in Section 18. Several recent Indian court decisions concluded that musical works included in audiovisual works or in sound recordings are not subject to payment of public performance royalties, i.e., the public performance rights in such musical works are deemed assigned to the producers of sound recordings or the audiovisual works in which they are used. These court decisions denied right holders in musical compositions the ability to enjoy their exclusive rights and run counter to India’s compliance with its international obligations under the Berne Convention and the TRIPS Agreement. The Act fixes the problems created by the court decisions in some respects but creates new problems in the process.

In Section 18(1), provisos indicate the author of a literary or musical work shall not be deemed to have assigned or waived “the right to receive royalties to be shared on an equal basis with the assignee of copyright” in two cases: 1) when included in a “cinematograph film” for all “utilization” other than “the communication to the public of the work along with the cinematograph film in a cinema hall”; and 2) when “included in the sound recording but not forming part of any cinematograph film.” New Sections 19(9) and (10) of the Act preserve the right of the author “to claim an equal share of royalties” as to: 1) “utilization” of “any work” in a cinematograph film in any form other than “for the communication to the public of the work, along with the cinematograph film in a cinema hall”; and 2) “utilization” of “any work” in “a sound recording which does not form part of any cinematograph film.”

³⁵Section 17(e) provides, “Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.”

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

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

IIPA agrees that mere inclusion of works in an audiovisual work or sound recording should not deem assigned or waived the rights of the authors of those works, or deny them the ability to negotiate and receive payments for the utilization of those works, e.g., public performances of musical works, or the exercise of other exclusive rights. At the same time, the new provisions should not limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works. IIPA is also concerned about the exact percentages or amounts ascribed to be paid to such authors, such as the Section 18 proviso that the royalties be shared with the assignee “on an equal basis,” or the Section 19 mandate of “an equal share.” This text does not specify the basis on which an “equal share” is calculated, although reports indicate this will result in a “net” 50/50 share between the publisher/owner and author following deductions of collecting societies’ costs. These provisions undermine the freedom of contract and the flexibility of parties to negotiate other agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. It should be confirmed that the scope of application of this provision is specifically limited to works created after the effective date of the law and has requested confirmation of this in the Draft Rules. Otherwise, it would upset existing freely negotiated contractual relationships and hinder the ability of right holders in such films or sound recordings to distribute their works without fear of disputes over conflicts between such arrangements and the statutory mandates.

Other parts of the Act unfortunately provided for significant limitations on assignments of works. According to a Section 18 proviso, assignments are deemed invalid as to “any medium or mode of exploitation of the work which did not exist or was not in commercial use” at the time the assignment was made unless that medium or mode was “specifically” mentioned in the assignment. This change precludes “all rights” assignments which historically have been treated by both authors and publishers/producers as the norm in the business, and could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution.³⁸ To the extent the provisions apply retroactively, they are also subject to possible constitutional challenge; IIPA has requested that in the Draft Rules it be confirmed that they do not apply retroactively. The software industry is also concerned about this provision, which severely limits the scope of a possible assignment of copyright in any work including software; given technological advances, it is not realistic to expect that the modes and media of exploitation can be fully spelled out in a contract as this provision would require.

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

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

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

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

⁴⁰Article 13(1) of the Berne Convention provides,

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

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

- **Section 31:** The first, Section 31, involves a compulsory license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work for which the right holder has “refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public,” as well as any work for which the right holder “has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.”
- **Section 31A:** Section 31A, an “orphan works” provision, provides for a compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished Indian works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found.” The Act extends this compulsory license to all “unpublished or published works” that are being “withheld from the public.”
- **Section 31B:** Section 31B is included for the benefit of the disabled. Section 31B fails to contain necessary protections to ensure that such works are limited solely to the disabled and that they otherwise fully meet the Berne Convention three-step test, and the 2011 amendments extend the availability of the compulsory license to “[a]ny person working for the benefit of persons with disability on a profit basis or for business....”
- **Section 31D:** The broadcast compulsory license in Section 31D is unprecedented, covering both radio broadcasts and television broadcasts, and appears to be inconsistent with India’s Berne Convention and TRIPS obligations.⁴² It is not limited on its face to those activities under Berne Article 11*bis* for which appropriate

(...continued)

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

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

⁴¹Article 11*bis*(2) of the Berne Convention provides,

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

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

⁴² Specifically, Section 31D provides, in its entirety, the following:

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

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

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

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

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

(...continued)

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

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

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

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

(...continued)

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

(7) The broadcasting organisation shall —

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶It is critical that any exceptions or limitations be narrowly tailored to avoid a scenario in which an exception effectively “swallows” the rule. The currently drafted 65A(2)(a) is, therefore, not an appropriate starting place, since it exempts all acts of circumvention “for a purpose not expressly prohibited by this act” which would seem to subsume all limitations and exceptions. By contrast, U.S. law provides narrowly tailored exceptions designed to facilitate specific uses, and also provides for a triennial rulemaking undertaken “to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls.” Since 2001, only a few narrowly tailored classes of works have been identified. The EU approach is to ensure that “rightsholders make available” the “means of benefiting from” a certain narrow list of exceptions, and have special provisions related to private use, with appropriate safeguards in place with respect to limiting the number of copies that can be made and with regard to the Berne three-step test.

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

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

Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility: A sound approach to this issue of dealing with online violations of law and the role of intermediaries is contained in the Information Technology Act, 2000, which provides for power to intercept or decrypt information through any computer source on certain grounds mentioned therein.⁴⁹ The IT Act provides that local ISPs bear responsibility for infringements on their networks after they have been put on notice and have knowledge of infringement. In 2010, the Parliamentary Committee urged that the Copyright Act be aligned with the principles laid out in the IT Act, recommending that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. In April 2011, the Information Technology (Intermediaries Guidelines) Rules, 2011⁵⁰ were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, specifically mentioning “copyright” infringement as a trigger for a notice from an “intermediary,” and setting takedown times for detected violations online to 36 hours. The Rules indicate the trigger for “disabling” access is “actual knowledge” through a notice and they do not appear to provide for red-flag notice (i.e., where the “intermediary” is aware of facts or circumstances from which an infringement is apparent) which is unfortunate. Also, since they carve out from the notice and takedown requirement certain transient reproductions without regard to whether the transaction taking place is an authorized one, questions remain as to how effective the Rules along with the IT Act will be in addressing infringements in the non-hosted environment.⁵¹

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

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

A proviso states:

“Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an

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

⁴⁹The IT Act 2000 also provides the power, but not the duty, to monitor information through any computer source on certain grounds mentioned therein. IIPA does not support any duty to monitor computer systems or services.

⁵⁰Information Technology (Intermediaries Guidelines) 2011, April 11, 2011 (on file with IIPA).

⁵¹The Information Technology (Intermediaries Guidelines) Rules, 2011 provide that an “intermediary” (as defined in the Information Technology Act, 2000) is not deemed to be directly liable for certain “temporary or transient storage” regardless of knowledge or red-flag knowledge and without regard to the legality of the temporary or transient storage, or of the transaction taking place across its network. Specifically, Section 3(3)(a) essentially provides that a service provider shall not be directly liable for the “temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

⁵²This new exception appears to confirm that the reproduction right under the Copyright Act, 1957, covers temporary copies, such as those made in the random access memory of a computer or other electronic device. The IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 also appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. Sections 52(b) and (c) also provide for exceptions from the exclusive right of reproduction for the transient and incidental storage of works in certain circumstances, and applying the *a contrario* principle it would appear that all such copies, including those not subject to such exceptions, are protected as reproductions.

infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

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

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

⁵³This list suggests some coverage of information location tools and facilitating access to infringing materials – which are some, but not all, of the activities for which an effective response is needed to online infringement.

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

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

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

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

- **New Broad “Private or Personal Use” Exception (Section 53(a)(1)).** The industries are concerned that the exception in Section 52(1)(a)(1) could be interpreted in overly broad ways. We appreciate the Indian government’s explanations to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theaters by further limiting the exception for private use to “private and personal use.” However, we remain concerned that this narrowing of the language does not alleviate the foreseeable difficulties with such an exception as a broad exemption can completely undermine the anti-piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use,” must still comply with the three-step test in the Berne Convention and TRIPS. It would be important to further limit the exception through an explicit recitation of the three-step test, and an explanation that the exception would rule out any act in which a use rendered a work or other protected subject matter available online or to anyone outside the person entitled to use under this exception, would certainly rule out copying of whole or part of a cinematographic work in a movie theater, and could be claimed only by the person who is entitled to a permitted use, and not by any other party or service.

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

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

1) Confirm That Camcording of a Motion Picture is Illegal: With the increase in illegal camcording of movies in theaters in India, the Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make (or attempt to make) a copy, in whole or in part, of a motion picture while inside a theater, and to prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcordered copy. The emerging trend is to provide explicit protection against this activity, and the U.S. and several other countries already have legislation in force, while other countries are considering bills which accomplish the same. We hope this activity will be prohibited in the Cinematograph Bill which emerged in 2010.

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

3) Adopt Statutory Damages: Proving actual damages, e.g., in end-user software, book publishing, and other piracy cases, can be difficult, and in order to expedite civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and Anton Piller orders to deal with piracy, India should adopt statutory damages at the election of the right holder.

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

5) Allow for Restitution in Criminal Cases.

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

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

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

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

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

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

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

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

MARKET ACCESS ISSUES

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

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

⁵⁸Here we noted the UNCTAD, MPDA, and PricewaterhouseCoopers reports mentioned above.

⁵⁹Many barriers are set forth in documents such as the FICCI "Key recommendations for Media & Entertainment Sector presented to the Finance Ministry" (February 2011), and in general, we concur with FICCI's findings therein.

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

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

- **TRAI Bans Exclusivity, Includes “Must Provide” in the Pay TV Sector; MIB Also Restricts “Direct-to-Home” Business:** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors) combined with a “must provide” requirement (obligating broadcasters to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.
- **Restrictions on Direct-to-Home (DTH) Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an individual home). Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 74%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Indian government has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films.

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

Any film not produced in the same language that is predominately spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice.

- **Price Fixing on Theatrical and Quotas:** The Indian government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.
- **Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.
- **Disruptive Content Control Rules for Television:** In August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated “U” can be broadcast on TV channels. This change was reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only “U” rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.
- **Service Taxes on Transfers of IP:** IIPA notes positively the addition of temporary transfers of IP rights to the Negative List, but also notes that litigation (Constitutional challenges filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts) remains pending for the 2010-2012 period. A further service tax has now been imposed on the “input”/production side (i.e., the services of actors, composers, and musicians) which cannot be offset, with negative effects on those who produce locally or are engaged in local co-productions.

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

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

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

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

TRAINING AND PUBLIC AWARENESS

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

GENERALIZED SYSTEM OF PREFERENCES

India enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). In 2011, India was the largest recipient of GSP preferences, with more than US\$3.73 billion worth of Indian goods entering the U.S. under the duty-free GSP code, accounting for almost 10.4% of its imports into the U.S. and around 20% of all U.S. imports under the program (US\$18.5 billion). In the first eleven months of 2012, more than US\$4.1 billion of India's exports to the U.S., or almost 11.1% of its total exports to the U.S., received duty-free treatment under the GSP code. India needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.



APPENDIX B

PricewaterhouseCoopers (for Motion Picture Distributors Association (India)), *Economic Contribution of the Indian Film and Television Industry 2010*, available at http://mpa-i.org/index.php/research_statistics.

March 2010

ECONOMIC CONTRIBUTION OF **INDIAN** FILM AND TELEVISION INDUSTRY

Prepared by PricewaterhouseCoopers for
Motion Picture Distributors Association (India)



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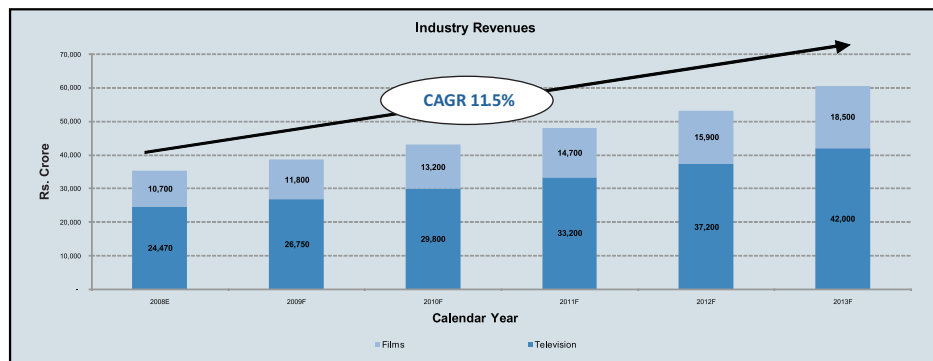
1. Executive Summary

This study on the "Economic Contribution of the Indian Film and Television Industry" has been conducted by Price waterhouseCoopers, for Motion Picture Distributors Association (India) ("MPDAI"), with the objective of highlighting the contribution of the film and television industry to the Indian economy. This overall contribution is based on the direct and indirect impact of the industry, on the economy, considering the spending, income and employment generated by the industry, and its effect on other related industries as well. The contribution has been estimated based on the financial performance of companies for the financial year 2008-09. **Please note the assumptions and limitations as specified in section 2 of this study.**

The key segments of the film and television industry covered in this study include:

1. Indian films
 - Hindi films
 - Key regional films
2. Indian television industry covering content production, broadcasting and distribution
3. U.S. /International films in India
4. Indian home video industry

The combined revenues of the Indian film and television industry were over Rs. 35,000 crores (USD 7.7 billion) in calendar year 2008. These are expected to grow at a CAGR of 11.5% over the period 2009 - 2013, reaching a size of over Rs. 60,000 crores (USD 13.2 billion).



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 1: Revenue Projections for the Indian Film and Television Industry

To quantify the economic contribution of the film and television industry, the following four measures have been used:

- **Gross Output:** This represents the total value of goods and services supplied by the entities in the industry. This is measured by the aggregate revenues of all companies in the industry.

Note: Gross Output as a measure, is different from the total consumer spend in the industry, and may vary based on the industry structure. However, the measures of "Gross Value Added", "Net Indirect Taxes" and "Employment" would remain the same, irrespective of industry structure. This has been further explained in the methodology section of this report.
- **Gross Value Added ("GVA"):** This factor measures the returns to labour and capital, i.e. the value of output generated by the entity's factors of production. This measure, along with the Net Indirect Taxes indicates the industry's contribution to the economy.
- **Net Indirect Taxes ("NIT"):** Indirect taxes (net of subsidies) paid by the industry.
- **Employment:** This measures the number of workers that are employed in the industry.

Table 1 provides a summary of the results of the economic impact study. The total Gross Output of the film and television industry is estimated to be **Rs. 92,645 crores** (USD 20.4 billion) for the year 2008-09.

The total contribution (direct and indirect), defined as the sum of the "Gross Value Added" and "Net Indirect Taxes", of the film and television industry was **Rs. 28,305 crores** (USD 6.2 billion) for the year 2008-09, which approximately constitutes **0.532 % of the Gross Domestic Product ("GDP") of India**. In comparison, the contribution of the Indian advertising industry constitutes 0.4% of the GDP of India. The employment generated by the industry was estimated to be **18.30 lakh (1.83 million) workers**.

Executive Summary

Table 1: Economic Impact (Direct and Total) of the Indian Film and Television Industry

	Gross Output (Rs. crores)		Contribution (GVA + NIT) (Rs. crores)		Employment (in lakhs)	
	Direct	Total	Direct	Total	Direct	Total
Indian Film Industry	12,312	20,467	2,932	6,846	1.4	4.2
Indian Television Industry	42,545	70,723	7,348	20,873	4.2	13.9
U.S. / International Film Industry in India	492	818	147	304	0.029	0.14
Home Video Industry	384	637	161	283	0.003	0.089
Total	55,733	92,645	10,587	28,305	5.7	18.3

Source: Industry estimates and PricewaterhouseCoopers analysis

From amongst the industries considered, the Indian television industry was estimated to have the largest economic contribution (Rs. 20,873 crores / USD 4.6 billion) and the highest employment generated (13.86 lakh / 1.38 million workers)

The film and television industry in India is one of the world's largest markets in terms of number of consumers and offers significant growth potential. Over the past few years the industry has experienced rapid double-digit growth and it is expected that this trend will continue in the future, thereby resulting in an increasing contribution to the Indian economy.

Table 2: Economic Impact (Direct and Total) of the Indian Film and Television Industry

	Gross Output (USD million)		Contribution (GVA + NIT) (USD million)		Employment (in thousands)	
	Direct	Total	Direct	Total	Direct	Total
Indian Film Industry	2,709	4,503	645	1,506	139	417
Indian Television Industry	9,361	15,561	1,617	4,592	424	1,386
U.S. / International Film Industry in India	108	180	32	67	3	14
Home Video Industry	84	140	35	62	0.3	9
Total	12,263	20,384	2,329	6,228	567	1,826

Source: Industry estimates and PricewaterhouseCoopers analysis

Note: exchange rate used Rs. 45.45/1 USD

2. Methodology, Approach and Assumptions

2.1. Measures of Economic Impact

The measures of economic impact that have been considered for the purpose of this study are:

- **Gross Output:** This represents the total value of goods and services supplied by the entities in the industry. This is measured by the aggregate revenues of all companies in the industry.

Note: While estimating Gross Output i.e. the aggregate revenues generated in the industry, there may exist an element of double counting. For example, if Firm A earned revenue of Rs. 100 crores and outsourced some activities to Firm B, for which it paid expenses of Rs. 50 crores (which is the revenue for Firm B), the combined Gross Output of Firms A and B would be Rs. 150 crores. However if Firm A were to conduct the activities itself and not outsource to Firm B, the Gross Output would be Rs. 100 crores (assuming Firm B earns revenue only from Firm A). Thus the Gross Output estimates could vary depending on the industry structure, however, the other measures- value added, Net Indirect Taxes and employment- would remain the same. The contribution to the Indian economy for a particular industry is measured by sum of the Gross Value Added parameter ("GVA") and Net Indirect Taxes ("NIT"), as explained below.

- **Gross Value Added ("GVA"):** This represents the returns to labour and capital, i.e. the value of output generated by an entity's factors of production. This measure, when combined with Net Indirect Taxes, indicates the industry's contribution to the economy, and consists of the following:
 - **EBITDA (Earnings before Interest, Taxation, Depreciation and Amortization)** - This is the total operating profits generated by the firm, and represents the income generated by the firm's capital inputs.
 - **Wages** - This measure represents the income generated by the firm's labour inputs.

Therefore, Gross Value Added = EBITDA + Wages

Note: Subsidies and incentives provided to an industry should be deducted from the Gross Value Added because they are a cost to the economy. For the purpose of this study, we have considered only the net reported revenue / earnings which excludes subsidies. Therefore the Gross Value Added estimate does not require adjustment.

- **Net Indirect Taxes ("NIT"):** Indirect taxes (net of subsidies) paid by the industry, are a contribution to the economy. This includes taxes such as Entertainment Tax, Service Tax, Value Added Tax etc.
- **Employment:** This measures the number of workers that are employed in the industry.
- **Multiplier Effect:** In addition to the direct impact of the industry, which is measured by estimating the economic indicators for the industry participants, there is also an indirect impact on other external sectors. This indirect impact is also called the multiplier effect, and together with the direct impact gives the total impact of the industry.

2.2. Our Approach

- **Gross Output and Gross Value Added:** For the purpose of this study, we have followed a bottom-up approach to estimate the economic measures of **Gross Output and Gross Value Added**. This approach involves the following:
 - The industry / sector value chain is considered, and the economic contribution is calculated for each stage of the value chain.
 - Total industry revenue and percentage break-up/flow of revenue for each stage is estimated based on PwC information / industry sources and reports.
 - For each stage, the following measures of economic activity are calculated:
 - Gross Output = Revenue
 - Gross Value Added = EBITDA + Wages
 - The above data is calculated for a sample of organisations based on information available in the public domain.
 - Based on the sample estimates, the values are extrapolated for the stage-wide Gross Output and Gross Value Added.

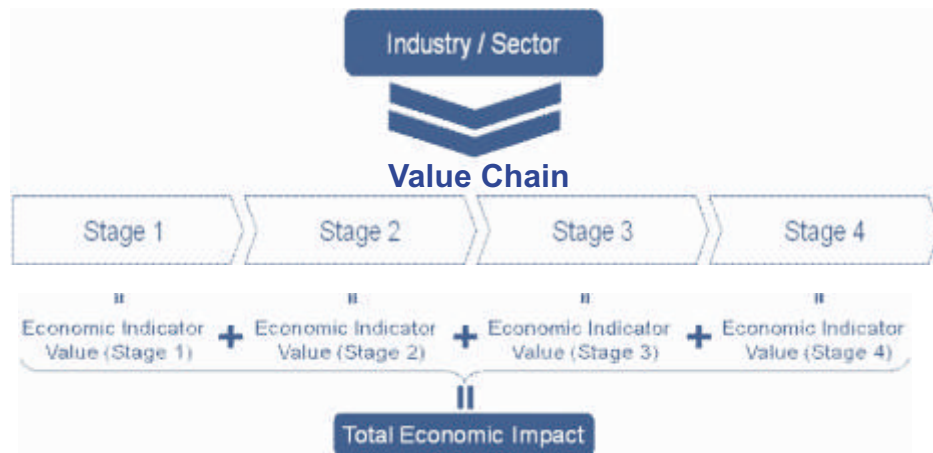


Figure 2: Overview of Approach (Calculating the Gross Output and Gross Value Added)

- **Indirect Taxes:** As certain segments of the film and television industry are largely unorganised, it is difficult to estimate the indirect taxes contributed by the industry. Accordingly, Entertainment Tax estimates have been arrived at based on the actual / budgeted collections by the Government.

Other tax categories such as VAT and Service Tax have not been considered in detail, as the industry-wise tax collections for these categories are not available. In such cases, estimates have been arrived at based on an extrapolation of information obtained through discussions with industry representatives.

In certain cases, due to non-availability of relevant information, the estimates of indirect taxes have been derived based on the overall "Net Indirect Taxes (NIT) to Gross Output" ratio calculated from the **"Input Output Transactions Table (2003-04)" - Matrix 1 (Provided by the Central Statistical Organisation)** for the sector classified as IOTT Sector No: 129 ("Other Services"). This classification covers recreation & entertainment, radio and TV broadcasting services, among others. This ratio has then been applied to the relevant industry Gross Output estimates.

Note: The assumptions for different segments are listed in section 2.4. These estimates may vary significantly from actual tax collections, especially for segments with a large number of unorganised players.

- **Employment:** For estimating the employment generated by each sector, the overall average Gross Value Added ("GVA") per worker has been considered and applied to the industry GVA to arrive at the employment generated. The estimate for average GVA per worker has been obtained from the **National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round)** for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)". Since the Indian film and television industry is primarily based in urban India, the ratios relevant to the "Urban" sector have been considered.

Note: The NSSO report estimates that at an overall level, 90 percent of the workers in urban India are full-time, and 10 percent are part-time workers.

In some cases where industry information is available, the direct employment generated has been estimated based on the ratio of average number of employees per Rs. lakh of revenue. This ratio has been derived from the sample information obtained for select companies within a particular segment, and then extrapolated for the overall segment revenue, to arrive at the employment generated.

Note: The assumptions for different segments are listed in section 2.4.

- **Indirect Impact:** The **Gross Output multiplier** for the industry has been obtained from the **"Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization)** for the sector classified as IOTT Sector No: 129 ("Other Services"). This classification covers recreation & entertainment, radio and TV broadcasting services, among others.

The indirect impact on **GVA** and **NIT** has been calculated based on the "GVA to Output" ratio and the "NIT to Output" ratio respectively, also derived from the Input Output Transactions Table (2003-04) - Matrix 1.

Methodology, Approach and Assumptions

The indirect impact of employment has been estimated, assuming the overall average GVA per worker for all the service categories, obtained from the **National Sample Survey Organization Report ('NSSO') on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round)**. The ratios relevant to the "Urban" sector have been considered.

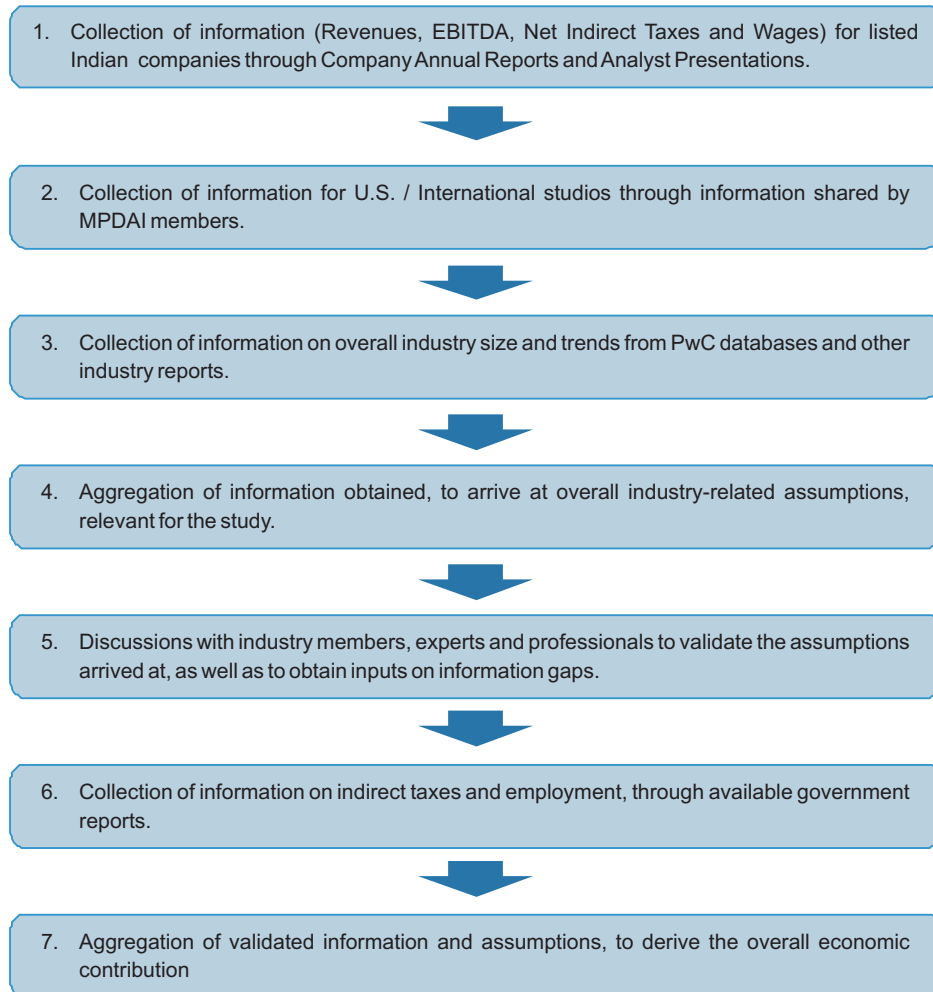
Note: The estimation of indirect impact based on the above approach is only a broad approximation, as industry specific multipliers are not available. Multipliers from other countries have not been considered, as the structure and functioning of the Indian film and television industry is quite unique, as compared to other developed nations and hence not comparable.

- The study has been based on company performance for the financial year 2008-09. However the figures for industry consumer and advertising spend used in the report, pertain to the calendar year 2008. We have assumed these calendar year figures to be representative of the industry size in the financial year as well.
- The exchange rate considered for conversion to US Dollars is Rs. 45.45 /USD, the average exchange rate for the Financial Year 2008-09. Currency figures are rounded off to the nearest crores / million.
- India's GDP for 2008-09, at current prices was **Rs. 53,21,753 crores**. As the study is based on company performances for the financial year 2008-09, we have used the GDP for 2008-09 and not 2009-10.

(Source: Economic Survey 2008-09, Ministry of Finance, Government of India)

2.3. Information Collation and Validation

For this study, the collation and validation of information, was based on the following steps:



Note: We have not independently verified the accuracy of information provided to us, and have not conducted any form of audit in respect of organisations that have provided the information necessary to undertake this assignment. Accordingly, we express no opinion on the reliability, accuracy, or completeness of the information provided to us and upon which we have relied. The statements and analysis expressed herein have been made in good faith, and on the basis that all information relied upon is true and accurate in all material respects, and not misleading by reason of omission or otherwise. The statements and analysis expressed in this report are based on information available as at the date of the report. We reserve the right, but will be under no obligation, to review or amend our Report, if any additional information, which was in existence on the date of this report was not brought to our attention, or subsequently comes to light.

2.4. Key Assumptions / Limitations

- **Overall**
 - Estimates of indirect economic contribution would be difficult to state due to a lack of appropriate multipliers in India. As a result, approximations from the broader industry classification have been used on an overall basis.
 - The effect of piracy has not been considered in the scope of this study.
- **Indian Film Industry**
 - Estimates of Entertainment Tax, is based on the overall budgeted Entertainment Tax collection by the Government, as per Indian Public Finance Statistics Report 2008-2009. Based on our discussions with industry representatives, we estimate that approximately 80-90 percent of total Entertainment Tax collections are from the film exhibition segment.
There may be an additional impact on indirect taxes from other categories such as VAT and Service Tax - however, due to the absence of relevant industry-wise information, this has not been considered in the analysis for this segment.
 - The impact of revenue generated from the film music industry has been considered as a part of the ancillary revenues earned by the film producer. The remaining part of the value chain of the Indian music industry has not been covered in this analysis.

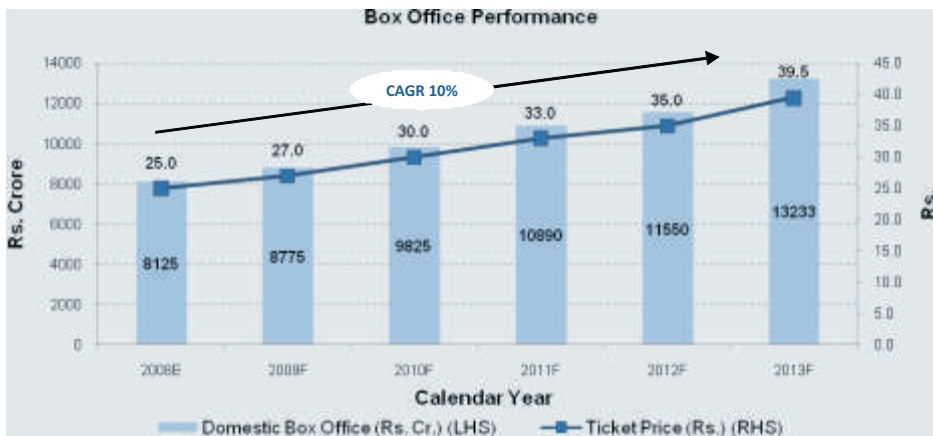
Methodology, Approach and Assumptions

- o Direct employment estimates have been arrived at based on the average Gross Value Added per worker for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)" from the National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).
- **Indian Television Industry**
 - o Film production, has not been considered, as part of the television industry value chain, inspite of being a source of content for television. The value-added and output from this segment has been considered in the "Indian film industry" economic contribution. Therefore, production houses producing only TV content have been considered.
 - o There are multiple channels available, covering multiple languages and genres. Since the variety of channels is extensive, large players with a portfolio of channels across multiple genres and languages have been assumed to be representative of the overall broadcasting segment.
 - o Due to its unorganised nature, economic measures such as revenue, operating margins and wages for the Local Cable Operators ("LCOs") have been derived based on discussions with industry experts.
 - o The overall share of subscription revenue for cable television, between Broadcasters, Multi-System Operators and Local Cable Operators, has been assumed based on the prescribed revenue share arrangement by TRAI for CAS areas. The revenue share arrangement in non CAS areas has not been considered separately, as it may vary significantly on location or operator basis.
 - o Indirect taxes have been assumed at 2 percent of revenue based on the NIT / Output Ratio for the overall sector 129 ("Other Services") in the Input Output Transactions Table (2003-04), developed by the Central Statistical Organization.
 - o Direct employment estimates have been arrived at based on the average Gross Value Added per worker for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)" from the National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).
- **U.S. / International Film Industry in India**
 - o The average net profit margin earned by the International production houses has been deducted from the average EBITDA margin - for the calculation of EBITDA/ GVA. This is based on the assumption that most of this profit is repatriated to the studios' home country.
 - o Estimation of indirect taxes is based on the average taxes paid as a percentage of revenue for a sample list of organizations, and subsequently extrapolated for the overall industry.
 - o Estimation of the employment generated in this industry, is based on the average number of employees per lakh of revenue, for the segments considered (based on a sample list of organizations).
- **Home Video Industry**
 - o This analysis covers the overall distribution of home video titles in India, considering all languages.
 - o For our analysis, the segments related to the retail sale and rental of CDs and DVDs has not been considered, as these segments are largely unorganised.
 - o Indirect taxes have been assumed at 2 percent of revenue based on the NIT / Output Ratio for the overall sector 129 ("Other Services") in the Input Output Transactions Table (2003-04), developed by the Central Statistical Organization.
 - o Estimation of the employment generated in this industry, is based on the average number of employees per lakh of revenue, for the segments considered (based on a sample list of organizations).

3. The Indian Film Industry

3.1. Overview

On an overall basis, the size of the Indian film industry is estimated at Rs. 10,700 crores (USD 2.5 billion) in 2008 and is expected to grow at a CAGR of 11.5% over the period 2008-2013. Out of Rs. 10,700 crores, domestic box-office collections accounted for Rs. 8,130 crores (USD 1.8 billion) with overseas box-office, ancillary rights and home video making up the balance.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 3: Projected Box Office Performance for the Indian Film Industry

Domestic box office collections are projected to increase to Rs. 13,000 crores (USD 2.8 billion) by the year 2013, growing at a CAGR of 10%. This growth is primarily attributable to the growth in average ticket prices, projected to increase from Rs. 25 (USD 55 cents) in 2008 to Rs. 40 (USD 88 cents) by 2013.

Some of the key trends in this industry include:

- **Growing industry size** - The growth in India's per capita income coupled with an increasing tendency to spend on discretionary items has led to a larger audience and consumption market for the industry. As a result, many new players have entered this segment and the existing players are

focusing on expanding their own portfolio. For example, Yash Raj Films, one of India's most well known and respected film production houses, has recently started production of television serials for Sony Television.

- **Largest number of movie releases in the world** - India is one of the largest producers of films in the world, in terms of number of films produced. This coupled with the growing international movie market in India has led to the Indian consumer having access to a huge variety of content.
- **Piracy impacting returns¹** -The Indian film industry is significantly impacted by online piracy. A study undertaken by Motion Picture Distributors Association (MPDAI) has put India among the top ten countries in the world, where online piracy is at its highest. Hollywood (English Films), Bollywood (Hindi Films), Tollywood (Telugu Films) and Kollywood (Tamil Films) are the prime victims of the crime. Research has shown that online piracy of film and television content in India is mainly through file sharing networks. For example, Vishal Bharadwaj's Kaminey was downloaded a record number of times (estimated at 350,000 times) in India and abroad. The situation is equally bad for regional language films with 88 percent of Telugu and 80 percent of Tamil films being downloaded from the internet.
- **U.S. / International studios in India** - Hollywood and other international players have been making determined efforts to enter and consolidate their positions in India. Their endeavours have ranged from joint productions (for example Warner Bros. joint production with Ramesh Sippy for Chandni Chowk to China , Walt Disney's joint production with Yash Raj Films for Roadside Romeo and others) to international films being released in English and regional languages. Hollywood/ international efforts to dub their films in Indian regional languages has been an attempt to reach out to a wider audience and boost box-office numbers and this effort has been very successful in the recent past.

¹Source:
● www.businessofcinema.com

- **Exhibition facilities** - The expansionary tendencies of the multiplexes and the growing demographic trend of increasing consumer spend on entertainment has led to multiplexes expanding into other properties. However, the recession in FY 2008-09 and the high cost of developing property has led to a slow down in the rate of expansion with different operating models (like managing mall properties) being explored. The ability of better facilities to attract audiences has also caused many single screens to upgrade their premises.
- **Better realization for producers in FY 2009-10** - The agreement of higher revenue share from exhibitors post the exhibitor-producer strike as well as more accurate reporting of ticket sales has led to improved realization for producers. With many exhibitors now opting for digitization of content and computerized ticketing, the reduction in under reporting of revenue and cost of prints has improved profitability. Additionally, the digitization of content has led to an ability to service a large geography in a timely manner which has helped in reducing piracy.
- **Entertainment Tax exemptions** - The Entertainment Tax exemption provided by the State Governments has served as an incentive for multiplex expansion and as a result, most multiplex properties have been functioning under subsidies on Entertainment Tax. With the expiry of these subsidies, we can expect a drop in realisations over the next 5 years creating changes in the profit and loss account structure of such exhibitors.
- **New distribution platforms** - With digital content gaining ground as the preferred media, it is natural that other digital delivery mechanisms would also be explored. Coupled with an audience willing to experience new delivery streams, this has led to a convergence of media enabling content on mobile phones, MP3 players and computers. This in turn has led to higher realizations for content producers and added new players in the distribution chain.

3.1.1. Regional Films in India

Mainstream cinema in India is dominated by Hindi language films which typically make up a significant portion of total domestic box-office collections. However, over the last few years, regional language films have been growing in popularity with releases in a greater number of theatres both within and outside the Indian Territory.

Within regional languages, the South-Indian segment is an important market in terms of number of film releases with the four southern states comprising Andhra Pradesh, Tamil Nadu, Karnataka and Kerala together accounting for a majority of the total number of film releases in India. Other regional language markets in India include films made in Bengali, Bhojpuri, Marathi, Punjabi etc. The total domestic box-office collections from regional language films in India are estimated to be about **Rs. 1,508 crores**.

3.2. Economic Contribution of the Indian Film Industry

3.2.1. Direct Contribution

The direct contribution of the Indian film industry is estimated at Rs. 2,931 crores (USD 645 million), comprising of Gross Value Added ("GVA") amounting to Rs. 2,132 crores (USD 469 million) and Net Indirect Taxes being Rs. 800 crores (USD 176 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 12,312 crores (USD 2.7 billion).

In our analysis, we estimate that Entertainment Tax paid by the industry to be Rs. 1,010 crores (USD 222 million) as per Indian Public Finance Statistics Report 2008 - 09. Based on our discussions with industry representatives, we estimate that approximately 80-90 percent of total Entertainment Tax collections are from the film exhibition segment. There may be an additional impact on indirect taxes from other categories such as VAT and Service Tax - however, due to the absence of relevant industry-wise information, this has not been considered in the analysis for this segment.

The Indian Film Industry

The following table highlights the contributions across the value chain:

Table 3: Direct Impact of the Indian Film Industry

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. crores	USD million	Rs. crores	USD million	Rs. Crores	USD million	Rs. crores	USD million
Film Production and Distribution	3,201	704	463	102	241	53	704	155
Film Exhibition								
Hindi	7,393	1,627	701	154	466	103	1,167	257
Tamil	711	156	62	14	40	9	103	23
Telugu	579	127	51	11	33	7	84	18
Kannada	29	6	2	1	2	0	4	1
Others	400	88	35	8	35	8	70	15
Total	12,312	2,709	1,315	289	817	180	2,132	469

The total value added by the film industry is taken as the sum of GVA as above (Rs 2,132 crores) and Net Indirect Taxes (NIT) paid. Based on the analysis of available information, the NIT paid by the film industry is estimated to be Rs. 800 crores (USD 1.7 billion).

Thus, total Direct Economic Contribution (GVA + NIT) of the Indian Film Industry is estimated to Rs. 2,931 crores (USD 645 million).

Table 4: Direct Economic Contribution of the Indian Film Industry

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		Employment
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	
Indian Film Industry	12,312	2,709	2,132	469	800	176	1.4

3.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect and total impact of the film industry is estimated to be as below:

Table 5: Total Contribution of the Indian Film Industry (Rs. Crores)

	Gross Output		Contribution (GVA + NIT)		Employment Lakhs
	Rs. Crores	USD Million	Rs. Crores	USD Million	
Direct Impact	12,312	2,709	2,932	645	1.4
Indirect Impact	8,154	1,794	3,914	861	2.8
Total Impact	20,467	4,503	6,846	1,506	4.2

Table 6: Multipliers for Indirect Impact of the Indian Film Industry

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").

The Indian Film Industry

- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

Thus, the economic impact of the Indian film Industry is estimated at Rs. 6,846 crores (USD 1.5 billion) which is approximately 0.13% of GDP. The estimated total employment generated by the Indian film Industry is estimated at 4.2 lakh (0.42 million) workers.

4. The Indian Television Industry

4.1. Overview

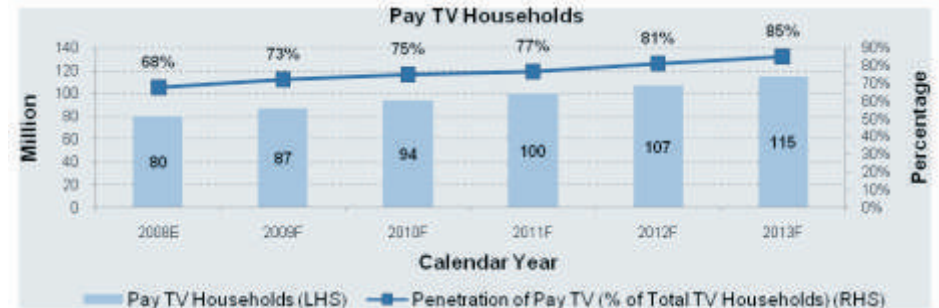
The Indian television industry has grown at a healthy rate of 17.4% (CAGR) over the period 2004-08, to an estimated size of Rs. 24,470 crores (USD 5.4 billion) in 2008. Of the total industry revenues, approximately 60 percent is contributed via television subscription income. The other major revenue contributor to the industry revenues is television advertising income. As shown in the figure below, the industry is projected to increase to a size of Rs. 42,000 crores (USD 9.2 billion) by 2013, thus growing at a CAGR of 11.4%.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 4: Revenue Trends for the Indian Television Industry

The growth in the television industry is driven primarily by the increasing penetration of DTH (Direct-to-home) and Cable television homes in the country. The number of pay-television households in India is projected to reach 115 million households by 2013 and projected to penetrate 85 percent of total television households in India. The average ARPU (average-realisation per user) is also projected to increase to Rs. 180 (USD 4) per month.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 5: Pay TV Households in India

Some of the key trends in this industry include:

- Increased fragmentation in viewership:** Viewership, especially in the Hindi general entertainment genre, is increasingly getting fragmented as a result of a large number of such channels being broadcast in India. However, a few players continue to dominate the market, commanding a significant share of the industry segment revenues.
- Increased competition amongst broadcasters:** With new channels being introduced at regular intervals, there is increased competition amongst broadcasters, for viewership and advertising revenue. This coupled with high content and marketing costs is expected to impact the profitability of broadcasters in the medium to long term.
- Increasing penetration of DTH (Direct-to-home):** There has been rapid growth of DTH subscribers in the last year, albeit from a relatively smaller base. This trend is expected to continue over the next few years. However, operating profits are still negative for the industry, due to high customer acquisition costs, and is expected to remain this way until a critical mass of subscribers is reached.
- Acquisition of LCOs:** Cable television distribution in India is dominated by Local Cable Operators ("LCOs") which are largely unorganised in nature. During recent times, Multi-System Operators ("MSOs") have started acquiring LCOs to gain greater control over the distribution network and prevent revenue leakage.

4.2. Economic Contribution of the Indian Television Industry

4.2.1. Direct Contribution

The direct contribution of the Indian television industry is estimated at Rs. 7,348 crores (USD 1.6 billion), comprising of Gross Value Added ("GVA") amounting to Rs. 6,497 crores (USD 1.4 billion) and Net Indirect Taxes being Rs. 851 crores (USD 187 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 42,545 crores (USD 9.4 billion).

The television broadcasting segment is the largest contributor, in terms of GVA, primarily due to higher operating margins. While the television distribution segment is the largest in terms of Gross Output, but due to significantly lower operating margins, the GVA of the segment is relatively low. However, the distribution segment contributes the most, in terms of wages. The television production segment, a relatively smaller segment, is low both in terms of Gross Output and GVA. The following table highlights the contributions across the value chain:

Table 7: Direct Impact of the Indian Television Industry

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. Crores	USD Million	Rs. Crores	USD Million	Rs. Crores	USD Million	Rs. Crores	USD Million
TV Production	1,500	330	120	26	60	13	180	40
TV Broadcasting	15,283	3,363	3,057	673	1,375	303	4,432	975
TV Distribution	25,763	5,668	(149)	-33	2,033	447	1,885	415
Total	42,545	9,361	3,028	666	3,469	763	6,497	1,429

The total value added by the television industry is taken as the sum of GVA as above (Rs 6,497 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the television industry is estimated to be Rs. 851 crores (USD 187 million).

Thus, total Direct Economic Contribution (GVA + NIT) of the Indian Television Industry is estimated at Rs. 7,348 crores (USD 1.6 billion).

Table 8: Direct Economic Contribution of the Indian Television Industry

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		lakhs
	Rs. crores.	USD million	Rs. crores.	USD million	Rs. crores.	USD million	
Indian Television Industry	42,545	9,361	6,497	1,429	851	187	4.24

4.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the television industry is estimated to be as below:

Table 9: Economic Impact of the Indian Television Industry

	Gross Output		Contribution (GVA + NIT)		Employment Lakhs
	Rs. crores.	USD million	Rs. crores.	USD million	
Direct Impact	42,545	9,361	7,348	1,617	4.24
Indirect Impact	28,178	6,200	13,525	2,976	9.62
Total Impact	70,723	15,561	20,873	4,592	13.86

Table 10: Multipliers for Indirect Impact of the Indian Television Industry

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

The Indian Television Industry

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

Thus, the economic impact of the Indian television industry is estimated at Rs. 20,873 crores (USD 4.6 billion) which is approximately 0.39% of GDP. The estimated total employment generated by the Indian television industry is estimated at 13.86 lakh (1.38 million) workers.

5. U.S. / International Film Industry in India

5.1. Overview

The U.S. / International film industry in India had an estimated size of Rs 300 crores (USD 66 million) in FY 09 and is expected to increase steadily going forward. This industry revenue consists of the box office collections of U.S. / International films released in India in FY 09.

Some of the key trends in this industry are² :

- U.S. / International cinema appealing to Indian masses -U.S. / International films are making a mark with the Indian masses and are no longer confined to audiences in metro and large cities. Dubbed versions of U.S. / International films are appealing to the Indian masses staying in small towns and villages.
 - 2012 turned out to be a huge hit in India in 2009, with box office collections of over Rs 90 crores, surpassing the previous highest grossing Hollywood film in India, Spiderman-3. The film had the widest release ever for a Hollywood film with a total count of 766 prints in English, Hindi, Tamil and Telugu. The film proved successful in both urban multiplex cinemas and traditional single screen cinemas in small towns and villages.
 - For Spider-Man 3, Sony had released 558 prints across the country. Of these, 261 prints were in Hindi, 162 in English, 156 in Tamil and Telugu, three special IMAX prints, and six, in Bhojpuri. It was a first for a Hollywood movie. A three-month long marketing campaign covered nine metros and nearly 70 small towns. The Bhojpuri version of the movie ran to packed houses at halls in Bihar's interiors.
 - Hollywood blockbuster Avatar, has grossed over Rs 100 crores in India, making it the biggest ever film for Fox in India after breaking Titanic's record collections of Rs. 55 crores. As discussed below, Avatar heralds the trend for viewers to pay higher prices for a 3D movie experience.
- **Children films** - A recent trend has been the release of children films by U.S. / International studios in India in the summer season and their success at the box office. Bollywood produces lesser number of such children films where Hollywood has taken lead in India. Last year, the two stars of Hollywood for

Indian summer were Harry Potter and Night at the Museum.

- Night at the Museum, a 20th Century Fox release, grossed Rs 2.3 crores in India over its opening weekend and about Rs 4 crores overall.
- Harry Potter, an all time children's favourite, grossed about Rs. 20 crores. Warner Bros released Harry Potter & the Half Blood Prince with 350 prints and 450 screens in India.

²Sources:

- www.businessofcinema.com
- www.livemint.com
- www.boxofficemojo.com
- www.exchange4media.com

Past Trends³:

- **Global players' entry into the Indian Film business** - Walt Disney produced and released its first film in India in 2008 with Yash Raj Films, Roadside Romeo, a full-length animation feature film. Tamil superstar Kamal Haasan also starred in two Disney productions - Marmayogi and 19 Steps. Disney also bought the home video rights of Aamir Khan's directorial debut Taare Zameen Par for release in the US.
- Warner Bros released its film made in association with Ramesh and Rohan Sippy: Chandni Chowk to China in January 2009. It ventured in India as distributors with the film Saas, Bahu Aur Sensex. Warner Bros also signed a three-movie deal with People Tree Films and a one film tieup with Tandav Films. The production house has also brought in internationally acclaimed Indian filmmaker Shekhar Kapur to direct a USD 200 million Hollywood fantasy-epic Larklight.
- Fox STAR Studios tied up with Vipul Shah for a multiple-film exclusive deal.
- Mexican global multiplex operator Cinapolis announced plans to invest Rs 1,700 Cr in India for its film exhibition business over the next seven years. It has already established an Indian subsidiary that is in talks with mall developers for opening 500 movie screens by 2016. In the first phase of expansion, the company plans to invest Rs 370 Cr for opening 110 screens across eight locations. In July 2009, the exhibition chain tied up with Advance India Projects Limited (AIPL), to set up its property in their mall project in Amritsar.

Future trends³:

- **3D movies** - The success of Avatar has paved the way for 3D cinema in India. 3D presentations have accounted for 81 percent of Avatar's gross box office collection. That is by far the largest 3D gross ever, and "Avatar" is effectively most people's first sampling of the new 3D technology. With the release of Avatar, 3D screens in India have seen a rise in cities like Mumbai, Delhi, Pune, Bangalore, Chennai and Hyderabad as well as in smaller centres like Coimbatore, Amritsar, Kerala, Jaipur and Ahmedabad.

³Sources:

- www.businessofcinema.com
- www.livemint.com
- www.boxofficemojo.com
- www.exchange4media.com



5.2. Economic Contribution of the U.S. / International Film Industry in India

5.2.1. Direct Contribution

The direct contribution of the U.S. / International film industry is estimated at Rs. 147 crores (USD 32 million), comprising of Gross Value Added ("GVA") amounting to Rs. 97 crores (USD 21 million) and Net Indirect Taxes being Rs. 50 crores (USD 11 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 492 crores (USD 108 million). The following table highlights the contributions across the value chain:

Table 11: Direct Impact of the U.S. / International Film Industry in India

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. crores	USD million	Rs. Crores	USD million	Rs. Crores	USD million	Rs. crores	USD million
Film Production and Distribution	98	22	5	1	7	1	12	3
Film Exhibition	394	87	50	11	36	8	85	19
Total	492	108	55	12	43	9	97	21

The total value added by the U.S. / International film industry in India is taken as the sum of GVA as above (Rs 97 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the U.S. / International film industry in India is estimated to be Rs. 50 crores (USD 11 million).

Thus, total Direct Economic Contribution (GVA + NIT) of the U.S. / International Film Industry in India is estimated at Rs. 147 crores (USD 32 million).

Table 12: Direct Economic Contribution of the U.S. / International Film Industry in India

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		Employment lakhs
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	
International Film Industry	492	108	97	21	50	11	0.029

5.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the U.S. / International film industry in India is estimated to be as below:

Table 13: Economic Impact of the U.S. / International Film Industry in India

	Gross Output		Contribution (GVA + NIT)		Employment lakhs
	Rs. crores	USD million	Rs. crores	USD million	
Direct	492	108	147	32	0.029
Indirect	326	72	157	34	0.11
Total	818	180	304	67	0.14

Table 14: Multipliers for Indirect Impact of the U.S. / International Film Industry in India

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").

- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

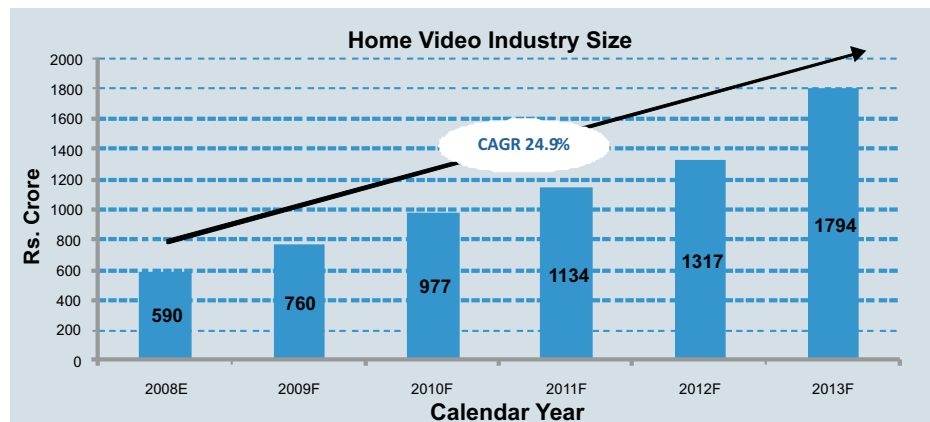
Thus, the economic impact of the U.S. /International film industry in India is estimated at Rs. 304 crores (USD 67 million) which is approximately 0.006% of GDP. The estimated total employment generated by the U.S. /International film industry in India is estimated at 0.14 lakh (0.01 million) workers.

6. Home Video Industry

6.1. Overview

The Home Video market has grown at a healthy rate of 14.3% over the period 2004-2008, to an estimated size of Rs. 590 crores (USD 130 million) in 2008. As shown in the figure below, the industry is projected to increase to a size of Rs. 1,794 crores (USD 395 million) by 2013, thus growing at a CAGR of 24.9%.

The home video market is driven primarily by new film content in Hindi (informally referred to as 'Bollywood' films) and other Indian languages.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 6: Growth of Home Video Industry in India

Some of the highlights of this industry are:

- Changing Business Models** - The home video market is converting to sell-through from rental, which constituted 100 percent of sales in 2004. By 2013, sell-through is expected to constitute 92 percent of the market. Sell-through spending will jump from about Rs. 180 crores (USD 40 million) in 2008 to about Rs.1,650 crores (USD 363 million) in 2013. The migration to sell-through is leading to sharp declines in rental spending. Rental spending dropped by 41 percent in 2008.

- This change in business models was spurred by the entry of Moser Baer in the market in 2007. Moser Baer slashed the retail prices of its DVDs and VCDs to the levels at which pirated products were sold and rented. As a result of this disruptive strategy, other players in the business were also forced to slash their prices to similar levels as Moser Baer. This boosted the sell-through market as DVDs were now available to consumers at low prices.
- This severely impacted on margins as the content acquisition prices for home video were at similar levels. However, the retail prices are now being increased to appropriate levels and the home video market is expected to grow at a CAGR of 25 percent over the next five years.
- The online rental market is growing steadily but is still at a significantly smaller scale as compared to the physical sell-through model. It does not pose a serious threat to physical sales over the next five years.
- Piracy is the biggest risk the home video industry faces. Piracy is being curbed with digitisation, shortening of the release window between theatre and home video release and government regulation such as the Copyright Act.
- Key Players** - The home video market is dominated by a few large participants such as Moser Baer, EROS, Big Home Video and Excel Home Video.
 - Moser Baer - Moser Baer is one of India's leading technology companies with interests in storage media, photovoltaic, entertainment and IT peripherals, and consumer electronics. It currently offers home video titles in 18 major Indian languages and has acquired the rights for close to 10,000 titles. It is estimated to hold approximately 33 percent market share.
 - EROS International - Eros International plc is a global player in the rapidly expanding Indian media and entertainment arena. Eros not only produces and commissions film projects but also globally distributes films across all formats including cinemas, digital and home entertainment and television syndication. Eros has a catalogue of over 1,900 film titles and about 20 percent market share.

Home Video Industry

- o Big Home Video - BIG Music & Home Entertainment is a Reliance Big Entertainment Company. It started operations in 2008. The company is the exclusive licensee for distribution & marketing of all titles on Home Video for Warner Home Video, Paramount Home Entertainment, Dreamworks Studios and Universal Studios Home Entertainment. The company also forayed into regional home video by acquiring selective prestigious titles. It has built and consolidated an impressive depth and width in distribution, along with localization of International content, with dubbing of English films in 6 regional languages.
- o Excel Home Video - Excel Home Videos is the home entertainment distribution and marketing arm of Excel Productions Audiovisuals Pvt. Ltd. Excel is focussed on international movies and holds about 40 percent market share in that segment.
- o Reliance BigFlix, Showtime and Moviemart are movie rental companies.
- **Future Trends** - Over the longer run, growth in Blu-ray high definition ("HD") videos will offset a declining DVD market and propel overall sell-through. Rental company Movie Mart launched its online Blu-ray disc renting and selling facility in 2009. It is the first online Blu-ray discs renting website in India.

6.2. Economic Contribution of the Home Video Industry

6.2.1. Direct Contribution

The direct contribution of the home video industry is estimated at Rs. 161 crores (USD 35 million), comprising of Gross Value Added ("GVA") amounting to Rs. 153 crores (USD 34 million) and Net Indirect Taxes being Rs. 8 crores (USD 1.7 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 384 crores (USD 84 million). The following table highlights the contributions across the value chain:

Table 15: Direct Economic Contribution of the Home Video Industry

	Gross Output		EBITDA		Wages		Gross Value Added (GVA) = EBITDA + Wages		Net Indirect Taxes		Employment
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	lakhs
Home Video Distribution	384	84	107	23	46	10	153	34	8	1.7	0.00272

The total value added by the home video industry is taken as the sum of GVA as above (Rs 153 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the home video industry is estimated to be Rs. 8 crores (USD 1.7 million).

Thus, total Direct Economic Contribution (GVA + NIT) of the home video industry is estimated at Rs. 161 crores (USD 35 million).

6.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the home video industry is estimated to be as below:

Table 16: Economic Impact of the Home Video Industry

	Gross Output		Contribution (GVA + NIT)		Employment
	Rs. Crores	USD million	Rs. crores	USD million	lakhs
Direct Impact	384	84	161	35	0.0027
Indirect Impact	254	56	122	27	0.087
Total Impact	637	140	283	62	0.089

Table 17: Multipliers for Indirect Impact of the Home Video Industry in India

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

Thus, the economic impact of the home video industry is estimated at Rs. 283 crores (USD 62 million) which is approximately 0.005% of GDP. The estimated total employment generated by the home video industry is estimated at 0.089 lakh (0.008 million) workers.

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APPENDIX C

BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, available at http://portal.bsa.org/piracyimpact2010/cps/cp_india_english.pdf.

PIRACY IMPACT STUDY: ECONOMIC BENEFITS OF REDUCING SOFTWARE PIRACY



India

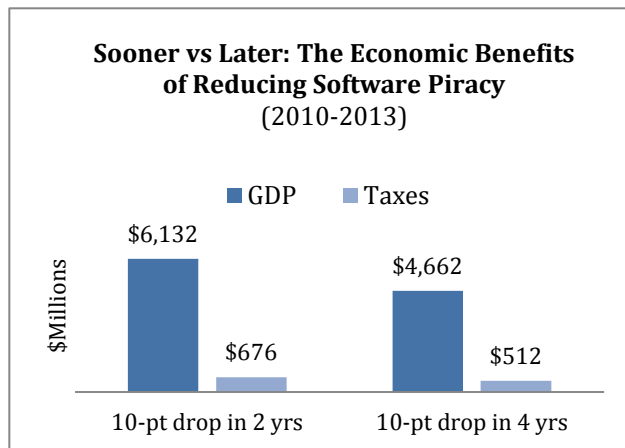
PROFILE

Reducing software piracy stimulates spending throughout the economy—and the faster software theft is addressed, the greater the benefit.

65 percent of software installed on personal computers (PC) in India last year was pirated, representing a commercial value of US\$2 billion. Yet the ripple effects of this theft go beyond the software publishing industry, depriving local distributors and service providers of spending that creates jobs and generates new tax revenues.

Reducing software piracy has the reverse effect, sending ripples of stimulus through the information technology (IT) sector and broader economy. This study, "The Economic Benefits of Reducing Software Piracy," produced by IDC and BSA, documents the economic impact of reducing PC software piracy in India:

- Reducing the PC software piracy rate in India by 10 percentage points in four years would deliver: **US\$4.66 billion in new economic activity; 59,728 new IT jobs; and US\$512 million in additional tax revenues** by 2013.
- Front-loading the benefits by reducing software piracy 10 points in the first two years of the same four-year period compounds the economic benefits by 32 percent, delivering: **US\$6.13 billion in new economic activity and US\$676 million in new tax revenues** to support essential local services.



The findings show that concerted action to reduce software piracy in India should be a priority — sooner rather than later.

Economic Impact of Reducing PC Software Piracy in India (2010-2013)

	New Jobs	Added GDP(M)	New Tax Revenues (M)
10 point drop in 4 years	59,728	US\$4,662	US\$512
10 point drop in the first 2 of 4 years	59,728	US\$6,132	US\$676

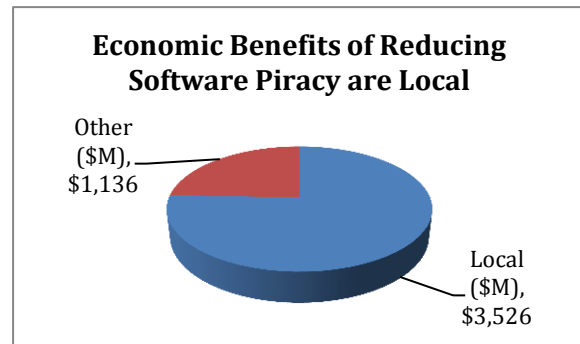
The Big Picture: Software & the Indian Economy

The IT sector already is a major contributor to the Indian economy. In 2009:

- The IT industry supported 842,078 highly skilled, high-paying jobs in India.
- IT companies and their employees paid US\$2.2 billion in taxes.

Just as IT helps drive the economy, software drives IT. Spending on software has a ripple effect on the broader IT industry because selling, servicing and supporting software creates downstream economic activity.

Because of software's unique role as a revenue generator for local service and distribution companies, most of the benefits of reducing software piracy remain in the country. **In India, IDC finds that 76 percent of the added GDP from a four-year, 10-point drop in piracy would remain in the market.**



76% of added GDP from a 10 point drop in piracy accrues to the local market

BSA Blueprint for Reducing Software Piracy

Reducing software piracy is a proven way for governments to stimulate the economy. BSA's blueprint for reducing software piracy involves five key steps:

- Increase public education about the value of intellectual property (IP) and the business value of software asset management (SAM) to manage software licenses.
- Implement the World Intellectual Property Organization's Copyright Treaty to create an effective legislative environment for copyright protection, online and offline.
- Create strong and workable IP enforcement mechanisms, as required by the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights Agreement, and provide for vigorous enforcement of misappropriation and infringement of new software innovations, such as cloud computing technologies.
- Strengthen enforcement with dedicated resources, including specialized IP enforcement units, and improve cross-border cooperation among law enforcement agencies.
- Lead by example through active SAM policies, and promote the use of legal software by government agencies, state-owned enterprises, contractors and suppliers.

About the Study

"The Economic Benefits of Reducing Software Piracy" quantifies the economic impact of reducing PC software piracy in 42 countries representing 93 percent of the packaged software market. For more information and a description of the study methodology, see the full report at www.bsa.org/piracyimpact