

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2020.¹

Executive Summary: India plays an important role in the future growth of the U.S. creative industries, with its growing population of consumers and its status as the second largest market worldwide for Internet services and smartphones. The promise of growth, however, is threatened by piracy, market access barriers, overbroad interpretations of statutory licenses for broadcasting musical works and sound recordings, criminal enforcement difficulties and legal requirements that are out-of-step with technological developments.

India's rampant piracy takes many forms, all of which undermine the growth of the Indian marketplace for creative materials. The Government of India, in combination with industry, continued to take significant steps in 2019 to improve enforcement. In 2019, the Delhi High Court established permanent site blocking as a remedy to curtail online infringement in India in *UTV Software Communication Ltd. v. 1337x.TO* and in a slate of follow-on cases. The court's decision to issue "dynamic" orders that allow for the inclusion of additional domains accessing the site already blocked, and then to issue "doubly dynamic" orders to block additional domains even while the case is still being adjudicated, are examples of judicial measures that effectively address piracy. In 2019, the audiovisual and music industries continued to successfully collaborate with the National Internet Exchange of India (NIXI), the agency in charge of the .in domain registrations.

Notwithstanding the excellent results through the courts in 2019 to disable access to 106 sites and nearly 1,000 domains permanently, much more needs to be done to improve the efficiency and capability of law enforcement in handling other digital piracy cases. Enforcement against online piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity investigating and handling digital forensic evidence, and the ease with which pirates use anonymizing software and infrastructure to continually evade detection. The prospect of seeking criminal enforcement of intellectual property violations is very daunting in India due to the absence of any centralized IP enforcement agency, lack of appetite by local enforcement and significant time delays. The overwhelming challenge lies in the lack of effective interagency cooperation at the national level and across 29 Indian states. As a criminal offence, copyright infringement falls under a national criminal code, but cybercrime enforcement and related proceedings fall upon the individual states.

India needs to improve its legal framework to fully comply with the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (the WIPO Internet Treaties) to which India acceded in 2018. IIPA urges India to withdraw a problematic 2016 DIPP Office Memorandum concerning the scope of the existing statutory license for broadcasting literary or musical works and sound recordings. Moreover, many significant market access challenges remain.

PRIORITY ACTIONS REQUESTED IN 2020

Enforcement

- Encourage the Maharashtra Cyber Digital Crime Unit (MCDU), Telangana Intellectual Property Crime Unit (TIPCU) and NIXI to continue their antipiracy activities.

¹For more details on India's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of India's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- Strengthen and standardize the national IP enforcement regime and establish uniform, state-level cybercrime law and enforcement procedures, and a state-level, centralized IP crime unit (similar to the enforcement initiatives started by the TIPCU and MCDCU) across the country to ensure proper investigation of IP crimes, including Internet piracy. Some priority states are Tamil Nadu, Punjab, Andhra Pradesh, Karnataka, and Kerala.
- Reform the judicial processes to: (i) allow electronic filings and evidence sharing (and dispense with the signing requirements); and (ii) encourage courts to expedite the final adjudication.

Legislation

- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining technological protection measures (TPMs), ensuring sanctions apply to both acts of circumvention and trafficking in devices, components, and services that circumvent, and providing civil and criminal penalties; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).
- Amend Section 52(1)(c) of the Copyright Act to ensure that: (i) only neutral and passive service providers are eligible for safe harbor protection; and (ii) Internet service providers (ISPs) employ measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. Clarify that the term “person” in this Section includes ISPs.
- Ensure the private use exception is compatible with the three-step test.
- Repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum withdraw the September 2016 administrative Office Memorandum from the Department for the Promotion of Industry and Internal Trade (DPIIT), which interprets the statutory license as extending to Internet transmissions.
- Reject DPIIT’s draft amendments to the Copyright Rules which would appear to broaden the Section 31D statutory license to all internet transmissions of sound recordings and musical works in breach of India’s obligations under WCT, WPPT and WTO TRIPS Agreement (TRIPS).
- Enact the proposed Cinematograph Bill amendments that make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, audio and/or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Ensure that any amendments to the Information Technology (Intermediaries Guidelines) Rules 2018 that lift the threshold for safe harbors under the Information Technology Act: (i) clarify that safe harbors apply only to ISPs whose activities are neutral and passive; (ii) maintain Rule 3(4) of the 2011 Rules, which provides for notice and takedown; and (iii) specify that “unlawful content” includes copyright infringing content.

Market Access

- Simplify the rules and procedures for cinema construction.
- Eliminate local body entertainment taxes (LBET) and other related taxes imposed over and above national Good and Services Tax (GST), and simplify compliance rules.
- Agree to a further extension of the WTO e-commerce moratorium on customs duties for electronic transmissions.
- Eliminate mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle and therefore properly exercise their exclusive rights.
- Eliminate local establishment requirements for the uplink and downlink of audiovisual satellite signals.
- Eliminate “must provide” requirements, which further hinder rights holders’ ability to exercise their exclusive rights.
- Ease the prohibition on direct-to-home (DTH) operators from entering into exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.

THE DIGITAL MARKETPLACE IN INDIA

India is the second largest Internet market by number of users in the world. Under the government's *Digital India* initiative to promote increased Internet accessibility across the country, India reached 687.62 million Internet subscribers in September 2019.² The creative industries have embraced increased Internet speeds and accessibility as an opportunity to provide consumers in India with online access to even more of the copyrighted content consumers want. For instance, millions now use licensed music streaming services which, in 2018, encompassed 69.7% of the overall Indian recorded music market. Digital formats overall supplied 78% of the total recorded music industry revenue in the country.³ On the audiovisual front, it is estimated that India will reach more than 500 million users of online video by 2023, positioning India as the second largest market for Video-on-Demand (VOD) after China. It is also estimated that video will account for more than 77% of all Internet traffic in India by 2022.

Online piracy: The shift to online consumption of content has resulted in the proliferation of illegal linking and video streaming sites, as well as stream-ripping sites that enable users to make free permanent downloads of music from streaming video services and pre-release piracy of copyrighted content that is especially harmful to rights holders. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come pre-loaded with apps that allow users to access infringing content without authorization by circumventing subscription services and by other means. Through its different forms, Internet piracy is the greatest threat to the film and television industry in India. According to a 2018 study by antipiracy consulting firm Muso, Indian consumers rank third highest globally for the number of visits (17 billion) to piracy websites.

The torrent site *Tamilrockers*, along with its many progeny and copycats, constitutes a notorious piracy syndicate for motion pictures. It currently ranks in the top 200 sites in 12 countries and enjoys 26.6 million monthly visits according to SimilarWeb data. The site's operators frequently boast new content offerings on the site within hours of release. The site is now blocked in India, although the group has shown expertise in evading such orders by quickly creating and rotating new domains to continuously thwart blocking efforts. This piracy operation is the perfect example of what Justice Manmohan of the Delhi High Court has called the "Hydra-headed" rogue site that calls for dynamic injunctions. While there have been numerous attempts to identify and enforce against individuals connected with this site, the syndicate's principal operators and server locations are unknown. Other notorious infringing sites that are ranked near the top in India are *Fmovies*, *1337x*, *yts* and *Zooqle*.

As a top market for mobile app downloads, India is also seeing a rise in piracy using mobile apps available on the Apple and Google Play Stores, as well as numerous third party app stores. The *Telegram* app, which has over 200 million users globally, has gained a huge following in India and has become a major conduit for pirated audiovisual content because it creates anonymous channels for members of unlimited size, and enables the sharing of files larger than 1GB. In 2018, 29 mobile apps were found to be distributing pirated content (which included U.S. and regional films and TV series), and 15 of these were found on unauthorized platforms such as *9apps*, *apkpure*, and *rawapk*.

Piracy of recorded music is a major issue in India. Despite considerable growth in use of licensed streaming services, both domestic (e.g. *Gaana*, *JioSaavn*, *Wynk*) and international (*Amazon Music*, *Spotify*), music piracy rates are higher in India than in any other country worldwide except for China, according to a 21 country study conducted for IFPI. Two-thirds (67%) of Indian Internet users pirate music each month with more than three-quarters of 16-34 year olds engaged in music piracy. Although stream-ripping—making illegal downloads taken from YouTube videos—is the most popular form of music piracy, rates of downloading music through BitTorrent sites (e.g. *1337x.to* and *torrentz2.eu*) and cyberlockers (e.g. *zippyshare.com* and *uptobox.com*) remain very high in India. Popular stream-ripping sites include *y2mate.com* and *savefrom.net*. Most sites enabling this type of piracy are based outside India, meaning that systems of site blocking are a vital enforcement tool. Ninety five percent of those pirating music said that they would

²https://main.trai.gov.in/sites/default/files/PIR_08012020_0.pdf.

³IFPI 2019 GMR, p. 43 and 47.

turn to licensed means, primarily online streaming, if they were no longer able to download illegally, demonstrating the significant harm that piracy is causing to the recorded music industry in India.

The video game industry reports that India rose to fourth in the world in 2019 (up from fifth in 2018) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public peer-to-peer (P2P) networks. India also placed fourth in the world on infringement of games for the PC platform (up from fifth in 2018) and fourth when it comes to infringement of games for mobile (down from first in 2018).

Unauthorized Camcording is an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were forensically traced to theater locations in Indian, up from two video sources and 23 audio sources matched in 2018. Arrests resulting from enforcement operations in 2013, 2015, 2016 and 2017 show some willingness from state authorities to tackle this pervasive problem. However, camcording copies of new releases sourced from Indian theaters continue to leak online during the films' opening weekends, including from the notorious syndicate *Tamilrockers*, resulting in heavy losses for content owners.

Unauthorized Book Copying: Unauthorized commercial-scale photocopying⁴ and unauthorized reprints of academic textbooks and professional books (for both the domestic and export markets) continue to be problematic for the publishing industry in India. India-only, lower-priced editions of textbooks continue to be made available in the domestic market to meet domestic needs, but this long-standing practice is jeopardized not only by the export of these editions to developed markets, but also by the increase in the number of counterfeit academic and professional textbooks being produced in India and shipped into other markets, including the U.S. Customs officials should be empowered to take *ex officio* actions with respect to illegal exports of lower priced textbooks (similar to how imports are addressed).

Other Physical and Retail Piracy: Although the growing focus of the copyright industries is on online piracy, physical and retail piracy continue in India in many forms, including: (i) optical discs, mobile devices, and flash or pen drives (the "side loading" issue for the recording industry); and (ii) the unauthorized sale of video games supported by sales of technological protection measures (TPM) circumvention devices or technologies and modification services for consoles. India should establish enhanced penalties for such piracy.

COPYRIGHT ENFORCEMENT IN INDIA

On balance, enforcement against copyright infringement improved somewhat in 2019. In large part, as a result of significant efforts from the creative industries to block sites and support other initiatives such as domain name suspension by the NIXI of sites that have fraudulent Whois information, and GoDaddy's suspension of accounts for terms of service violations when a site is the target of a judicial blocking order. Meanwhile, state-based enforcement units like the MCDCU are taking some enforcement actions by insisting ISPs halt access to domains where there is an alleged criminal IP infringement.

Despite these improvements, enforcement of intellectual property rights remains a challenge across 29 Indian states with the absence of a nationally led enforcement agency.⁵ Although the establishment of the IPR Crime Units in Maharashtra (MCDCU) and Telangana (TIPCU), is a positive step, their establishment cannot substitute for a more robust federal approach.

IIPA recommends the following steps: (i) a focus on inter-state operations of organized crime units engaged in piracy and establishment of state-level enforcement task forces that are coordinated, systematic, and efficient; (ii)

⁴Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

⁵For example, publishers report that district police departments have different requirements for pre-raid documentation to lodge complaints, as well as for gathering evidence during raids, safeguards during raids, and post-raid recordation. These divergent procedures invariably lead to different results, often a duplication of efforts and low conviction rates. Defendants can often resume business shortly after the initial arrest. If and when charge sheets are finally presented in court, cases are routinely dismissed. A more detailed explanation of the enforcement issues some of IIPA's members face because of the lack of a national IPR policy can be found in the 2018 India report: <https://iipa.org/files/uploads/2018/02/2018SPEC301INDIA.pdf>.

the establishment of a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and CBI, that is overseen by DIPP and directed at copyright infringement occurring online and on mobile devices; (iii) the establishment of a centralized IP crime unit within the CBI Cyber Crime Detective Unit; and (iv) a focus on training prosecutors and police officers on the seriousness of IP offences, linkages to organized crime, and the importance of investigating up the chain.

IIPA is heartened that India's Cell for IPR Promotion and Management (CIPAM) held several IPR training programs for law enforcement officers with cooperation from creative industries, as well as IPR awareness workshops in schools and colleges. CIPAM needs additional resources to expand its activities beyond educational programs and, in particular, to have broader interaction with state governments. The NCETF should be permitted to collaborate across state lines to ensure proper enforcement. Thus far, two state-level crime units (TIPCU in 2016 and MCDCU in 2017) have been established to improve cooperation among industry stakeholders, ISPs, policy makers, and enforcement agencies, aided by legal and technical experts, to address digital piracy problems.

Given the lack of centrally coordinated enforcement in India, much more should be done to improve the efficiency and capability of law enforcement in handling digital piracy cases, and to increase their awareness and understanding of intellectual property rights in general. Enforcement against online piracy operators remains very challenging given the scale of the problem, officers' general lack of familiarity in investigating and handling digital forensic evidence, and the ease with which pirates, such as *Tamilrockers*, use anonymizing software and infrastructure to continually evade detection.

Seeking criminal enforcement for intellectual property violations in India is challenging due to endemic delays and the lack of resources and appetite by local enforcement. In November 2018, MPA filed a criminal complaint with the Kolkata police against a major source pirate 'Unknown' operating with a significant international footprint. The investigation by the Kolkata authorities has stalled without any indication of real progress being made in the case.

Civil Enforcement and Case Developments

Major positive developments occurred in 2019 for copyright protection through the courts in Delhi. In particular, in April 2019, the Delhi High Court firmly established permanent site blocking as a remedy to curtail online infringement in India. In *UTV Software Communication Ltd. V. 1337x.TO*, the court issued "dynamic" orders that allowed for the inclusion of additional domains accessing the site already blocked. In July 2019, the same court decided *Warner Bros. Entertainment Inc. v. Https:Hindilinks4u.To*, where it created a "doubly dynamic" system where domains can be added to a blocking order while a case is still being adjudicated. As a result of these decisions, and many new cases and "impleadments" (whereby additional domains resolving to the same rogue piracy sites are added to the orders), the audiovisual industry has blocked a total of 106 websites comprising 964 domains, which has caused a significant decrease in traffic to the blocked sites and overall piracy in India.

In April 2019, the Mumbai High Court decided *Tips Industries v. Wynk Ltd. & Anr*, where it held that the Section 31D statutory broadcast license did not apply to Internet music download and streaming services. The court rejected the erroneous 2016 interpretation from the Department for the Promotion of Industry and Internal Trade's (DPIIT) and correctly held that, while the statute included radio and television broadcasting, it did not include Internet broadcasting. The court enjoined Wynk Music from using the Tips music catalog. The case is currently on appeal.

Notwithstanding these positive developments, the courts in India can pose challenges, including long latency periods, evidentiary issues, and court costs. In part, the latency periods have been due to overcrowding in the courts and extremely long dockets, leading to cases in the past dragging on for years. In an effort to improve this situation, the Delhi High Court changed its standing rules requiring higher damage claim requirements, and charging higher court filing fees per plaintiff. This has resulted in prohibitively expensive costs. However, these problems appear to have been partly resolved, since cases can be brought by one plaintiff (decreasing by multiples the court filing fees per case), and in the case of site blocking, since one case can now be brought against many sites, decreasing the number

of suits. Finally, the Indian courts have not yet come to terms with electronic filing, thus archaically requiring thousands of pages of physical filings to be made, duplicated, and filed with the courts in person, with each page being individually signed. For copyright cases that may contain thousands of pages of evidence, the process of signing and filing the cases can take days. Indian courts should allow for electronic filings while dispensing with the need to sign each page, and the Delhi High Court should monitor dockets and adjust court filing fees downward should it determine the backlog issue has been resolved.

Criminal Enforcement

Given the scope of the piracy challenges discussed above, the Government of India should prioritize online and mobile piracy cases and ensure appropriate tools are in place to address hosted and non-hosted infringements of domestic and foreign sites. Because online copyright infringements in India are often large-scale and organized cybercrime, commercial operations, the most appropriate approach is criminal enforcement. However, some rights holders find that criminal copyright cases in India generally do not yield effective and deterrent results. These experiences differ by region and across copyright industries, but overall, training and retaining a cadre of police officers for cybercrime investigations, as well as appointing properly trained IP judges and dedicated IP expert prosecutors and investigators, would be helpful.

Domain Registry Outreach

A few pirate sites in India have *.in* country code domains. NIXI, the agency in charge of the *.in* domain registrations and state-based enforcement units, can either suspend the *.in* domains, or cancel their registrations based on false or fraudulent Whois data. The music and film industries have good cooperation with NIXI and MCDCU on this issue. Over the past couple of years, hundreds of domains in India have been suspended by NIXI in conjunction with MCDCU.⁶ In conjunction with efforts to suspend these domains, convicting those involved in content theft is also under the MCDCU's jurisdiction. The most notable case was that of *Game of Thrones*, Season 7, Episode 4, which leaked in India two days prior to its U.S. release. The unit promptly took action and made four arrests. This agreement continued to be helpful in 2019 and should remain part of India's enforcement strategy.

Producers' Rights: Following Phonographic Performance Limited India's (PPL) reorganization and application for an operating license, DPIIT should re-register PPL as a collecting society to license public performance and broadcasting rights. Separately, the existing exception for weddings from the public performance right results in a loss of substantial revenue for record producers and should be repealed.

INDIA'S TREATY OBLIGATIONS AND COPYRIGHT LAW REFORM

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and, as of September 25, 2018, also a member of the WIPO Internet Treaties. It is now necessary for the Indian Government to amend its law to fully comply with the WIPO Treaties. While the Government of India believes the law is currently compliant, rights holders (including IIPA members) believe the current law falls short of full compliance in important respects.

To fully implement the WIPO Internet Treaties, key changes to the Copyright Act of 1957, last amended in 2012 (implemented in the Copyright Rules, 2013, in force March 14, 2013) are needed, including: (i) clarifying the TPM circumvention provisions, plus implementing civil and criminal penalties applicable to acts of circumvention and trafficking in circumvention devices, components and services; and (ii) adopting definitions and sanctions for the unauthorized removal of rights management information (RMI).

⁶Since 2017, MCDCU has suspended 203 domains, impacting approximately 160 million users accessing these sites per month.

The 2016 Office Memorandum from DPIIT (then DIPP), which interpreted the applicability of statutory license as extending to Internet transmissions, is incompatible with Berne, the WCT, WPPT and TRIPS. Subsequently, DPIIT published draft amendments to the Copyright Rules which appear to broaden the existing Section 31D statutory license to all Internet transmissions of sound recordings and musical works in breach of India's obligations under Berne, WCT, WPPT and TRIPS. Now, DPIIT has launched a consultation on the Copyright Act, with a view toward proposing amendments near the end of 2020. To fully comply with its international obligations, IIPA urges India to repeal the statutory license for broadcasters under Section 31D of the Copyright Act, or at a minimum, withdraw the September 2016 Office Memorandum, and the proposed changes to the Copyright Rules on the scope of the Section 31D statutory licence.

Regarding TPMs, Section 65A of the Copyright Act provides protection against circumvention of effective technological measures. The 2012 amendments intended to meet the minimum threshold requirements of the Internet Treaties are inadequate. Under current law, the phrase "effective technological measure" is undefined and, thus, does not expressly cover common TPMs, such as access controls. Moreover, the section fails to expressly prohibit the manufacture, importing, trafficking and dealing in circumvention devices as established in the Internet Treaties and as required to effectively cover entities engaged in the provisioning of circumvention services. Also, the current requirement of proof of a nexus between the circumvention and copyright infringement makes the TPMs provision ineffective (and superfluous to infringement actions), and is inconsistent with the Internet Treaties. While Section 65A makes circumvention a criminal offense, it excludes a civil cause of action and remedies. We recommend that civil causes of action also be included in the provision. Lastly, the exception provided under Section 65A(2)(a), namely "doing anything referred to therein for a purpose not expressly prohibited by this Act," is overly broad and vague.

To ensure full compliance with the WIPO Internet Treaties, the Government of India should also: (i) amend its 60 year term of protection to 70 years to be consistent with international minimum standards; (ii) amend Section 52(1)(c) of the Copyright Act to bring it in line with international standards pertaining to transient copies and to clarify that the services eligible for "safe harbor" protection are only those ISPs whose activities are of a neutral and passive nature; and (iii) revise its law to ensure the private use exception is compatible with the Berne and WTO TRIPS three-step test.⁷

LEGISLATION AND REGULATION IN INDIA

Anti-Camcording: For years, industry stakeholders have advocated for effective anti-camcording provisions in Indian law. In February 2019, the Indian Cabinet approved proposed anti-camcording provisions in amendments to the Cinematograph Amendment Bill 2019. However, progress toward passage of the bill stalled due to 2019 elections and it has been reintroduced before the National Parliament. India should swiftly enact legislative amendments to outlaw unauthorized recording of all or part of an audiovisual work in a cinema.

Administrative Website Blocking: Currently, the creative industries have sought website blocking through the courts, with good successes to date, particularly, blocking 106 websites comprising 964 domains in the Delhi High Court, and hundreds more domains at least temporarily through MCDU. Still, rights holders are open to alternative enforcement mechanisms to reduce traffic to piracy sites. We understand India is considering further amendments to the Copyright Act, 1957 in order to obtain administrative *suo motu* action by the Ministry of Communication and Information Technology's Computer Emergency Response Team (CERT). This initiative would allow CERT (or some other chosen agency) to act without prompting by judicial orders to disable access to structurally infringing websites. To date, the federal government has been reluctant to take on this role.

⁷India is considering amending its Copyright Act to enable the Ministry of Communication and Information Technology's Computer Emergency Response Team (CERT) to pursue *suo motu* action to disable access to structurally infringing websites without prompting by judicial orders. Although positive, this amendment is not as important as others to fulfill India's international obligations.

Statutory License for Broadcasting Under Section 31D of the Copyright Act, 2016 DPIIT Office Memorandum and 2019 Regulatory Amendment Proposal: Section 31D was enacted as part of the 2012 amendments to the Copyright Act. It created a statutory license for the use of musical works and sound recordings by broadcasting organizations “desirous of communicating to the public by way of a broadcast or by way of performance.” Section 13 of the Copyright Act treats sound recordings as objects of copyright protection and grants rights holders a number of exclusive rights, including in Section 14, for the act of “communicating the sound recording to the public.” However, Section 31D has reduced the exclusive nature of the broadcasting right to a remuneration right (requiring no authorization from a rights holder for a broadcast). The licensing rate for such activities is not determined by the rights holder, but instead by the Copyright Board. This legal license scheme is inherently incompatible with Sections 13 and 14 of India’s Copyright Act and undermines the value of rights holders’ broadcast rights. In addition to the music industry, U.S. motion picture studios are also affected by these overbroad licensing rules, as they often produce local films with musical content. These extended compulsory licenses appear inconsistent with India’s commitments in the Berne and TRIPs agreements. Under the three-step test, as codified in the TRIPs Agreement, the Berne Convention, and the WIPO Internet Treaties, limitations and exceptions must be confined to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” The wholesale application of a limited terrestrial license to the Internet space could implicate India’s obligation to comply with this basic rule in several ways.

As currently drafted, Section 31D enables any broadcasting organization (radio or television) to apply to the Copyright Board for a statutory license, curtailing rights holders’ negotiating power. Additionally, the rate fixed by the Copyright Board may not (and in fact does not) reflect the market rate. India is globally ranked as the IFPI’s 15th market, but falls short on producer and performer revenues from broadcast music (it ranks as 29th in terms of performance rights revenue) despite ongoing growth of the Indian broadcasting industry. Section 31D forces rights holders to allow broadcasters to use their works, even though they have exclusive property rights, for very low revenue returns. Section 31D should be deleted and replaced with an exclusive right that enables negotiations between rights holders and broadcasting organizations.

In 2016, DPIIT (formerly DIPP) issued an Office Memorandum providing an interpretation of Section 31D that is incompatible with the WCT and WPPT as well as the express wording of Section 31D. The Office Memorandum states that the statutory license of literary or musical works and sound recordings in Section 31D is “not restricted to radio and television broadcasting organizations only, but [also] cover[s] Internet broadcasting organizations.” While not legally binding, the Office Memorandum has created confusion in the market and poses a major threat to the growth and sustainability of India’s digital music and film industries. Some prospective licensees have already sought to rely on the Office Memorandum to influence licensing negotiations, mischaracterize the relevant uses as “broadcasting”, and claim that interactive transmissions fall within the Section 31D statutory license.

The music industry continues to actively fight DPIIT’s interpretation in Indian courts and the Intellectual Property Appellate Board (IPAB). In addition to the aforementioned April 2019 decision from the Mumbai High Court in *Tips Industries v. Wynk Ltd. & Anr.*, which held that the Section 31D statutory broadcast license did not apply to Internet music download and streaming services and is currently on appeal, music publisher Warner Chappell sued Spotify before the same court over the applicability of Section 31D to online streaming. The case was dismissed in January 2020 after the two parties reached an agreement whereby Spotify agreed to enter into a license to make available Warner Chappell’s musical works on its service. *Radio Next Webcastion Pvt. Ltd. v. Union of India and Anr.*, also on the application of the Section 31D license to digital services, is pending before IPAB. After the *Wynk* decision, DPIIT proposed to extend the scope of the statutory license through an amendment to the Copyright Rules of the Copyright Act of 2013. We urge DPIIT to abandon such efforts and for its memo to be withdrawn.

Clarification of the Safe Harbor Provisions: There are safe harbor provisions in both the Copyright Act and the IT Act. It remains unclear how the two sets of provisions—in the Copyright Act and the IT Act—interact, causing legal uncertainty and loopholes in copyright enforcement. India should strengthen statutory provisions addressing

online infringements to facilitate timely and effective enforcement against unlicensed content distribution, including requiring expeditious takedown or disabling access to infringing content.

Section 79 of the IT Act exempts from liability an intermediary for any third party information, data, or communication link made available or hosted by the intermediary. To ensure a stronger framework, IIPA recommends the following amendments: (i) clarify that safe harbors apply only to ISPs whose activities are of a neutral and passive nature; and (ii) reinstate Rule 3(4) of the 2011 Rules, which provides for notice and takedown; (iii) expressly include infringement of intellectual property rights as one of the grounds for intermediaries to remove or disable access to certain contents (effectively replacing and superseding the inadequate safe harbor provisions of the Copyright Act described below); (iv) make clear that the obligation to deploy automated tools to identify and remove unlawful content under proposed Rule 3(9) extends to copyright infringing content; and (v) introduce a penalty provision to give teeth to Rule 3 of the pending draft *Information Technology [Intermediaries Guidelines (Amendment) Rules] 2019*.

The Copyright Act also currently includes a safe harbor provision for ISPs which mirrors systems in other countries, i.e. it applies to 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 52(1)(c)). These provisions do not facilitate adequate online copyright enforcement because they are not limited to truly neutral and passive ISPs that have no knowledge or control of the material posted, and they do not prevent the abuse of these “safe harbors” by services that are designed to facilitate or enable copyright infringement. Additionally, the takedown mechanism in Section 52 virtually requires rights holders to obtain an injunctive court order to prevent infringing content from being reinstated after a notice, which is contrary to international best practices and forecloses the intended goal of an efficient and expeditious remedy to online infringement (although through recent site blocking orders, ISPs are now required to be informed of their immediate obligation to block by the Department of Telecommunication within five days of the issuance of the court order). The Copyright Rules also provide that takedowns occur within 36 hours of a notice, which is too long a period when dealing with online infringement, especially in cases of pre-release piracy. Rule 75 of the Copyright Rules sets out cumbersome requirements for rights holders to comply with complaint notices. ISPs are generally cooperative with takedown notices for hosted content, and are complying well with site blocking orders. The Copyright Act should be amended to resolve these issues, but no amendments are currently pending.

Data Protection White Paper: In 2017, the MeitY issued a “White Paper on Data Protection framework for India.”⁸ The stated objective of the review was to “ensure growth of the digital economy while keeping personal data of citizens secure and protected.” IIPA recommends that any data protection legislation arising from this consultation contain exceptions to allow IP rights holders to access *Who/s* data to enforce their rights (in criminal and administrative actions). No known legislation is pending as a result of the white paper.

Draft National e-Commerce Policy: In February 2019, DPIIT released a Draft National e-Commerce Policy for stakeholder comment. IIPA suggests this should be an opportunity to meaningfully improve online copyright enforcement. While the objectives of the policy are laudable, and the draft Policy document mentions certain anti-piracy measures to address online distribution of pirated content, the anti-piracy issues in the online environment should be addressed more effectively. In particular, the proposed draft Policy should: (i) limit safe harbor protection to ISPs that are passive and neutral; (ii) require ISPs to implement measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content; and (iii) enable consultation among industry stakeholders, including creative industries, to make determinations on “Trusted Entities” (whose complaints are resolved on a priority basis by ISPs) rather than leaving such decisions to the sole discretion of ISPs as provided under the existing draft.

⁸<http://meity.gov.in/White-paper-data-protection-framework-india-public-comments-invited>.

MARKET ACCESS ISSUES IN INDIA

The negative economic effects of market access barriers cannot be underestimated. In December 2014, the U.S. International Trade Commission, addressing U.S.-India trade, found that “if tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two-thirds, and U.S. investment in India would roughly double.”⁹ Some of the more egregious market access barriers in India include:

- **India’s Telecom Regulatory Authority (TRAI) “Must Provide” Rules in the Pay-TV Sector:** The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation prohibits broadcasters from granting exclusive contracts and imposes “must provide” channel programming requirements for any distributor who requests them on a non-discriminatory basis, thereby eliminating all potential for competition among distributions and defeating incentives to develop exclusive programming.
- **Direct to Home (DTH) Guidelines:** These guidelines prohibit DTH operators from entering into exclusive contracts with any broadcaster. They also prohibit DTH operators from carrying signals of any broadcaster who has entered into any exclusive contract with any distribution medium, and/or against whom any litigation is pending in such regard. These regulations limit choice and undermine competition.
- **Broadcast Regulations/Restrictions and Price Controls:** The Indian Government regulates the uplink and downlink of satellite signals beaming into India. Foreign broadcasters are required to set up offices in India licensed by the government and must pay prescribed fees per channel beaming into India. More generally, India’s Telecom Regulatory Authority (TRAI) imposes an onerous set of regulations on the broadcast sector, stifling innovation and hindering competition. For example, TRAI has issued tariff orders that establish the amounts, by genre that broadcasters can charge satellite and cable platforms for content (these orders were upheld by India’s Supreme Court in 2018) and continues to create regulatory uncertainty around pricing of pay-TV channels. The government’s attempt at price controls reduces the incentive for foreign investment in the sector, despite the lifting of many foreign direct investment restrictions in 2015. In August 2019, TRAI issued a consultation paper on Tariff Related Issues for Broadcasting and Cable Services. In response to that paper, industry urged TRAI to avoid price controls, restrictions on market bundling, and restrictions on foreign investment in the broadcast sector.
- **Foreign Direct Investment Caps:** Although India in recent years has raised the foreign direct investment (FDI) cap for Indian television news channels from 26% to 49%, FDI above 49% for news channels requires government approval. Further, FDI in digital news sites is still restricted to the earlier limit of 26%.
- **Local Body Entertainment Tax (LBET):** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates depending on ticket price. However, LBET collected by state governments have been left out of the GST, prompting state governments (Madhya Pradesh, Tamil Nadu, and Kerala) to attempt to tax entertainment products over and above GST. Local body taxes significantly increase the tax cost for exhibitors and work against the principle of “One Nation, One Tax” and the intent of the GST model, i.e. to remove a multiplicity of high taxes. Additionally, in the case of at least one state government (Tamil Nadu), the current LBET provision is discriminatory based on the language of the film content. India should subsume all taxes into the national GST system and refrain from discriminatory taxes against film content based on language version.
- **Tariffs:** High tariffs on entertainment software and hardware products, including PC video game products, console video game products, video game console hardware, and video game activation cards. IIPA encourages India to join the expanded Information Technology Agreement to reduce tariffs on goods that enhance digital trade in India.
- **Bill on the Registration of Press and Periodicals:** Introduced in November 2019, this bill may have detrimental implications for U.S. journal and book publishers operating in India or seeking to enter the Indian market. The bill would require printing press owners as well as periodical publishers to register and obtain a Certification of Registration from the Press Registrar General before engaging in any kind of publication subject to a penalty of INR 50,000 (around US\$700). The bill is unnecessarily broad in scope and could potentially apply to all print and digital publications—regardless of whether they were published in India. The bill is replete with undefined

⁹USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, Publication No. 4501, Investigation No. 332-543, December 2014, available at https://www.usitc.gov/publications/332/pub4501_2.pdf.

requirements that would make it difficult for press and periodical publishers to navigate. For instance, the bill does not clearly identify the criteria on which decisions on registration will be made, or the factors that would adjudge an applicant press or publication eligible for registration.

- **Customs Duties:** India has recently indicated that it may not agree to further extensions of the WTO e-commerce moratorium on customs duties for electronic transmissions, and has raised the possibility of charging customs duties on electronic services such as Subscription Video-on-Demand (SVOD) and digital transmission of films. Such duties would likely raise prices for consumers, place India out of step with regional and international best practices, hamper economic growth, and hinder bilateral trade in digital products. The Indian Government should reconsider its approach on this issue or face increasing frictions with key global trade partners including the U.S.