

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** India plays an important role in the growth of the content creative industries, with its large population of consumers and status as the second largest market in the world.<sup>2</sup> For both Indian and foreign-based creative industries, however, the promise of continued growth is threatened by piracy, market access barriers, attempts to expand statutory licenses for broadcasting of literary and musical works and sound recordings to include Internet transmissions, criminal enforcement difficulties, inadequate term of protection, undue regulation of transfers of rights, and broad and unclear exceptions. Strong copyright protection and enforcement that meets international standards and best practices, as well as adequate legal protection and effective legal remedies against the circumvention of effective technological measures, would help address many of these challenges and could transform India into a more engaging business environment for the creation and dissemination of copyrighted works.

India's copyright legal framework is missing key provisions to comply with international treaties to which India has acceded, including, the Berne Convention, the Geneva Phonograms Convention, the World Trade Organization (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), and the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) (together, the WIPO Internet Treaties). IIPA urges the Government of India to pursue the necessary legal reforms to fully comply with the WIPO Internet Treaties, including by amending its existing provisions on technological protection measures (TPMs), which fall short of treaty requirements. Regarding India's review of the Copyright Act of 1957, IIPA respectfully requests that USTR continue to monitor this process closely and to encourage India to pursue changes to its Copyright Act that comport with the country's international commitments and align the law with international best practices. In particular, IIPA greatly appreciates the U.S. Government's engagement with India regarding the highly concerning proposal from the Parliament of India to amend Section 31D of the Copyright Act to impose a statutory licensing system on Internet transmissions and welcomes the continued engagement of the United States to urge the Government of India to reject the proposal.

While enforcement in India is generally challenging, judicial enforcement, particularly through the Delhi High Court, has been successful. The seminal 2019 Delhi High Court decision in *UTV Software Communication Ltd. v. 1337x.TO et ors.* established permanent site blocking in India against "rogue" piracy sites. The decision led to the closure of the notorious piracy site *Tamilrockers*. Orders are issued quickly and are "dynamic," meaning that variations of the same piracy service can be blocked quickly and efficiently. IIPA also commends the work of the dedicated intellectual property (IP) crime unit within the Maharashtra Police (MIPCU, formerly MCDU) for its work to reduce online piracy. Still, issues with piracy sites persist, including with "copycat" sites that spring into action in the vacuum of some of the more popular domains that have been blocked (including copycat sites for *Tamilrockers*, such as *Tamilblasters* and *TamilMV*). The Indian government must mobilize to address these largely home-grown piracy services and must modernize its laws on secondary liability, knowledge, and constructive knowledge to appropriately address the threats of web hosts and middleware providers like *HostPalace*, *IPTV Smarters*, and *HostSpicy*.

<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.

<sup>2</sup>*The future of the Internet is Indian*, CNN Business, available at <https://edition.cnn.com/interactive/2018/11/business/internet-usage-india-future/>.



## **PRIORITY ACTIONS REQUESTED IN 2022**

### **Enforcement**

- Strengthen and standardize the national IP enforcement regime through a central authority to coordinate with state-level enforcement units. Establish uniform, state-level cybercrime law and enforcement procedures and state-level IP crime units across the country to ensure proper investigation of IP crimes, including Internet piracy.

### **Legislation**

- Reject the Department Related Parliamentary Standing Committee's (DRPSCC) proposal to amend Section 31D of the Copyright Act to broaden the statutory license to cover all Internet transmissions of sound recordings and musical works, as well as literary works, in breach of India's obligations under the WCT, WPPT, and WTO TRIPS Agreement (TRIPS).
- Ensure the open-ended review of copyright laws is used as an opportunity to shore up stronger IP protections for the online environment and does not result in the weakening of existing protections.
- Amend the Copyright Act and Criminal Procedure Codes to fully comply with the WIPO Internet Treaties by: (i) appropriately defining TPMs, ensuring sanctions apply to both acts of circumvention and trafficking in devices, software, 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) of the Copyright Act to clarify that: (i) service providers will attract secondary liability for copyright infringement if they have actual or constructive knowledge of infringing content or links on their services or networks and they fail to remove the copyright infringing content or links to such content expeditiously and ensure that the same works do not reappear on the service upon gaining such knowledge or awareness; and (ii) only neutral and passive online intermediaries that meet the specific conditions for safe harbor protection are eligible for the liability privilege.
- Ensure the private use exception is compatible with the three-step test.
- Eliminate the over-regulation of private contracts involving sound recordings in Section 39A of the Copyright Act.
- Repeal the exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers' and other rights holders' right of public performance in respect of "social festivities associated with a marriage."
- Enact proposed Cinematograph Bill amendments that make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility (i.e., to address the problem of camcording).
- Address online piracy, introduce "Know Your Business Customer" (KYBC) regulatory obligations for online operators to identify themselves on their website, as well as obligations on the businesses listed to know their customers, and require hosting, payment, advertising, domain name, and proxy service providers to do business with only known commercial entities.

### **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 the Telecom Regulatory Authority (TRAI) mandated rates (price controls) for pay-TV providers that inhibit the ability of rights holders to bundle and therefore to properly exercise their exclusive rights and also ensure that TRAI or any other regulatory body does not seek or propose rates (price controls) for digital service providers.
- Eliminate the proposed mandate on non-personal data sharing with government and business competitors that undermines content owners' ability to maintain high standards of data security and intellectual property rights, and

severely disadvantages competition in the Indian market.

- 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 exclusive contracts with any broadcaster.
- Ease foreign ownership restrictions on news channels.
- Eliminate high tariffs on video game software and hardware.
- Remove revisional powers of the central government in the proposed Cinematograph Bill amendments that would give the central government the authority to re-examine any certified film that has a valid certificate from the Central Board of Film Certification (CBFC) under Article 19(2) of the Constitution of India.

## **THE DIGITAL MARKETPLACE IN INDIA**

By the end of September 2021, India reached 794.88 million broadband Internet subscribers.<sup>3</sup> After China, India is the second largest Internet market by number of users in the world. For instance, the use of licensed music streaming services grew by over 20% in 2020 and encompassed over 85% of the overall revenues of the Indian recorded music market.<sup>4</sup> On the audiovisual front, it is estimated by KPMG that India will reach more than 500 million users of online video by 2023, positioning the country as the second largest market for video-on-demand (VOD) after China.<sup>5</sup>

**Online piracy:** Unfortunately, the widespread availability of high-speed Internet has also facilitated the proliferation of illegal linking, peer-to-peer (P2P) file sharing, video streaming, torrent, and stream-ripping sites, many of which feature and profit from advertisements of legitimate products. In addition, an increasing number of users are downloading apps that facilitate infringement and some Piracy Devices (PDs) come either pre-loaded with apps that allow users to circumvent subscription services to access infringing content or are accompanied by instructions on where such apps can be downloaded by users. Through its different forms, online piracy is the greatest threat to the film, television, and music industries in India, which rose 62% in March 2020 at the start of the pandemic.<sup>6</sup> The losses due to streaming piracy in India are expected to reach US\$3.08 billion by 2022.<sup>7</sup> IIPA requests an explicit, stand-alone obligation to impose civil and criminal liability and penalties on app stores that sell or provide free-of-charge dedicated piracy apps that provide streaming and/or direct download access to titles on mobile and desktop devices. The Government of India should also facilitate a standardized enforcement framework to enable the take-down of infringing apps, which may involve a national-level unit, coordinating with state-level enforcement if appropriate.

The *Telegram* app, which has over 500 million users globally, has gained a huge following in India, which currently has the highest number of active users in the world (28% of *Telegram*’s monthly active users’ share). *Telegram* 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. While the operators of *Telegram* are responsive to rights holders’ requests to take action against infringements found or facilitated over its platform, IIPA recommends that more be done to encourage operators to responsibly cooperate.

The film and television industry reports that Internet piracy is its greatest threat in India. According to a 2018 study by anti-piracy consulting firm Muso, Indian consumers ranked third highest globally for the number of visits (17 billion) to piracy websites. The industry has had some success in disabling access to piracy domains through Delhi High Court no-fault injunction orders and is now working cooperatively with search engines to close the “back door” through search delisting after the “front door” is closed through site blocking. However, while the Copyright Act is the

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<sup>3</sup>Telecommunications Regulatory Authority of India, Press Release 46/2021 (October 21, 2021), available at <https://www.trai.gov.in/notifications/press-release/trai-releases-telecom-subscription-data-30th-september-2021>.

<sup>4</sup>International Federation of the Phonographic Industry (IFPI), 2021 Global Music Report, p. 123.

<sup>5</sup>*India’s Digital Future*, KPMG, August 2020, p. 66, available at <https://assets.kpmg/content/dam/kpmg/in/pdf/2020/09/year-off-script-kpmg-india-media-and-entertainment-2020.pdf>.

<sup>6</sup>*India see big spike in film piracy post covid-19*, Mint, May 11, 2020, available at <https://www.livemint.com/news/india/india-sees-big-spike-in-film-piracy-post-covid-19-11589183182123.html>.

<sup>7</sup>*With digital piracy on the rise in India amid pandemic, original content creators lose revenue*, FirstPost, June 6, 2021, available at <https://www.firstpost.com/entertainment/with-digital-piracy-on-the-rise-in-india-amid-pandemic-original-content-creators-lose-revenue-9689181.html>.

basis for site blocking, laws in India have not been used to date to address other Internet piracy phenomena like middleware providers (that provide the backbone for piracy turn-key solutions that are used worldwide) and services like *IPTV Smarters*, *Host Spicy*, and *Host Palace*. The Indian government should ensure the laws are fit-for-purpose to address such businesses that profit off the piracy services of their customers.

Recorded music piracy is also a major issue in India. Despite considerable growth in the 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 the International Federation of the Phonographic Industry's (IFPI) 2021 Music Consumer Survey. Some two-thirds (68 percent) of Indian Internet users reported that they downloaded pirated music in the previous month. Stream-ripping remained the key method of piracy with 66 percent of pirated music accessed through stream-ripping sites or apps in the previous month. Based on analysis of SimilarWeb data, there were 178 million visits to music piracy sites by Indian internet users in August 2021. The most popular domestic music pirate site was Tamil music piracy site *masstamilan.in*, which received more than 4.5 million visits from India in August 2021. The most popular stream-ripping site was *mxtube.net*, which received over 21.3 million visits in August 2021, according to SimilarWeb data. This site is focused on domestic Indian content. *Savefrom.net* also remained popular with visits from India the third highest of any country in the world at 13.1 million in August 2021. Other popular stream-ripping services include *yt1s.com*, which received over 10 million visits, and *ytmp3.cc*, which received over 9.9 million visits in August 2021. As time goes on, stream-ripping is becoming an industry-wide problem to monitor and address.

For 2021, the video game industry reports that India remained fourth in the world (where it ranked in 2020 and 2019) in terms of the number of connections by peers participating in the unauthorized file sharing of video games on public P2P networks, as well as in infringement of games for the PC platform. India fell from second place in 2020 to fourth place (as it was in 2019) in infringement of games on mobile devices.

The scale of online piracy of books and journals is likewise a threat to the publishing industry. *Sci-Hub* and *Libgen*, two notorious pirate sites, continue to provide access to millions of infringing copies of journal articles and books in the country. Despite the Delhi High Court having issued blocking orders against several notorious online sites engaged in the unauthorized distribution of pirated content, it is curious that a similarly expeditious grant of injunctive relief against an adjudged pirate site such as *Sci-Hub* has not occurred. At the outset of the litigation initiated by two journal publishers in December 2020, the site operator obligated herself to refrain from further uploading purloined articles to the site. Yet, in September 2021, the pirate operator—in open contravention of an obligation she undertook to the court—uploaded a further 2 million journal articles illegally obtained from journal publisher databases.

**Unauthorized Camcording:** Unauthorized camcording remains an ongoing challenge for rights holders in India. In 2019, six new video sources and 47 audio sources were traced to Indian theaters. During 2020 and 2021, the COVID-19 pandemic led to the wide-scale closure of theaters in India, so while there were a number of unauthorized camcords of major U.S. motion pictures, the numbers from this period are generally anomalous. However, India is likely to remain a major provider of camcorded films once movie theaters fully re-open. The high number of audio cams reflects the strong demand for local language audio files, which are sourced for various international release groups. A key camcorder was referred to police in Kolkata for criminal investigation in mid-2018, and all forensic evidence and identifying details were provided to the police. However, the enforcement unit has yet to take meaningful steps in the investigation. State authorities should undertake efforts to tackle this pervasive problem, and the Cinematograph Bill should be adopted to codify a nationwide legal standard.

**Unauthorized Book Copying:** The publishing industry continues to be concerned with the unauthorized commercial-scale photocopying<sup>8</sup> and unauthorized reprint of academic textbooks and professional books (for both the domestic and export markets). While India-only, lower-priced editions of textbooks are made available in the domestic

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<sup>8</sup>Unfortunately, the 2017 decision in the Delhi University case served only to make more difficult the problem of addressing unauthorized photocopying.

market to meet domestic needs, these editions continue to be found in several markets around the world. 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); (ii) the unauthorized sale of video games supported by sales of TPM circumvention devices or technologies and modification services for consoles; and (iii) unauthorized reproduction of textbooks (as noted above).

## **COPYRIGHT ENFORCEMENT IN INDIA**

Enforcement has continued to improve over the past year in the area of judicial site blocking. Due to the COVID-19 pandemic, the courts had shifted primarily to electronic filings and virtual hearings, which has greatly eased burdens previously imposed on rights holders (such as the old requirement to sign every page of pleadings). However, most hearings are back to in-person as of December 2021. In addition, the courts have expanded their reach incrementally, now blocking “proxy portal” sites used principally to circumvent site-blocking orders. The data indicates that these actions are having a positive impact in reducing traffic to piracy sites—though only for certain types of content.

However, other enforcement against online piracy operators remains inadequate given the current scale of the problem, officers’ general lack of familiarity investigating and handling digital forensic evidence, and the sophisticated nature of the pirate criminal enterprises operating notorious piracy sites and services. Such piracy operations can easily evade enforcement with the help of anonymizing software. Additionally, the prospect of seeking criminal enforcement for intellectual property violations is very daunting due to the absence of a centralized IP enforcement authority and the lack of effective inter-agency cooperation at the national level and across the country’s 28 states and nine Union Territories. For example, while criminal copyright infringement falls under a national criminal code, cybercrime enforcement and related proceedings fall upon the individual states. India needs to improve the coordination of its enforcement framework against criminal piracy syndicates.

IIPA recommends the following steps: (i) India should focus on inter-state operations of organized crime units engaged in piracy and establish state-level enforcement task forces that are coordinated, systematic, and efficient; (ii) India should establish a National Copyright Enforcement Task Force (NCETF), including the Enforcement Directorate and Central Bureau of Investigation (CBI), that is overseen by the Department for Promotion of Industry and Internal Trade (DPIIT) and directed at copyright infringement occurring online and on mobile devices; (iii) India should establish a centralized IP crime unit within the CBI’s Cyber Crime Detective Unit; and (iv) India should focus on training prosecutors and police officers on the seriousness of IP offenses and their links to organized crime.

**Civil Enforcement and Case Developments:** Significant positive developments have occurred from 2019 through 2021 for copyright protection through the courts in Delhi. 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*, in which the court created a “doubly dynamic” system wherein 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 related to the originally blocked rogue piracy sites are added to the orders), there has been a significant decrease in traffic to the blocked sites and in overall piracy in India.

In addition, on October 19, 2020, the operators of notorious pirate site *Tamilrockers* announced they would be shutting down the service, after many site-blocking actions were conducted and a significant number of notices were issued. The Indian authorities should complement this effort by halting newly emerging or copycat sites feeding

off the same traffic, such as *Tamil Blasters* and *TamilMV*. Moreover, the law still does not expressly confirm whether facilitation of piracy, for example, through the commercial provision of middleware to pirate operators, is actionable with actual knowledge of a specific infringing act. This liability should be clarified, since to date, operators of almost turn-key services providing pirates with the blueprint for their operations have been able to skirt enforcement.

**Domain Registry Outreach:** A few pirate sites in India, and many pirate sites around the world, employ the *.in* country code in their domains. Since 2017, the music and film industries had good cooperation with National Internet Exchange of India (NIXI), the agency in charge of *.in* domain registrations used by commercial-scale copyright infringers, and the state-based enforcement units, such as the Maharashtra Cyber Digital Crime Unit (MCDCU), to suspend the *.in* domains used by commercial-scale copyright infringers. Registrars like *GoDaddy* were also cooperative in cancelling these registrations based on false or fraudulent Whois data. These efforts illustrate how KYBC requirements—whereby Internet intermediaries verify and record the identity of their customers—could work in practice, particularly as *GoDaddy* was willing to take a proactive stance whenever it discovered fraudulent activity. The Indian government should revisit ways to integrate KYBC disciplines to foster a healthier Internet.

**Collective Management of Producers’ “Performance” 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 without further delay. Following the initial and unexpected denial of its registration by DPIIT, PPL has approached the Delhi High Court asking the court to vacate the DPIIT decision. The case remains pending; however, DPIIT should reconsider its decision on its own initiative and re-register PPL, which represents the vast majority of domestic and international rights in India.

## **COPYRIGHT LEGISLATION AND REGULATION IN INDIA**

In 2012, Section 31D of the Copyright Act created a statutory license for the use of musical works and sound recordings for radio and television broadcasting.<sup>9</sup> In July 2021, DRPSCC Report on Review of the Intellectual Property Rights Regime in India recommended extending Section 31D of the Copyright Act to include “internet or digital broadcasting” within the existing statutory licensing for radio and television broadcasting of literary and musical works as well as sound recordings found within that section. The Government of India held a consultation on the DRPSCC recommendation to amend Section 31D, and IIPA, as well as other industry representatives, filed comments.<sup>10</sup> IIPA is grateful for the U.S. Government’s intensive engagement with India, including as part of the U.S.-India Trade Policy Forum (TPF) ministerial held in November 2021, as well as the TPF Intellectual Property Working Group and other bilateral engagement, and notes with appreciation the reference to India’s commitments under the WCT and WPPT in the TPF Joint Statement.

The proposal to amend the Copyright Act remains inconsistent with India’s obligations under the WCT, the WPPT, and the TRIPS Agreement. Under the WPPT, for example, the definition of “broadcasting” clearly excludes interactive Internet transmissions. The WPPT defines broadcasting as “the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also ‘broadcasting’; transmission of encrypted signals is ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent.”<sup>11</sup> The Guide to the Copyright and Related Rights Treaties Administered by WIPO (Publ. No. 891) clearly explains that “[b]roadcasting’ is not to be understood as

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<sup>9</sup>Following the 2012 revision to the Copyright Act, the Department of Industrial Policy & Promotion drafted a 2016 Office Memorandum that sought to extend the Section 31D statutory license to Internet transmissions. The 2016 Office Memorandum, however, is inconsistent with the Copyright Act, the 2012 revision of the Act, and relevant international copyright agreements. The text of the law and legislative history are clear that Section 31D as currently written is limited to radio and television broadcasting and was not intended to extend to Internet transmissions. The Bombay High Court has held that the 2016 Office Memorandum went too far and that Section 31D applies only to television and radio broadcasting and not Internet transmissions. See *Tips Industries Ltd. vs. Wynk Music Ltd. & Anr.*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, Bombay High Court (April 23, 2019).

<sup>10</sup>See IIPA Comments on India’s Review of the Intellectual Property Rights Regime in India by the Department Related Parliamentary Standing Committee (DRPSC), September 3, 2021, available at <https://www.iipa.org/files/uploads/2021/10/IIPA-Comments-on-Review-of-the-Intellectual-Property-Regime-in-India-Final.pdf>.

<sup>11</sup>WIPO Performances and Phonograms Treaty, Article 2(f), available at <https://www.wipo.int/treaties/en/ip/wppt/>.

including interactive making available of works and objects of related rights over computer networks (where the time and place of reception may be individually chosen by members of the public).<sup>12</sup> Moreover, the recommendation to extend the Section 31D statutory license to cover interactive Internet transmission is incompatible with India's obligation under the WCT and the WPPT by denying rightsholders the exclusive right to make available to the public their content.<sup>13</sup> Finally, the proposed amendment is inconsistent with the three-step test in the TRIPS Agreement, among other international treaties. IIPA urges the Government of India to reject the proposal and to provide certainty by committing to not extend the Section 31D statutory license to Internet transmissions.

In October 2020, the Indian government announced an open-ended process to review whether changes should be made to the Copyright Act of 1957, in light of the COVID-19 pandemic. IIPA submitted comments to the Registrar of Copyrights with specific recommendations. IIPA also urged India to resist any calls to introduce amendments to the Copyright Act that would weaken copyright protection, purportedly to respond to exigencies of the ongoing pandemic and, instead, to take this opportunity to pursue all necessary amendments to meet its international obligations and align with best practices on copyright protection. IIPA urges USTR to monitor this process closely and to encourage India to ensure that any changes to its Copyright Act comply with the country's international commitments.

India is a member of the Berne Convention, the Geneva Phonograms Convention, the WTO TRIPS Agreement, and the WIPO Internet Treaties. While the Government of India believes the law is currently compliant, IIPA members believe the current law falls short of full compliance in some respects. To fully implement the WIPO Internet Treaties and to align with international best practices, 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:

- Section 52(1)(c)
  - Clarify that service providers are subject to liability for copyright infringement if they had actual or constructive knowledge of infringing content or links on their services or networks and they fail to remove the copyright infringing content or links to such content expeditiously upon having gained such knowledge or awareness;
  - Require Internet service providers (ISPs) to employ measures demonstrated to be effective in preventing or restraining infringement, including, among other things, disabling access to the specific infringing content identified by the rights holder;
  - Clarify that the term "person" in this Section includes ISPs;
  - Eliminate the requirement that rights holders obtain an injunctive court order to prevent infringing content from being reinstated within 21 days of submitting a notice of infringement; and
  - Amend Rule 75 sub-rule (3), (Chapter XIV) giving intermediaries 36 hours to take down content in line with recommendations to more effectively address the speed of distribution of illegitimate content online.
  
- Section 65A—WCT Article 11 and companion language in WPPT Article 18, require Contracting Parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures." These articles establish a right against unauthorized access that is independent from acts of traditional copyright infringement. To fully comply with these requirements, the following amendments are necessary:
  - Define the phrase "effective technological measure" to expressly cover common TPMs, such as access and copy controls;
  - Expressly prohibit the manufacturing, importing, trafficking and dealing in circumvention devices and software, as well as the provision of circumvention services and devices;
  - Establish civil *and* criminal sanctions for acts of circumvention, trafficking in circumvention devices

<sup>12</sup>Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 270, available at <https://www.wipo.int/publications/en/details.jsp?id=361&plang=EN>.

<sup>13</sup>See World Intellectual Property Office (WIPO) Copyright Treaty (WCT), Article 8, available at <https://www.wipo.int/treaties/en/ip/wct/>, and World Intellectual Property Office (WIPO) Performances and Phonograms Treaty (WPPT), Article 14, available at <https://www.wipo.int/treaties/en/ip/wppt/>. See also, WPPT, Article 10.

- and software, and offering circumvention services;
  - Eliminate the requirement of proof of a nexus between an act of circumvention and copyright infringement;
  - Narrow the scope of exception in Section 65A(2)(a), namely “doing anything referred to therein for a purpose not expressly prohibited by this Act”; and
  - Adopt definitions and sanctions for the unauthorized removal of RMI.
- Section 52(1)(b) establishes that the transient or incidental storage of a work in the technical process of an electronic transmission is not an infringement of copyright. Similar or equivalent provisions in other jurisdictions are narrower, and IIPA urges the Government of India to emulate similar limitations. For instance, the exception should require the stored copy to be only temporary, that the copying does not have independent economic significance, and that the sole purpose of the reproduction is to enable transmission in a network between third parties. These safeguards would prevent infringing services or those seeking to avoid fair licensing terms from benefitting from the provision.
  - Chapter V—As applicable, increase the standard term of protection from life of the author plus 60 years, to at least life of the author plus 70 years to meet contemporary international standards of protection, and increase the term of protection for sound recordings from 60 to at least 70 years accordingly.
  - Section 39A—Eliminate the over-regulation of private contracts involving sound recordings. This Section appears to impose contractual limitations for authors established in Sections 18 and 19 on the ability of performers to decide the terms on which to license or transfer their exclusive rights in sound recording agreements. These limitations result in unreasonable changes to established practices in the recording industry. Section 39A does make clear that Sections 18 and 19 shall be applied to performers’ rights “with necessary adaptations and modifications.” Such “adaptations and modifications” should remove any restrictions on the transfer of performers’ rights in sound recording agreements.
  - Section 52(1)(a)—Ensure the private use exception is compatible with the three-step test codified in the Berne and TRIPS agreements and the WIPO Internet Treaties.
  - Repeal the unjustifiable exception in Section 52(1)(za) of the Copyright Act, which provides for an exception to sound recording producers’ and other rights holders’ right of public performance in respect of “social festivities associated with a marriage.” Although it is not uncommon for national laws to include limited exceptions for the use of certain copyright works in religious ceremonies, this exception extends to purely social functions, which are customarily subject to the public performance right.
  - Enact proposed Cinematograph Bill amendments that would make it unlawful to use an audiovisual recording device to make or transmit an unauthorized copy of a motion picture (in whole or in part, audio or video) while it is being performed in a motion picture exhibition facility. Such amendments would address the problem of unauthorized camcording and illegal transmission of unauthorized content through cinemas.

**Information Technology (Intermediary Liability and Digital Media Ethics Code) Rules:** On February 25, 2021, the Ministry of Electronics and Information Technology (MeITY) introduced the 2021 Information Technology (IT) Rules, extending the scope of obligations on intermediary platforms. Although the 2021 IT Rules provide increased accountability and obligations on intermediary platforms, they do not improve the inefficient notice and takedown regime. By way of example:

- Rule 3(1) of the 2021 IT Rules provides for a takedown mechanism pertaining to complaints regarding copyright infringement. However, it directs the ISP to take down infringing content only upon being notified by an appropriate government authority. Further, the 2021 IT Rules provide a 36-hour deadline for removal, which is too long for infringing content to remain on the internet.
- Rule 3(2) of the 2021 IT Rules provides for a grievance redressal mechanism that directs an intermediary to take all reasonable and practicable measures to remove or disable access to content that is hosted, stored, published, or transmitted by it, within 24 hours of receiving a complaint from an individual or any person. However, under the said Rule, the scope of what content may be included is limited to any material or content that exposes the private area of such an individual, shows such an individual in full or partial nudity, shows, or



depicts such an individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such an individual. The recorded music industry in India strongly believes that the issue of copyright infringement ought to be included within the scope of content to be taken down within 24 hours of receiving a complaint from an individual or any person.

Indian legislation currently provides ample opportunities for digital services, including User Upload Services, to avoid liability for copyright infringing content on their platforms. The music industry has been lobbying the government for amendments to the relevant legislation, but proposals have thus far been inadequate. The recently adopted 2021 IT Rules have placed increased obligations on platforms, however, the rules lack clarity. Further, the 2021 IT Rules do not go far enough to address the flaws in the system. While the National E-Commerce Policy published in 2019 includes positive proposals, it is not clear whether legislative action will follow.

**ISP Safe Harbor Provisions:** The Indian Copyright Act regulates limitations on the liability of ISPs in respect of copyright infringements. These provisions are extremely problematic from the perspective of robust protection of copyright online and its effective enforcement, because: (i) they are not limited to truly neutral and passive ISPs that have no knowledge or control of the data; (ii) they do not prevent the abuse of these safe harbors by services that are designed to facilitate or enable copyright infringement; and (iii) the takedown mechanism under Section 52(1)(c) essentially requires rights holders to obtain an injunctive court order to activate a takedown, which defeats the idea of efficient resolution of infringement by notice and takedown procedure. The inclusion of a court order requirement for these purposes is also inconsistent with international practice.

Section 79 of the IT Act exempts an intermediary from liability for any third-party information, data, or communication links made available or hosted by the intermediary. It remains unclear how the two sets of provisions—in the Copyright Act and the IT Act—interact, which is a cause of legal uncertainty and results in loopholes in copyright enforcement. In particular, the notice and takedown mechanism should be improved to prevent reappearance of the same infringing content.

In July 2020, DPIIT released a Draft National E-Commerce Policy for stakeholder comment. It is unclear whether any legislative proposals will materialize based on this draft Policy. Nevertheless, IIPA suggests this should be an opportunity to meaningfully improve the ISP Safe Harbor provisions (and online copyright enforcement more generally). The proposed draft Policy should in particular: (i) limit, to begin with, safe harbor protection to purely technical, automatic, and passive intermediaries; (ii) have ISPs implement measures that have been demonstrably effective in preventing or restraining infringement, including, among other things, disabling access to the specific infringing content as identified by the rights holder; 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. Despite the importance of the Policy, no revised drafts or policy proposals have been seen since.

**Exception for Weddings:** The existing exception for weddings from the public performance right is resulting in a loss of substantial revenue for record producers. The exception is incompatible with the three-step test, because it goes beyond certain special cases and conflicts with the legitimate interests of rights holders. The public performance of music at weddings impacts a major commercial activity for music producers.

**Term of Protection:** Under Section 27 of the Copyright Act, the term of copyright in sound recordings subsists until 60 years from the beginning of the calendar year following the year in which the sound recording was published. This is shorter than the term of protection in the US, the EU, and in over 70 countries worldwide.

## **MARKET ACCESS ISSUES IN INDIA**

The negative economic effects of market access barriers in India cannot be underestimated. Some of the more egregious market access barriers for IIPA members include:

**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%. However, 100% of FDI is allowed in non-news channels with government approval.

**Local Body Entertainment Tax:** In 2017, India rolled out a unified GST nationwide. Cinema tickets are subject to 12% and 18% GST rates, depending on ticket price. Effective October 1, 2021, the GST rate for “content licensing, right to broadcast and show original films” is taxed at a single rate of 18%. However, the 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 (particularly cinema tickets) 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. IIPA urges India to subsume all local taxes on cinema tickets into the national GST system.

**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 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.

**Mandatory Sharing of Non-Personal Data:** In July 2020, the Expert Committee on Non-Personal Data under the Ministry of Electronics and IT released a report proposing to require the sharing of “non-personal data” with the Government of India and business competitors in India. Subsequent iterations of the report have continued to maintain this stance. Such proposal raises serious concerns regarding content owners’ ability to maintain high standards of data security in India, severely disadvantages competition in the Indian market, and has the potential to undermine intellectual property rights if copyrighted materials are not expressly exempted. Additionally, recent developments on India’s privacy law indicate that the originally envisaged “personal data” law is now likely to become an all-encompassing data legislation that will regulate both personal and non-personal data. It also appears that specific rules on non-personal data will likely be the subject of delegated legislation, which will be crafted by the regulatory body yet to be created under the proposed data law. The unpredictability this would cause for businesses and content owners is deeply problematic from the perspective of intellectual property rights, digital trade, and ease of doing business.