

International Intellectual Property Alliance Submission for the Record
Hearing on U.S.-India Trade Relations: Opportunities and Challenges
March 13, 2013



INDIA (SUMMARY)¹

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

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2013.

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

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

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

Priority Actions Requested in 2013:

Enforcement

- Implement a national anti-piracy task force to reduce piracy, *inter alia*, by working with state Nodal officers,⁵ providing them with significantly increased resources; provide more accountability and power to the recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD). Our understanding is that the Task Force is now preparing recommendations to present to MHRD.
- Reinvigorate "IP cells" within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.

¹The complete India Special 301 report can be found on the IIPA website, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>.

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

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

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

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

- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.
- Ensure Anton Pillar orders are readily available in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant's delay of proceedings as evidence can be preserved by court appointed commissioners.
- Issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets.

Legislation

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

Market Access

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

PIRACY UPDATES IN INDIA

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

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

Internet, and hard goods piracy, notwithstanding the launch of some legal services for audiovisual materials.⁷

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

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

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

Retail Piracy and Circumvention of TPMs Continue to Harm Right Holders: The predominant form of retail piracy in India consists of burned optical discs, with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of software, entertainment software and books/reference materials. The music industry alone reports losses due to hard goods piracy of Rs300 crores (US\$55.8 million). Some imported discs and factory-produced discs from India have reportedly still been detected in recent years. Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard disk loading piracy) is also prevalent in India. There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkatta, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs, with vendors openly selling circumvention devices on the Internet, in retail stores and kiosks, or selling game

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

⁸For example, the International Intellectual Property Alliance (IIPA) listed Canada-based *Torrentz.eu* as a notorious market in its 2012 submission to the U.S. Trade Representative in its Special 301 out-of-cycle review to identify notorious piracy markets. *Torrentz.eu* is particularly highly ranked in the city of Calcutta (12th) and in all of India it is ranked as the 18th most visited site (it is ranked in the top 32 sites throughout South Asia). See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf.

consoles that are already modified. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.⁹

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

Software Piracy: The software industry reports that the rate of software piracy has continued to decline in India, though it remains high at a rate of 63% in 2011 (down from 69% in 2007), representing a commercial value of unlicensed software of almost US\$3 billion.¹⁰ A key part of this problem remains the unlicensed use of software by enterprises in India. There have also been decreases in hard disk loading (the consumption of “white boxes” or assembled hardware with unlicensed software), although this remains a problem in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and sponsored by BSA, entitled *Piracy Impact Study: Economic Benefits of Reducing Software Piracy*, found that decreasing India’s PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the ten point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues. Notably, in November 2011, BSA launched in India a new global program for certifying enterprises that meet International Organization for Standardization (ISO) standards for software asset management (SAM) – the “Certified in Standards-based SAM for Organizations (CSS(O))” program. Several Indian enterprises have completed or are in the process of obtaining this certification, which will recognize them as implementing SAM best practices. Also in November 2011, BSA and the Department of IT issued a joint report establishing a roadmap for promotion of SAM best practices in government and private enterprises and collaborative efforts between government and industry continue under this framework. Both of these efforts offer promising opportunities to drive down unlicensed software uses by enterprises.

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

⁹In its December 2012 announcement, USTR cited Nehru Place (New Delhi, India) as “one of the many markets in major cities throughout India that are known for dealing in large volumes of pirated software, pirated optical media containing movies and music, and counterfeit goods.” See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. The Motion Picture Association of America (MPAA) recently identified in its Special 301 out-of-cycle review submission on “notorious markets” for piracy Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai). These Indian markets with clusters of street vendors attract significant pedestrian traffic and are known for their high volume of pirated DVDs and other counterfeit products. See Michael O’Leary, Motion Picture Association of America, *Request for Public Comment on the 2012 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2012-0011, September 14, 2012.

¹⁰BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in India was 63%, representing a commercial value of unlicensed software of over US\$2.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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

ENFORCEMENT UPDATES IN INDIA

Internet Enforcement Experiences Mixed in India: The Internet enforcement situation in India demonstrates the complex nature of fighting piracy in India. The Copyright Law (both before and after the 2012 amendments) fails to provide a wholly adequate framework for a systematic and effective approach to Internet piracy. As such, takedowns have been generally patchy and never entirely successful. The music industry reports a takedown rate in India of 30% to 40%, with better luck against established user generated content (UGC) sites with established takedown processes, but only some relief in the case of court-mandated takedowns due to claimants' efforts to serve orders on ISPs, who comply for a short period of time after which compliance is an issue. One of the largest problems in India remains rogue foreign sites operating within the country, despite criminal cases having been filed against many of these sites. With ISPs taking the position that they will only take instructions from the Department of Telecommunications, and with no MOU in place with ISPs, there is no real remedy except for seeking to disable access to such foreign rogue sites. It is against this backdrop that local right holders have requested courts to order the disabling of access to foreign rogue sites causing significant harm to their interests. The latest instance involves the local music industry association obtaining orders from the Calcutta High Court directing all ISPs (387 in all) to disable access to 104 music sites from India (this included *songs.pk* mentioned in the 2011 IIPA report as particularly egregious, but many others with clear linkages to Bollywood, music or movies of India, or other indicia such as inclusion of words like "desi" or "tamil"). Where investigations reveal that websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One of these criminal cases was lodged in Rajkot Gujrat involving two websites (both shut down) and resulted in the arrest of two students in connection with running the websites; the case is ongoing. With respect to growing mobile device piracy, the Indian music industry is bringing to the police more than 500 mobile device piracy cases per month (up from 200 per month in 2011). However, cases such as these are not high on the agenda of Indian police, since they are instead focused principally on Internet or mobile cases involving credit card fraud or false names and addresses. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*, decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its "webspaces" or "places" to be used for sharing infringing materials. The local Indian record industry was involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites (many of which have been shut down as a result of the actions in Calcutta).

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

Some Retail Enforcement Ensues, But Piracy Remains a Low Priority Offense: Some industries continued to experience good support from Indian authorities in 2012, with law enforcement generally willing to conduct complaint-

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

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

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

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

Civil and Criminal Court Processes Remaining Somewhat Problematic: Despite some positive case results in both civil and criminal cases in the past couple of years, industry notes some endemic problems. First, criminal fines (reportedly roughly 200 fines were meted out in copyright cases in 2012) are invariably low and non-deterrent, with most falling under US\$1,000. Second, while the number of criminal convictions has gone up in the past couple of years, the sheer number of piracy cases still pending indicates that much more needs to be done to effect judicial reform and speed dockets; the music industry reports roughly 18,000 pending cases. Third, many courts, particularly outside Delhi, remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. Further problems involve unreasonable demands on right holders to produce copyright registration certificates, and demands for right holders to physically make witnesses available. Even in civil cases, in which credible IP judges have developed in the High Court in Delhi, Chennai and Kolkata, the high pendency rate, low damages, and the years that it takes to enforce any kind of court judgment, remain problematic features of the legal system in India. For these reasons, IIPA continues to urge the Indian government to establish special IP courts throughout the country with expert judges and prosecutors.

COPYRIGHT LAW AND RELATED ISSUES

Copyright (Amendment) Act, 2012 In Force, Further Modernizing India's Copyright Law: Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, effective June 21, 2012, and related laws and regulations. The Act (as amended) leaves in place existing, and raises some new, concerns which can be summarized as follows:

- unprecedented ownership and assignment provisions that could unduly restrict existing commercial arrangements in India;
- expanded compulsory license provisions;
- inadequate provisions on the protection of technological protection measures (TPMs) against unlawful circumvention as well as trafficking in circumvention devices and services;¹¹ and inadequate protection of rights management information (RMI);
- failure to address adequately online infringement/Internet piracy issues and to promote ISP responsibility and foster cooperation with right holders to combat such infringements; and
- some overly broad exceptions and limitations.

These issues and others¹² are reviewed in detail in IIPA's full India Special 301 report, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>. IIPA also provided comments on the development of a National IPR Strategy.¹³

MARKET ACCESS ISSUES

India currently imposes significant market access hurdles on the motion picture, entertainment software, book publishing, and software industries. One reason for this is the various taxes and charges that are imposed on right holders at various points in the distribution or dissemination of creative product in India. One measure which the Indian Parliament is considering is the Goods and Services Tax (GST) expected to be taken up in the 2013 Parliamentary Budget Session. Some hurdles remain to achieving consensus on the GST, particularly in regard to the states' views on 1) fiscal autonomy, 2) revenue-neutral rates, and 3) which items will be included in the GST list. Nonetheless, adoption of the GST could resolve many issues below related to entertainment taxes, high tariffs on entertainment and double taxation.¹⁴

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

- ***TRAI Bans Exclusivity, Includes "Must Provide" in the Pay TV Sector; MIB Also Restricts "Direct-to-Home" Business:*** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors) combined with a "must provide" requirement (obligating broadcasters to provide channel programming to all

¹¹ The Act left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT (Article 11) and WPPT (Article 18). While India has not yet ratified these treaties, the amendments are intended to address the WCT and WPPT issues to make India ready for such ratification. Specifically, Section 65A of the Act remains of concern as, on its face, it is incompatible with the WCT and WPPT. The provision falls short of international best practices without some clarifications and possibly revisions. IIPA has proposed certain of these through the Draft Rules process. Among key concerns are the following:

o The Act as amended does not expressly cover access controls as is required by the treaties. It should define "effective technological measure" as "any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright" to ensure proper coverage. IIPA has recommended that the Rules could confirm this definition of "effective technological measure."

o The Act appears to cover only the "act" of circumvention and only when the person engaging in circumvention activities acts "with the intention of infringing" an exclusive right.

o The Act does not expressly prohibit manufacturing, importing or trafficking in circumvention technologies, devices, or services and merely requires that person to keep a "record" of the names and addresses and other "particulars" of the person using such device or service to circumvent. This is highly unfortunate.

o The Act does not define an "effective technological measure."

o The Act would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby potentially eviscerating protection), and creates other overbroad exceptions. While this exception provision clearly places India outside the scope of the "adequate and effective" protection needed regarding unlawful circumvention, there may be ways to limit the scope of this provision through the Draft Rules. The Draft Rules currently permit a person to "approach anyone who can assist him to circumvent the technological protection measures." The Draft Rules should at the very least limit the scope of entities eligible to assist in circumvention, e.g., an approved list by the Ministry of those who it has verified will keep proper records and ensure that no act of circumvention is performed outside of any permitted purpose.

o The Act provides for criminal remedies, but not civil remedies.

¹²For example, IIPA also recommends that the government of India: 1) Confirm That Camcording of a Motion Picture is Illegal; 2) Deal with Damaging "Pre-Release" Piracy; 3) Adopt Statutory Damages; 4) Allow Seizure Orders as a Matter of Right; 5) Allow for Restitution in Criminal Cases; 6) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion; 7) Enhance Corporate Audit and Disclosure Requirements; 8) Adopt Policies to Ensure Legal Software Use and Software Asset Management (SAM) Best Practices in Government Agencies and Promote the Same With Private Enterprises; 9) Address Lengthy Patent Pendency; and 10) Adopt an Effective Optical Disc Law.

¹³During the fall of 2012, the Department of Industrial Policy and Promotion (DIPP) initiated a process to review a Draft National IPR Strategy, inviting views of stakeholders. IIPA and BSA submitted comments in the process. In IIPA's comments, we note the importance of properly defining intellectual property rights, that copyright and creativity have long played an important role in India's economic development, and the importance of providing adequate and effective levels of protection and enforcement in India as a means to achieve the goals of the IP system (citing the priority actions from the 2011 Special 301 report as guideposts). BSA's submission highlighted the need to, among other things, 1) cover software under the Gondas Acts which recognize the link between piracy and organized crime; and 2) make software-specific changes to the Copyright Act consistent with this report; 3) make changes to disclosure and audit requirements in the Companies Act, 1956, to ensure that companies are properly procuring and licensing software; 4) establish a "National Intellectual Property Council" under the Prime Minister's Office to monitor progress of the National IPR Strategy and for other purposes; 5) put into place a directive or strict policy guideline mandating all government departments across the country use legal software and follow due diligence while procuring software assets, including the adoption of latest software asset management (SAM) practices; and 6) not discriminate in procurement or adoption practices on the basis of their business model, their place of origin, or the type of technology they employ.

¹⁴CNBC-TV18, Budget 2013: GST stuck between states' demands, India Inc's pleas, SME Mentor, January 17, 2013, at <http://www.moneycontrol.com/smentor/news/indian-markets/budget-2013-gst-stuck-between-states-demands-india-incs-pleas-808898.html>.

requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.

- **Restrictions on Direct-to-Home (DTH) Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an individual home). Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 74%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Indian government has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films. Any film not produced in the same language that is predominately spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice.
- **Price Fixing on Theatrical and Quotas:** The Indian government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.
- **Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.
- **Disruptive Content Control Rules for Television:** In August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated “U” can be broadcast on TV channels. This change was reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only “U” rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.

- **Service Taxes on Transfers of IP:** IIPA notes positively the addition of temporary transfers of IP rights to the Negative List, but also notes that litigation (Constitutional challenges filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts) remains pending for the 2010-2012 period. A further service tax has now been imposed on the “input”/production side (i.e., the services of actors, composers, and musicians) which cannot be offset, with negative effects on those who produce locally or are engaged in local co-productions.

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

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

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

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

GENERALIZED SYSTEM OF PREFERENCES

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