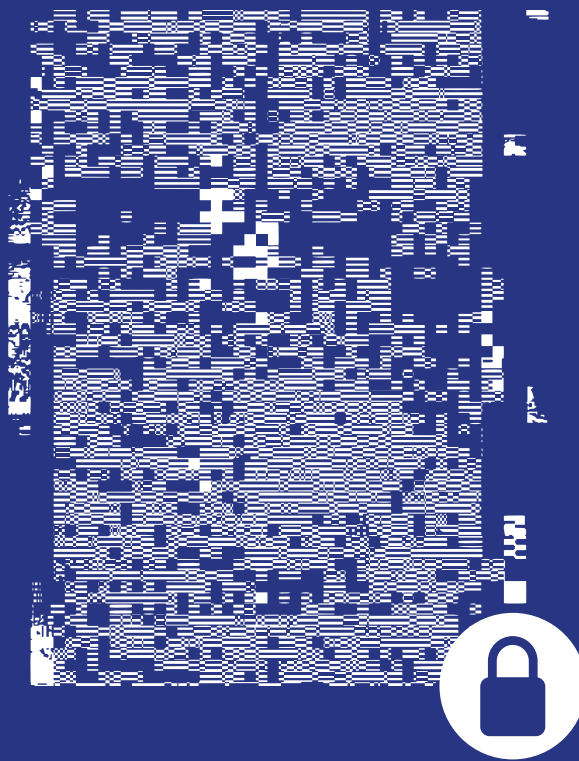




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# **TRENDS IN COPYRIGHT INFRINGEMENT AND ENFORCEMENT IN INDIA**

*December 2019*

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Designed by: Drishti Khokhar

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## OVERVIEW

Copyright is an exclusive right of the creator of original creative work. In the digital world it protects creative and cultural products including books, art, music, videos, films, video on demand (online curated content) content, and software code.

Since copyright subsists in protectable works and does not need to be ‘registered’, the scope of its impact is difficult to measure or quantify. Consequently, it remains a challenge to estimate the revenue lost due to copyright infringement/piracy<sup>1</sup>.

This monograph is a step towards understanding copyright infringement and challenges thereof, in light of the prevailing copyright legislation and its enforcement. It also explores the digital future, where such infringement can be deterred through technology. We look at legislative, judicial, technological, and policy developments in India and around the world to gain insights from best practices. We also summarise the latest estimates of losses from piracy in the music and film industries.

This report is second in our *Contemporary Culture and Intellectual Property* series. The first report set out the context of contemporary digital culture and explored some megatrends at the intersection of intellectual property (IP) and digital culture in the Indian context. In this report we focus on music and films, and present key trends in law and technology to counter digital copyright infringement. We also briefly cover recent issues such as intermediary liability, piracy of live sports broadcasts, and the role of streaming platforms in the content ecosystem.

**CHAPTER 1** of the report examines existing data to measure piracy, estimate losses, and frame policies based on consumer behaviour.

**CHAPTER 2** explores the impediments created by current legislation and proposes reforms to increase the efficiency of enforcement strategies. It suggests that state capacity would be better utilised by rationalising penalties in laws that deal with copyright infringement, differentiating between commercial and individual users, and building a robust legislative and enforcement framework for protecting copyright in a digital age.

**CHAPTER 3** examines judicial trends to counter copyright infringement and suggests key considerations to develop effective jurisprudence. The judiciary in India has relied primarily on injunctions under so called John Doe orders to deal with copyright infringement—the chapter explores how these orders can be made more effective. In this context it also studies live blocking, broadcast piracy, dynamic injunctions, and the ‘notice and take-down’ and ‘notice and stay-down’ regimes.

**CHAPTER 4** highlights key alternatives to traditional anti-piracy methods—for instance, the expedited judicial systems in Chile, and the use of administrative frameworks with safeguards as in Greece and Spain. It explores other recent developments such as the Cinematograph (Amendment) Bill 2019, and the Draft Copyright (Amendment) Rules 2019, which will have implications for IP and the content ecosystem in India.

**CHAPTER 5** delves into common cross-border issues faced by copyright holders and examines the systems in place to protect foreign works in India, and Indian works abroad. It explores the standardisation of conflict of law principles, technological and market solutions, and aid from legislation unrelated to IP as means of addressing cross-border copyright infringement.

**CHAPTER 6** examines measures that can be adopted beyond the law, and presents instances of global best practice in curbing copyright infringement. It elaborates on technological and soft law measures adopted across the world in this regard.

**CHAPTER 7** concludes by looking at key global regulatory and policy developments that may be helpful in framing relevant policies in India. These include lessons in modernising copyright legislation, improving border controls, innovations in big data and artificial intelligence and so on. It also critically examines the National Intellectual Property Rights Policy in India, and presents a summary of recommendations.

## INTRODUCTION

The World Intellectual Property Organisation describes copyright (or author's right) as the rights that creators have over their literary or artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films to computer programmes, databases, advertisements, maps, and technical drawings.

In the first report in the series, we explored the changing role of IP rights globally, shaped by advancements in the digital era. We discussed how copyright has been elevated from being an 'economic vehicle' to 'a communications instrument relevant to cultural policy'.<sup>2</sup> And how, therefore, copyright laws influence free expression, shape innovations in the digital cultural space, govern information flows, regulate the production and exchange of digital cultural products, and shape social relations of communication.<sup>3</sup>

Copyright law gives control to authors and subsequent owners. Thus, writers, artists, musicians, performers, software programmers, publishers, students, researchers, librarians, teachers, readers, movie-goers, and music fans amongst others, exist in a web of cultural and economic relations subject to copyright law.<sup>4</sup>

Copyright impacts the information and communication markets as well as culture around the world, its infringement can be seen as both a moral and an economic violation. With the proliferation of the Internet and internet devices, infringement has become seamless and at scale.

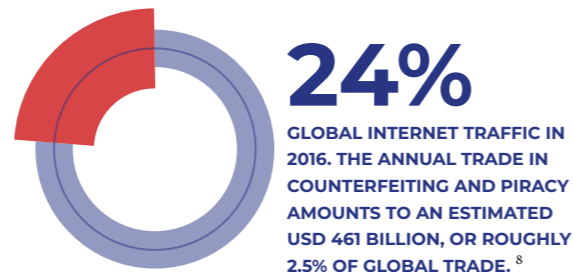
This report explores the contours of digital copyright piracy and how it affects all kinds of expressions of *ideas*.<sup>5</sup>

## INDUSTRY GROWTH AND PIRACY

The debate over piracy, and whether it promotes or harms cultural consumption, remains unsettled. The rise of the digital medium for consuming content has added to industry growth but has also aided digital piracy. For instance, online streaming has emerged as the biggest contributor to music consumption. **In India, as of December 2018, the value of the audio OTT market was USD 250 million, and music consumption per week stood at 21.5 Hours versus a global average of 17.8 Hours.**<sup>6</sup>

Using music as a proxy for the content industries would demonstrate the potential of the digital market.

Piracy has affected other digital media as well. Illegal streaming reportedly accounted for



## THE INDIAN CONTEXT

The Indian creative industry (largely comprising the media and entertainment industry) is poised to be worth USD 31 billion by 2020<sup>9</sup> and is expected to create 1.3 million jobs by 2022.<sup>10</sup> Although the Indian Government has identified the audiovisual sector<sup>11</sup> as a 'champion services sector', much remains to be done to protect and promote investment and innovation in India's creative economy. The growth of an innovative content ecosystem depends on a clear understanding of the market, the legislative and enforcement framework, and piracy's technological underpinnings.

The first critical step is identifying why piracy takes place, and what makes India a particularly challenging market in this regard. A recent meta-study of the existing literature found that a predisposition towards digital piracy is influenced by several aspects: personality factors (self-control), personal or psychological factors (neutralisation techniques, attitudes and beliefs), and social and cultural factors (social learning, collectivistic/individualistic factors)<sup>12</sup>. Other determinants included legislation, and efforts by industry, the judiciary, and policymakers to curb digital piracy.<sup>13</sup>

The drivers of digital piracy in India specifically remain unaddressed in recent academic literature. There is no recent and reliable data on the total size or scope of the cultural economy in India, nor the scale and nature of copyright infringement. For instance, while WIPO has calculated the revenue, employment and net exports

generated by the creative industries in a number of countries, such a study is yet to be conducted for India.<sup>14</sup>

India presents a number of challenges in combating online piracy for multiple reasons: lack of uniform enforcement mechanisms, the fragmentation of supply chains in cultural industries, emerging business models, the rapid development of the OTT space requiring increased technological investments in media encryption and piracy monitoring, an overburdened judicial system lacking in specialised IP courts, and the absence of a widespread understanding of copyright, among other factors. Content owners thus need to additionally invest in media encryption and piracy monitoring services. Local industry continues to be dominated by promoters and family owned companies, therefore, governance structures tend to be informal, making industry organisation and policy advocacy more difficult.<sup>15</sup>

Centralised and uniform enforcement strategies are difficult to implement in India. 'Law and order' is a state subject under the Seventh Schedule to the Constitution, so enforcement initiatives that rely on the police are organised at the state level rather than through any centralised agency with national jurisdiction, making it difficult for enforcement strategies to be implemented uniformly throughout.

In conversations with industry experts we discovered some unconventional factors (beyond pricing and availability) that shape the piracy industry in India. For instance, the factor of time or the 'windowing' period is critical to controlling piracy. The less time it takes for a theatrical release to find its way to a legal, more accessible digital medium like OTT, the less users' predisposition to consume pirated content. In this context, a recent report mentioned that due to the threat of digital piracy across and between windows has prompted many TV copyright owners to shorten delays between releases to different segments of the market. In certain cases where there is a high risk of widespread piracy (e.g. the Game of Thrones series), some content suppliers have moved to a day-and-date approach in which material is released simultaneously across differing outlets and platforms worldwide.<sup>16</sup>

Indeed, the use of OTT platforms has emerged as a strong anti-piracy measure, and with local and international content now available at lower prices on various OTT services, the piracy market in India is bound to undergo certain changes, given the variety of content (international and regional) offered by several legal online content platforms at affordable price points.

## METHOD

This report combines desk-based analysis with semi-structured interviews and discussions with practitioners and academic experts. It focuses primarily on the media and entertainment industries, given the availability of previously conducted research and data. It is also rooted in current and future trends, a review of global literature, and specific case studies. In its working paper format, the report was valuably informed by a focus group discussion among experts.

## CHAPTER 1/ ECONOMIC ANALYSIS OF PIRACY IN THE INDIAN MOVIE AND MUSIC INDUSTRY

Losses from piracy in the film and the music industries are hard to estimate. There is a case for aligning methodologies with global practices and accounting for the multi-dimensional relationship between legal and pirated content. Smartphones and streaming devices are the primary channel for viewing content, and India is reportedly among the top five countries in the world using 'peer to peer' or P2P platforms like BitTorrent. Recent cross-country evidence shows the main driver of piracy to be the high price of legitimate content, followed by quality, access, and ease of use. However, there is lack of evidence for India.

### QUANTIFYING LOSSES FROM PIRACY

Quantification of the extent of piracy in the film and music industries has largely been based on figures directly quoted by industry stakeholders or through relatively small consumer surveys, incorporating a variety of assumptions about user preferences. When asked about the hurdles facing the Indian film industry, including piracy, the Ministry of Information and Broadcasting stated that it does not maintain such information.<sup>17</sup>

The major hurdle in estimating losses due to piracy is the inability to elicit the true substitution rates between legal and illegal content by consumers. These may depend on a variety of factors including income, location, and access to legal content. If blocking consumer access to pirated content is hypothesised, it is not known what proportion of users would switch to legal content at the full price, or switch to other content, or to no content at all. Each user's response will differ based on her preferences and the accessibility of legal content.<sup>18</sup> For example, in an analysis of banned sites in the UK during 2012-2014<sup>19</sup>, mixed results were found. In the 2012 ban on the Pirate Bay, users blocked from the site switched to other sources of illegal content, while in subsequent years on other sites, consumers switched to legal subscription sites.

In this setting, the number of consumers viewing paid content would determine content prices of revenue of the industry. For example, an influx of viewers of legal content in a market may pave the way for more content producers and providers, thus increasing competition, lowering of ticket prices, and potentially lowering gross sales for a particular producer.<sup>20</sup>

**Table 3 - Possible effects of file sharing on the purchase of CDs, films, games and related products**

<i>Positive</i>	- File sharing introduces consumers to music, films and games (and to artists and genres), thus creating demand. This is known as the sampling effect (SHAPIRO & VARIAN, 1999; LIEBOWITZ, 2006). - File sharing allows consumers to pool their demand, resulting in increased demand. <sup>(*)</sup> - File sharing enhances willingness to pay and demand for concerts and related products (complementary demand). - File sharing enhances the popularity of products, boosting demand driven by a lack of purchasing power (network effect). <sup>(**)</sup>
<i>Neutral</i>	- File sharing meets the demand of consumers who are not, or not sufficiently, willing to pay and subsequently are not served by the manufacturer. - File sharing meets a demand for products that are not offered by manufacturers (e.g. film files for iPods).
<i>Negative</i>	- File sharing substitutes for the purchase of music, DVDs or games or cinema visits (substitution). - File sharing results in the deferred purchase of music, DVDs or games, at a lower price than the price at launch. - Sampling results in sales displacement as a result of fewer bad buys. <sup>(***)</sup>

(\*) This applies in particular to the exchange of media with friends rather than to the anonymous exchange through P2P networks.

(\*\*) This applies in particular to the use of software for which network effects are clear. A (modest) network effect may also be found for lifestyle products such as music, films and games. Unauthorised use can also, under certain circumstances, have a positive effect on profits and investments without network effects as it can weaken competition between products. Jain (2008).

(\*\*\*) ROB & WALDFOGEL (2006) show that on average people's appreciation of music is lower after it has been bought or downloaded than prior to the purchase.

*Figure 1: Possible effects of file sharing on the purchase of CDs, films, games and related products. Source: Table 3, Poort, Joost, Rutten & Van Eijk (2010)*

Besides, the relation between legal and illegal content is not unidimensional. Poort, Joost, Rutten & Van Eijk summarise the potential positive, negative and neutral effects of piracy on the purchase of legal content (see above).<sup>21</sup> While there is substitution in sales and an impact on the windowing strategies of producers and distributors, piracy has also been reported to introduce users to new content<sup>22</sup> and enhance the willingness to pay for live events and merchandise. These interacting effects and spillovers hinder any accurate assessment of losses due to piracy.

A recent global study on online piracy revealed an interesting relationship between legal consumption and the incidence of online piracy.<sup>22</sup> First, it found no evidence linking stronger enforcement mechanisms with a reduction in piracy. Rather, higher incomes per capita were found to be correlated with lower piracy. Second, it found that pirates and users of legal content were largely the same people, with over 95% of pirates also consuming

content legally. Their median legal consumption was twice that of non-pirating legal users. This suggests that consumer patterns are not always what have been hypothesised, and emphasises the need for similar studies in India.

### SURVEY BASED EVIDENCE

The Indian Music Industry (IMI) 2018 Digital Music Study<sup>24</sup> provides some survey-based insights on online music content. It reported that about



A FICCI-Ernst & Young (EY) report published in 2019, reporting for 2018 translated this survey response into industry losses of approximately INR 15 billion, or USD 215 million.<sup>25</sup>

If the share of respondents who reported streaming pirated music is simply scaled to total digital music sales, estimated at INR 6.65 billion in the same report<sup>26</sup>, it is possible to get a direct estimate of losses due to piracy. This loss is approximately INR 21 billion (USD 292 million) in online music sales, if it is assumed that there is full substitutability between legal and illegal sources. However, if lower substitution rates are assumed, it is possible to get numbers closer to the EY study. The difference between this estimate and EY's is approximately the size of the entire digital music industry, and it is difficult to provide evidence for the substitution rates among Indian consumers in the current repository of consumer surveys.

The Global Online Piracy study attempts to assess the substitution rates of consumers around the world.<sup>27</sup> It highlights that on average, 4.1% of all legal blockbuster movie consumption is displaced by illegal consumption. This rate is higher in Thailand and Brazil than in Japan or the Netherlands. A 4.1% displacement rate in online music would mean a loss of about INR 270 million or USD 3.76 million, much smaller than the losses estimated by EY.

The Global Online Piracy study estimates substitution rates by studying consumer behaviour in several contexts—whether they would travel without a ticket, or jaywalk, or use flash photography in museums—as an instrument of consumer behaviour. A similar survey setup would be required to work out similar substitution rates for India.<sup>28</sup> Here the questions would have to be adapted to the Indian context, and a proxy for substitution rates would have to be attempted. This substitution rate could be incorporated into a model of the market structure to estimate the impact on final prices, total demand, the change in viewer profiles, and therefore the overall loss in revenue.

Similar calculations for revenue losses due to piracy can be made for the film industry. In 2016, Nirmal Bang surveyed approximately 280 individuals to capture trends in film exhibition. The survey included two questions about piracy: whether the respondents watched pirated versions of newly released movies, and whether they downloaded and watched movies from torrent sites. Roughly a third of the respondents answered yes to the first question, and about half answered yes to the second. Given an industry size of INR 142.3 billion that year,<sup>29</sup> with the share of domestic

theatrical sales at INR 99.8 billion, this translates to possible losses up to the size of the entire industry, assuming full substitution between legal and pirated views.

In contrast, the FICCI Frames-KPMG 2017 report estimated that INR 180 billion in revenues were lost to piracy in 2016, which would represent 55.8% of the industry size. Further, according to the Motion Picture Association of America Theatrical Market Statistics data, the box office collection stood at USD 1.9 billion or INR 124 billion. With these figures it is possible to obtain an upper bound on the loss in revenue to be INR 124 billion, which is roughly 70% of revenue loss due to illegal channels of consumption.

**Annexure I to this report compiles the latest figures for revenue and piracy losses in the music and film industries.**

### ALTERNATIVE STRATEGIES TO ESTIMATE PIRACY

The European Union Intellectual Property Office and the Organisation for Economic Cooperation and Development have used global customs data to estimate losses due to counterfeiting.<sup>30</sup> For digital piracy, they 'follow the money' and use information from advertisements on piracy sites to calculate revenue loss. (Chapter 5 of this report elaborates on the method.) They also conduct consumer surveys to estimate the degree to which users pirate content, knowingly or unknowingly. The EUIPO and the OECD not only provide annual updates in this regard, but also update the methodology regularly.

This report emphasises that concerted efforts to estimate the impact of piracy on the media and entertainment industry can be made only if the State recognises piracy as a serious threat and allocates adequate resources to collecting India-specific data.

### CHANNELS OF PIRACY

The IMI Digital Music Study, 2018 identifies stream-ripping as the most popular form of illegal downloading in India. Software like YTD Video Downloader or browser plugins immediately allow users to download audio from any YouTube page, facilitating piracy.

The Irdeto Global Consumer Piracy Survey<sup>31</sup> documented responses from thirty countries observing that mobile devices, especially Android smartphones, were a popular medium for watching pirated video content.

In the global survey, respondents were asked whether they watched pirated content via any of the following streaming devices—Roku, Google Chromecast, Amazon Fire TV Stick, Mag 250, Raspberry Pi, Android set-top box or Kodi. For India, 20% of respondents across all age categories replied in the affirmative, and this was the highest proportion among the countries surveyed. Movies and TV series were the most popular type of pirated content. 13% of respondents also illegally

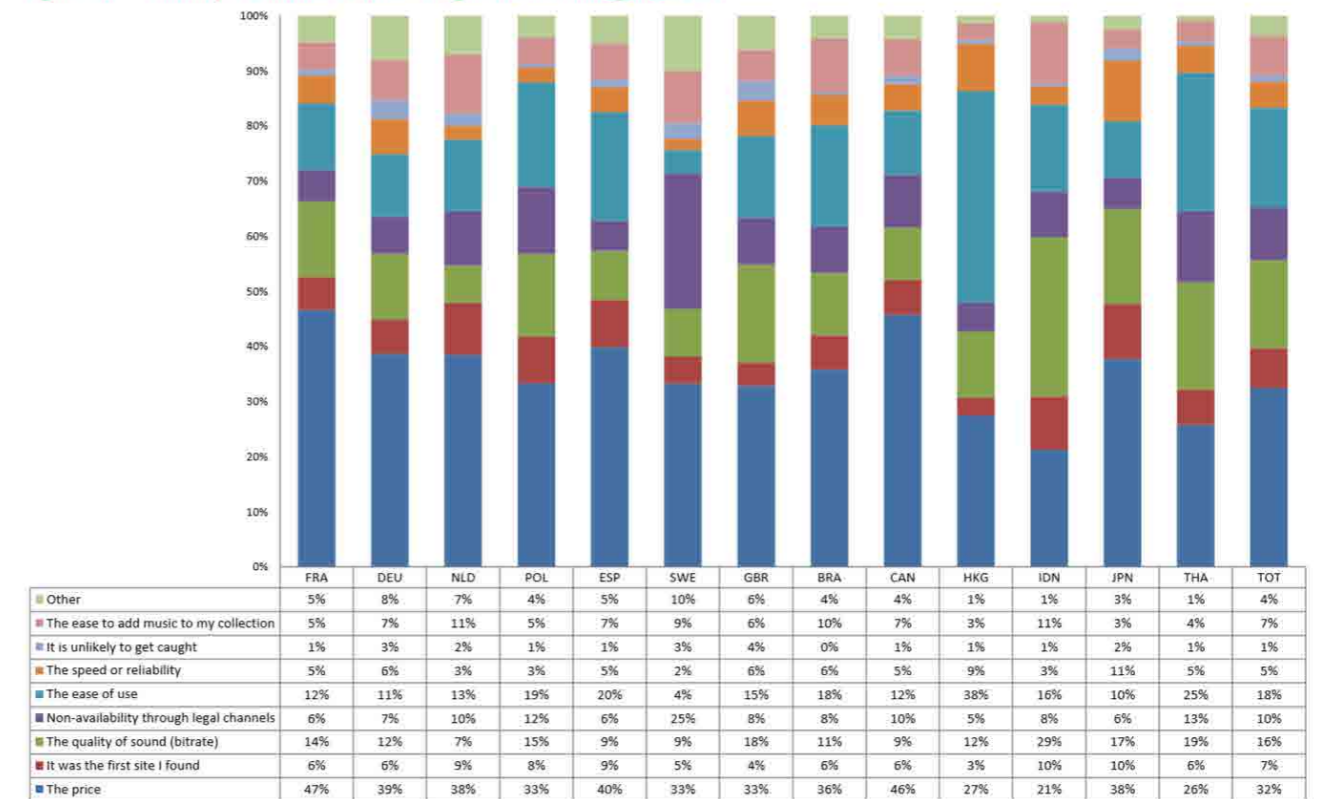
streamed live sports. Irdeto data further stated that India was one of the top five countries using P2P downloads to access pirated content.

### DRIVERS OF PIRACY

Across consumer surveys, the main driver of piracy is the high price of legal content. In a consumer survey conducted across 13 countries, the Institute for Innovation Law found similar motivations behind pirating music as the IMI report for other countries, with price being the primary reason for streaming or downloading content illegally, followed by sound quality and ease of use.

The Nirmal Bang Report on the Film Exhibition Sector found a similar trend, with 52.2% of the respondents saying they would opt out of watching movies at multiplexes if ticket prices rose by 5-10%. This aligns with the Global Online Piracy Study findings where

Figure 5.7 Primary reason for downloading music from illegal sources



Source: Global Online Piracy Study Report, Institute for Information Law (2018)

price was cited as the main cause for pirating movies, followed by picture and sound quality, non-availability through legal sources, and ease of use.<sup>32</sup>

With time-sensitive content such as movies or live events, producers have anticipated and responded to piracy through shorter ‘release windows’ between when events are live-streamed or shown in multiplexes, and when they are distributed through legal means to other subscription and ad-based services. This helps effective monetizing of content and extending the period of content revenue generation. Shorter windows have worked to reduce losses due to piracy and are being adopted widely.

**This should draw attention to the growing market for high-quality content in India. As the country’s income levels rise, we can more expect consumers to be sensitive to factors such as quality and convenience in addition to just prices. It is expected that having a variety of choice, high-quality content through legal means, across multiple devices will be appreciated by Indian audiences.**

This would require producers and distributors to adopt business models that adapt to evolving technologies, consumer content preferences and mobility. For instance, the music industry has found a niche with online streaming services. *Spotify*, a popular streaming service, allows users to choose between listening to free music with occasional ads or paying for unlimited, ad-free streaming.

In India, businesses are already providing legal content at low prices, or bundling products to offer an interesting mix of services, making piracy both inconvenient and less attractive. Examples include *YouTube Music*, which offers a monthly subscription starting at INR 99 (the premium membership being bundled with a *Google Play Music* subscription), *Spotify*, which offers a daily subscription for INR 13 and a monthly one for INR 119, besides a limited version for free, *JioSaavn*, with a monthly subscription for INR 99, *Airtel Wynk Music* with one for INR 49 or INR 99, for Airtel users and non-users respectively, *Apple Music* with a monthly pack for INR 99 along with price cuts for students, and *Amazon Prime Music*, which is bundling its subscription with Amazon Prime, offering same-day delivery and Prime video for only INR 129 per month, or INR 999 per year.

To summarise, reducing piracy will require a better understanding of the motivation and reservation-

prices of consumers for different kinds of content. Surveys can help elicit responses to understand what price consumers are willing to pay for legal content. Experimentation by producers when it comes to pricing plans, and innovative options for access, can also be informative. As highlighted in this Chapter, a more accurate estimation of piracy can perhaps be done using the ‘follow the money’ approach by using information from advertisements on piracy sites to estimate revenue loss.

Furthermore, the role of the State remains more complex: from improving awareness, enforcement, payment systems, dissemination, and accounting for the negative spillover effects to pirates from the production industry, which if not controlled will result in lower investment in quality content. Ultimately its role should be to create an ecosystem that upholds the rights of copyright holders and enables creative industries to thrive, without preventing consumer access to quality content.

## CHAPTER 2/ REVIEW OF COPYRIGHT LEGISLATION IN INDIA

*The Copyright Act, 1957 defines the scope of copyright infringement in India and the exceptions to it. Chapter XII and XIII of the Act deal respectively with the civil remedies available to the copyright holder and the recognised offences. A shift from civil remedies to criminal ones is a modern development in copyright law across the world, particularly to counter infringement for commercial gains happening digitally, and at scale. This chapter explores the Union and state legislations governing copyright infringement to suggest a balance between the rights of copyright holders and of users, accounting for limited state capacity and the differences between individual and commercial infringement.*

### CHALLENGES WITH UNION LEGISLATION: COPYRIGHT ACT, 1957

Copyright infringements generally occur for commercial gain, individual consumption, and by online service providers who knowingly or unknowingly become conduits for infringement.<sup>33</sup> However, in copyright law around the world, attempts are seldom made to distinguish between these differences. Indian copyright law is no different.

### UNIFORM CRIMINAL SANCTIONS

The Copyright Act does not distinguish between copyright infringement—infringement by an individual user for no explicit commercial gain—and infringement for commercial purposes.<sup>34</sup> While the proviso to Section 63 of the Act<sup>35</sup> prescribes lighter punishment for those who indulge in infringement without any ‘gain in trade’, this exception is left entirely to the courts’ discretion.

The distinction between commercial and non-commercial piracy is particularly relevant from the

standpoint of *public enforcement*. Researchers have argued that by bringing additional matters that could be dealt with more effectively under private enforcement remedies or soft law approaches (which may be cheaper and more effective for copyright holders—discussed in more detail in Chapter 6 of this report), the current law misallocates scarce resources in the enforcement of all types of copyright disputes, needlessly increasing the social costs of public enforcement without adding very many social benefits.<sup>36</sup> Reserving criminal sanctions only for copyright infringement for commercial purposes is also recommended by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>37</sup>

### IMPOSITION OF IMPRISONMENT AND FINES

In criminal jurisprudence ‘imprisonment’ is usually imposed at a higher threshold of criminality than ‘fines’. Therefore, several legislations prescribe ‘*imprisonment or fine*’ as a term to indicate that the courts can prescribe either one as punishment, depending on the nature of the infringement. The word ‘or’ also implying ‘and’, courts have the option of imposing both imprisonment and a fine. However, at several places in the Copyright Act, provisions penalising infringement use the phrase ‘imprisonment and fine’, which does not allow for such judicial flexibility.<sup>38</sup>

In India, neither the legislature nor the judiciary has issued structured sentencing guidelines, but several governmental committees and judicial decisions have pointed to the need to adopt guidelines in order to minimise uncertainty in awarding sentences. Further, several judicial decisions mandate criminal penalties that are proportional to the magnitude of the offence. Besides proportionality, courts have also directed that the punishment imposed should depend on the facts and circumstances of each case, such that mitigating and aggravating factors are heeded, and that the punishment is appropriate, adequate, just and proportionate, and commensurate with the nature and gravity of the crime.<sup>40</sup>

In this regard, *adopting a graduated or rationalised punishment mechanism* that moves from *fines and social service to imprisonment* may be a more rational approach to constructing criminal sanctions.

It is important to acknowledge that there is scant information from India about the impact of softer sanctions and enforcement strategies on piracy. However, empirical data on norms and copyright infringement in the US suggest that harsh sanctions, including criminal ones, may be ineffective in promoting lawful behaviour, and may in fact induce strong copyright aversion. Excessive sanctions could therefore prove counterproductive—and there is little evidence to suggest that increasing criminal penalties necessarily encourages IP innovation.<sup>41</sup>

The World Intellectual Property Organisation (WIPO) Advisory Committee on Enforcement recommends legislative justification for severe sentences, based on perceived harm to the public. That harm would depend on several factors to be considered: the nature of harm caused, the degree to which it was perpetrated, the level of moral culpability, and the economic harm. As such, it has been suggested that IPRs should be justified in order to be recognised, respected and enforced—for which it is necessary to consider IP enforcement in a social context, with regard for legitimate public rights, interests and concerns, and to move away from counter-productive enforcement<sup>38</sup> in the absence of qualitative reviews on the certainty of detection and conviction.

**A proportional and rational gradation of different kinds of sanctions in law can also substantially reduce enforcement-related costs per offence and per offender.<sup>43</sup> Thus, it is important not only to reform legislations to make sanctions graded and proportional to the specific infringement, but also to improve enforcement and judicial remedy.**

## CHALLENGES WITH STATE LEGISLATION

Some state legislatures including Karnataka, Tamil Nadu, Kerala and Maharashtra have attempted to deal with piracy by imposing stringent penalties, with some of them including piracy within the ambit of legislation introduced for other purposes. For example, the Goondas Acts introduced by some states in various forms aim primarily to prevent and curtail ‘goondas’ and others specified in the legislation from committing

criminal offences typically related to drug trafficking, sex trafficking, land offences, physical violence, and the like. These legislations include varied activities sometimes unconnected to piracy, and generally allow for preventive detention.<sup>44</sup>

Aside from the implications for free expression,<sup>45</sup> issues of legislative competence,<sup>46</sup> and the more basic fact that the Goondas Acts were originally introduced to maintain public order,<sup>47</sup> which copyright infringement does not usually threaten,<sup>48</sup> legislative instruments that seek to criminalise piracy through statute dealing with more serious and violent offences are problematic because of their disproportionate penalties, which extend far beyond the remedies provided for in the Copyright Act.

For instance, the Goondas Acts in Karnataka and Tamil Nadu, and the Maharashtra Act allow for the preventive detention of video or audio pirates and video pirates respectively, for a period of up to twelve months,<sup>49</sup> on mere suspicion.<sup>50</sup> The Kerala Act similarly allows for the preventive detention of ‘known goondas’<sup>51</sup> for a period of up to six months.<sup>52</sup> Preventive detention as a penalty is vastly disproportionate to copyright offences, especially given the massive potential for misuse,<sup>53</sup> and considering that they are in the nature of civil wrongs.

While some High Courts have held that the inclusion of piracy under the Goondas Acts and similar legislation falls within the mandate of states to ensure ‘public order’, the Supreme Court has in a number of cases specified what the public order exception to the right to freedom of speech and expression requires.<sup>54</sup> The link between the speech in question and the disruption to public order must be proximate—so much so that it amounts to a ‘spark in a powder keg’ or ‘incitement to imminent lawless action’.<sup>55</sup>

It is also important to note that the Copyright Act and the Information Technology Act, 2000 (IT Act) already include penalties for piracy. The use of the Goondas Acts and other such statutes to curb piracy is even more confusing when we consider the minimal prosecution under them for piracy.<sup>56</sup>

**The cost of enforcement is especially important to consider in India, with its overburdened police force<sup>57</sup> and high pendency of cases in the judiciary.<sup>58</sup> Therefore, the use of soft-law, extra-legal, and technical alternatives which account for the motivations behind piracy and focus on making lawful content accessible are explored in the subsequent chapters of this report.**

## CHAPTER 3/ KEY JUDICIAL TRENDS

*This chapter discusses key judicial trends relating to copyright infringement. In light of technological advances, it delves into emerging judicial trends on live blocking, broadcast signal piracy, internet broadcasting and statutory licensing.*

### JOHN DOE ORDERS

John Doe/Ashok Kumar orders are among the most commonly used remedies for copyright infringement in Indian courts. These judicial orders are issued against unidentifiable defendants and are injunctive orders,<sup>59</sup> intended to deter copyright infringement during the release of new content, usually targeting infringing websites. In India, John Doe orders were first passed in a case by the Delhi High Court,<sup>60</sup> which relied on the judicial systems of Canada, the United States, England, and Australia.

There is no denying that John Doe orders present a legitimate remedy against unidentified infringers of copyright. However, there is a lack of judicial precedent in differentiating piracy of various kinds—for example, the difference between pirating a popular and lucrative television show like *Game of Thrones*, and pirating an old movie. Further, copyright holders may need to approach the courts repeatedly to protect new content, which can be time-consuming and financially onerous, especially for smaller creators. Some injunction orders have also had an inadvertent effect on legitimate online businesses (Annexure IV of this report provides some anecdotal evidence in this regard). For these reasons, the succeeding paragraphs highlight some remedies for dealing with copyright infringement more effectively.

It is common for copyright holders to sub-contract the job of combing through infringing or potentially infringing websites to external agencies, which tend to cast a wide net.<sup>61</sup> A few of the investigative agencies studied online for this report were found to be providing a buffet of IP investigative and other investigative services: marriage, corporate espionage, surveillance, debugging, etc. These agencies were also indulging in private surveillance without regard to the

methods used. As the courts are overburdened and frequently rely on lists prepared by such investigative agencies, entire websites are sometimes blocked instead of specific infringing URLs (see **Annexure IV**). Further, such orders are usually passed on a minimal standard of evidence and on the word of the plaintiff. When such lists are produced in courts by petitioners, it might be useful for courts to enlist the help of certain accredited bodies, or a neutral third-party agency, to help identify and verify the infringing websites or URLs.<sup>62</sup>

**Similarly, to prevent misuse, there is also a need to develop a clear and unambiguous standard/process to be followed before passing blocking orders. This includes formulating guidelines on how infringing or potentially infringing websites/URLs may be identified, and by whom, and developing State capacity in this regard, to help the courts or an external agency assisting courts verify the list of websites/URLs provided by the petitioners. The draft National e-Commerce Policy, 2019 also provides for the use of an ‘Infringing Websites List’ to combat copyright infringement. It is recommended that the National IPR Policy is also updated to account for this recommendation.**

It is crucial however to accept that in certain cases involving live events such as sporting events of national or global importance, or new movies or songs, it may become critical for copyright holders to act swiftly, and for courts to be cognisant of the enormous economic harms that may arise due to piracy. Globally, courts have begun to issue different kinds of injunction orders keeping in mind the ‘live’ aspect of the event, or where the potential harms from piracy would far exceed the ordinary. Unlike typical blocking orders for copyright violations that focus on websites, live blocking orders require ISPs to block access to the servers which host the streams of these events, but only for the duration of the event. In *Football Association Premier League*,<sup>63</sup> the Football Association Premier League (“FAPL”) went to court to combat the streaming of Premier League matches being broadcast without their permission, especially through devices such as set top boxes, media



players, and mobile applications, rather than through web browsers.<sup>64</sup> The UK High Court, in allowing for this relief, included certain safeguards that would need to be followed.<sup>65</sup> These safeguards built on existing ones for website blocking in *Cartier International AG v British Sky Broadcasting Limited*,<sup>66</sup> which have since become standard for website blocking orders in the UK.<sup>67</sup> The UK High Court subsequently extended the operation of the order in the Football Association Premier League case to the 2018-19 season as well,<sup>68</sup> and provided a similar relief for live streams of footage of professional boxing matches,<sup>69</sup> and Union Des Associations Europennes De Football (UEFA) matches.<sup>70</sup>

In testing if such a remedy would be suitable for India, in addition to the safeguards provided for by the UK High Court, it is necessary to examine whether infringement in India occurs similarly to the UK (through set top boxes, for example), and to set down guidelines for identifying servers to be blocked.<sup>71</sup>

## NOTICE-AND-TAKE-DOWN

The Copyright Act and Copyright Rules lay down the regime for ‘notice-and-take-down’ for the online intermediaries that host ‘incidental or transient’ links to infringing content. On the receipt of a complaint from a copyright holder, intermediaries are required to take steps to stop facilitating access to the relevant material within 36 hours if they are satisfied that such material infringes copyright. The intermediaries must refrain from facilitating access for 21 days from the date of receiving the complaint, or until they receive an order from a competent court restraining them from facilitating access, whichever is earlier.<sup>72</sup> In a recent case<sup>73</sup> on the question of intermediary liability, the Delhi High Court held that intermediaries were immune from liability against copyright infringement for third party content unless ‘actual knowledge’ on their part could be proven. Sections 79 and 81 of the IT Act<sup>74</sup> and Section 51(a)(ii) of the Copyright Act<sup>75</sup> were read harmoniously to require online intermediaries to have actual and not general knowledge of the infringement, to seek relief that was specific, and specify the actual content which was being infringed.<sup>76</sup>

While the question of intermediary liability is an evolving one, it is important for courts to consider questions of what an intermediary is, what role is being performed, and what constitutes actual knowledge in each case. **It is recommended that for such matters of intermediary liability, the IT Act provide clarity on the different kinds of intermediaries and the varying degrees of responsibility that they would need to bear.**<sup>73</sup>

## NOTICE-AND-STAY-DOWN

The notice-and-stay-down regime has been explored as a means to deal with copyright infringement by online intermediaries. It is an alternative to the notice-and-take-down system, which requires copyright holders to send notices to such intermediaries each time infringing content is uploaded. Copyright holders have argued that this leads to significant costs and can be ineffective due to the high volume of uploaded content.<sup>78</sup> They have also argued that such a system may lead to a biased playing field in which they are unable to monetise their content on fair terms.<sup>79</sup>

The notice-and-stay-down system requires that intermediaries proactively identify and take down infringing content and prevent its uploading in future, once they receive notice from a copyright holder.<sup>80</sup> However, it has been criticised for its implications for privacy and the freedom of expression (especially in the absence of clear standards in the law<sup>81</sup>) among other concerns.<sup>82</sup> In this context, it is important to mention that Article 17 (erstwhile Article 13) of the EU Copyright Directive<sup>83</sup> put in place a liability regime aimed at inciting the content-sharing platforms to set up automatic content recognition tools, amongst a lot of controversy and criticism by digital rights and Internet governance experts.<sup>84</sup> In particular, Article 17(4) provides that if the rightsholders do not grant authorisation, intermediaries will be liable for unauthorised acts of communication to the public.

## DYNAMIC INJUNCTIONS

The Delhi High Court recently explored a new way of combating online piracy by using dynamic injunctions, in the case of *UTV v 1337x.to*.<sup>85</sup> Relief was framed such that where an injunction had been granted against a website, the copyright holder could approach the court’s Joint Registrar to extend the injunction to other websites (with different domain names or IP addresses providing access to a website which is the subject of the blocking order). This order extends website blocking injunctions beyond those websites mentioned in the court order and has simplified the process for copyright holders.

Dynamic injunctions were earlier explored by the Singapore Supreme Court, and applied to ‘Flagrantly Infringing Online Locations’ or FIOLs, which ‘primarily or predominantly share infringing content.’<sup>86</sup>

In determining what FIOLs were in this case, the Delhi High Court detailed some indicative factors that could be considered, such as whether the websites contained indexes and categories that facilitated infringement.<sup>87</sup> It also considered qualitative approaches (where blocking is justified because websites host ‘overwhelmingly infringing’ content) versus quantitative (where, for blocking to be justified, the relevant websites would need to contain only infringing material, with no legitimate content) approaches to the issue.<sup>88</sup>

The bench in *UTV v 1337x.to* opted to go with the qualitative approach, holding that to require copyright holders to identify each item of infringing content would place a disproportionate burden on them, and that a quantitative approach would mean that almost no website would be considered a violator—all they would have to do would be to include a small amount of legitimate content.

In determining when it is justifiable to block websites in their entirety, the Court in the aforementioned case held that it would have to consider whether this was proportionate and commensurate with the nature and extent of infringement, so as to strike a ‘fair balance’ between IP rights, the right to trade, and the right to free expression.<sup>89</sup> However, in this case, the Court did not examine whether the criteria it had detailed were satisfied for each defendant and blocked the websites in their entirety.<sup>90</sup>

Standardised guidelines coupled with procedures for verifying website lists by a neutral party can provide judicial clarity and predictability to copyright holders and users.

**Some best-practices could be borrowed from jurisdictions like Singapore, where courts have also relied on evidence that infringing websites had been blocked in other jurisdictions, or experienced significant traffic, or failed to comply with take-down notices issued by the plaintiffs, or posted instructions for circumventing measures to disable access.**<sup>91</sup>

The Delhi High Court in the *UTV v 1337x.to* also recommended technological measures to the Ministry of Electronics and Information Technology and the Department of Telecom, suggesting they consider formulating a policy whereby viewers of infringing content are issued warnings, and are fined if they do not stop viewing such content.<sup>92</sup>

In framing such a policy, it is essential to identify the specific problems sought to be addressed, and tailor the procedure and penalties accordingly.

## LIVE BLOCKING

The judiciary has addressed online piracy of live sports primarily through John Doe/Ashok Kumar orders, which are usually issued against violators of the broadcast reproduction right of broadcasters under Section 37 of the Copyright Act.<sup>93</sup> As yet the remedy of live blocking, which has been used in other jurisdictions such as the UK, has not been discussed extensively. Unlike typical blocking orders for copyright violations that focus on websites, live blocking orders require internet service providers (ISPs) to block access to the servers hosting these event streams for the duration of the event. In testing whether such a remedy would be suitable for India, in addition to the safeguards provided by the UK High Court,<sup>94</sup> it is necessary to examine whether infringement in India occurs similarly to the UK, and to establish guidelines for identifying errant servers. This remedy can also potentially be used to address issues faced due to broadcast signal piracy, which has been detailed in Chapter 6.

## CHAPTER 4/ KEY LEGISLATIVE TRENDS

*This chapter explores some alternatives to traditional legislative approaches to curbing copyright infringement and incentivising the consumption of legal content. It highlights key policy efforts undertaken across the world, including the creation of administrative frameworks with safeguards and expediting court processes. It also provides a brief summary of key legislative reforms undertaken in India.*

### EXPEDITED JUDICIAL SYSTEM

Chile is among the few countries that do not prescribe notice-and-takedown provisions, and while negotiating the U.S.-Chile Free Trade Agreement it specifically ruled out adopting such provisions.<sup>95</sup> It relies instead on an expedited judicial enforcement process, wherein a copyright holder may submit a judicial petition against a local ISP in a civil court and obtain an injunctive takedown order.<sup>96</sup> Its difference from the traditional notice-and-takedown regime is in shifting the burden of evaluating notices to the courts.<sup>97</sup>

The expedited court process has some advantages over the traditional notice-and-takedown system. Chile implemented an expedited judicial enforcement process where copyright holders may submit a judicial petition against a Chilean-based ISP in a Chilean Civil Court to expeditiously evaluate the alleged infringement and obtain an injunctive takedown order. The Chilean statute<sup>98</sup> specifically states that courts must, in response to lawful petitions, issue takedown orders “without delay”, and may also issue preliminary injunctions. Courts are also instructed to consider such petitions under a “brief and summary” procedure, and appeals to the courts’ order or reconsideration thereof are also specified to proceed “with priority”. Importantly, the statute also imposes several safeguards against overbroad blocking.<sup>99</sup>

**While the overburdened Indian judiciary does not currently have the capacity necessary to provide similar**

remedy, the Department for Promotion of Industry and Internal Trade (DPIIT) may consider setting up an expedited enforcement framework, or modifying existing mechanisms, in order to provide more effective redressal for infringement.

### ADMINISTRATIVE FRAMEWORKS WITH SAFEGUARDS

Greece offers yet another alternative for dealing with copyright infringement in the modified notice-and-takedown mechanism it has adopted for dealing with illegal content online. In 2017, it established an ad-hoc administrative authority named the Commission for the Notification of Online Copyright and Related Rights Infringement—a three-member administrative authority with representatives from the Greek Data Protection Authority and the Telecommunications & Post Commission. It is an out-of-court mechanism which can be availed of by copyright holders. If applications meet all procedural requirements, the Commission notifies all ‘internet access providers’ operating domestically and, where possible, the hosting providers, as well as the administrators or owners of the website/s where the infringement is allegedly taking place, and urges them to voluntarily comply with the copyright holder’s application by removing or disabling access to the infringing content, or by getting a licence from the copyright holder authorising use of the protected work. The Commission also has powers to permanently delete all infringing content, disable or block access, and levy administrative penalties for non-compliance.<sup>100</sup>

It must be noted that this system does not affect the copyright holder’s rights to take legal action regarding the same dispute.<sup>101</sup> If adopted in India, this mechanism may reduce the courts’ administrative burden, offering copyright holders an effective alternative remedy against infringement.

Spain, through its 2009 copyright legislation ‘Ley Sinde’, has created an Intellectual Property Commission which focuses on copyright infringement by websites. Copyright holders can report specific websites

infringing their copyright to the Commission—once the request is approved, the website’s owner is directed to remove the material. If the owner is not known, the request can be made through the ISP. ‘Ley Lassale’, the new version of the law, includes the possibility of fining advertisers on websites found to be hosting infringing content.

Spain’s IP Commission has two sections: the first being a regulatory body that defines policy on copyright issues, and the second working as a fast track court for copyright issues, with the entire process typically taking less than fifteen days. Although statistics on the Spanish tribunals are scant, the tribunals serve as an alternative to traditional notice-and-take-down procedures involving courts, and offer a credible alternative for India to dispense expeditiously with cases of digital piracy.<sup>102</sup>

**In India, a critical examination of how extrajudicial and administrative processes can be used effectively, along with greater cooperation between private creative industries, the executive, and law enforcement authorities, may be particularly useful for tackling digital piracy.**<sup>103</sup>

### RECENT LEGISLATIVE TRENDS IN INDIA

#### CINEMATOGRAPH (AMENDMENT) BILL, 2019

This bill was introduced in the Indian Parliament in 2019 to amend the Cinematograph Act of 1954<sup>104</sup> and to introduce penal provisions through new Section 6AA against the illegal recording of films (camcording) in cinema halls. Targeting the unauthorised recording of films, it prohibits anyone from using any audiovisual recording device to reproduce or transmit a film or abet the making or transmission of a film without written authorisation from its producer. Individuals who make copies of a film without authorisation may be punished with imprisonment of up to three years, a fine of up to INR 10 lakh, or both.<sup>105</sup>

The bill has been criticised by a few experts<sup>106</sup> for overriding the Copyright Act, for using undefined terms such as ‘exhibition facility’, and for impinging on fair dealing provisions.<sup>107</sup> Further, the bill does not differentiate between commercial and individual or private use of a work. It also prescribes harsh penalties including imprisonment. Nonetheless, the industry has lauded the bill as a major step towards building credible

deterrence and providing relief against piracy and infringing content online.<sup>108</sup>

Since it is a recent development, it remains to be seen if the measure is effective against film piracy in India.

#### DRAFT COPYRIGHT (AMENDMENT) RULES, 2019

The Draft Rules, released in May 2019 by the DPIIT,<sup>109</sup> were purportedly introduced to ensure smooth and flawless compliance with the Copyright Act, and to bring it in parity with other relevant legislation in light of technological advancements in the digital era. Some of the main provisions in the Draft Rules are the expansion of statutory licensing for the broadcast of literary and musical works and sound recordings to internet broadcasts as well; increased transparency requirements for copyright societies; and the introduction of digital payment of fees, communication and application. The Draft Rules also modify existing requirements to register copyright in computer programmes.

The impact of the Draft Rules, when finalised, on copyright infringement in India remains to be seen.

## CHAPTER 5/ CROSS-BORDER COPYRIGHT INFRINGEMENT

*The problem of cross-border copyright enforcement is particularly relevant in the digital age: infringing websites and servers may be located in other countries, where the laws of one country do not apply to individuals, companies or websites hosted beyond its borders. This chapter briefly examines the international legal framework governing IP, and the multilateral and technological options available to copyright holders.*

### WHY DOES CROSS-BORDER INFRINGEMENT MATTER?

A significant problem related to digital IP infringement is the inability of local or national enforcement agencies to exercise their legislative mandate across borders. For instance, websites with pirated content from one country may be hosted in another, making it difficult to enforce a country's domestic laws. The main objective of this chapter is to consider how international players can strategise and collectively improve IPR enforcement governance. This is especially important because issues such as digital content portability, copyright infringement, and copyright licensing models now appear prominently on legislative agendas around the world, while copyright law still varies by jurisdiction. Copyright laws across national boundaries are also becoming increasingly relevant to businesses, particularly as the digital market makes its impact felt and regional content is distributed in international markets.

### AVAILABLE REMEDIES

The copyrighted works of foreign nationals whose countries are members of certain international conventions are protected in India under the International Copyright Order, 1999,<sup>110</sup> and the Copyright Act.<sup>111</sup> India has become a member of various international conventions on IPR through

which it has secured protection for local works in foreign countries. It has acceded to many treaties administered by WIPO,<sup>112</sup> is a member of the Universal Copyright Convention,<sup>113</sup> and is subject to the World Trade Organisation's TRIPS Agreement.<sup>114</sup> India also acceded to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (together the 'Internet Treaties') in 2018, which were specifically enacted to deal with technological and commercial developments in the digital space.

These international instruments include certain provisions that help set minimum standards of IP protection across jurisdictions. For instance, the Berne Convention and subsequent treaties provide for national treatment with respect to the works of foreign nationals. Subject to some exceptions, this essentially requires that each member country provide foreign authors of works qualifying for copyright the same treatment as it does to its own country's authors.<sup>115</sup> The TRIPS Agreement increases the standard of protection from the Berne Convention, and contains detailed provisions on the enforcement of IPRs.<sup>116</sup> The Internet Treaties extend copyright protection to the digital space, and provide the right to exclusively authorise the online transmission of works to authors, performers, and phonogram producers,<sup>117</sup> and also provide for exclusive distribution rights.<sup>118</sup> Importantly, they require member states to protect and provide remedies against the circumvention of measures used to protect the works of authors, performers, and phonogram producers.<sup>119</sup> The Copyright Act currently provides for restrictions on circumvention of technological protection measures (TPMs), which were introduced through amendments to the Act in 2012. These provisions are less restrictive than in other jurisdictions such as the US, leading rightsholders to argue that they do not comply with the standards mandated by the Internet Treaties. However, others argue that the Internet Treaties provide flexibility to member states to tailor the relevant provisions and that it is compliant with its obligations under these treaties.<sup>120</sup>

The rights of broadcasters are sought to be protected in the proposed 'Broadcasting Treaty', which is in its

draft form and is being negotiated at WIPO.<sup>121</sup> This aims to provide broadcasting organisations with recourse against signal piracy, which has caused significant revenue loss to Indian broadcasting organisations.<sup>122</sup> India has been criticised for its perceived lack of support to broadcasting organisations,<sup>123</sup> its opposition to the inclusion of webcasting, simulcasting, and transmissions over computer networks in the Treaty, and for its emphasis on the importance of limitations and exceptions to the Treaty for developing countries.<sup>124</sup> However, it seems to be changing its approach. For instance, India reversed its initial opposition to including post-fixation rights (whereby broadcasters would have the right to make their content available online, after the initial broadcast).<sup>125</sup> Moreover, in the 37th session of the Standing Committee on Copyright and Related Rights (SCCRR), India stated that it supported the early finalization of the balanced treaty for the protection of broadcasting organizations, and that discussions on important issues like the definition of broadcasting organizations, rights of broadcasting organizations, limitations and exceptions and terms of protection would facilitate resolving the key issues of the treaty.<sup>126</sup> India reiterated its support for the finalisation of the Broadcasters Treaty in the latest (38th) session of the SCCRR, and the 59th meeting of WIPO's General Assembly, where it specifically stated that the protection under the proposed treaty should not be limited to traditional broadcasters, but should also include broadcasting over the internet. However, India also specified that it would continue to support the signal-based transmission approach without ownership rights over content to broadcasters.<sup>127</sup>

The WIPO Building Respect for Intellectual Property Database (BRIP Database) represents a cross-border effort to reduce copyright infringement by targeting advertising on websites that host infringing content. It comprises a secure, access-controlled online platform where authorised agencies from WIPO member states may upload lists of websites that facilitate copyright infringement, and advertisers can thereafter ensure that their advertisements do not appear on those websites.<sup>128</sup>

### BEST PRACTICES

The inclination of copyright holders across the world has been to enforce their rights through ISPs, which enable swift enforcement and takedowns. However, this is not without pitfalls, particularly in the cross-border context. For example, the law in the service provider's jurisdiction may not view a certain piece of content as infringing. In certain other cases, infringers may respond

to a notice-and-takedown action by the copyright owner by filing for a declaratory judgement action in a jurisdiction foreign to the copyright holder.

**Standardising certain conflict of laws principles<sup>129</sup> internationally may be beneficial in helping copyright owners initiate global copyright enforcement actions. This would enable them to file a single case in a court of general jurisdiction under a single copyright law, instead of having to file multiple cases in multiple jurisdictions, sometimes simultaneously.**

This could help eliminate most of the costs that copyright owners otherwise incur from the need to ascertain multiple foreign copyright laws, invoke and/or plead multiple foreign laws (and in some courts prove infringement), and engage legal experts for multiple jurisdictions.<sup>130</sup>

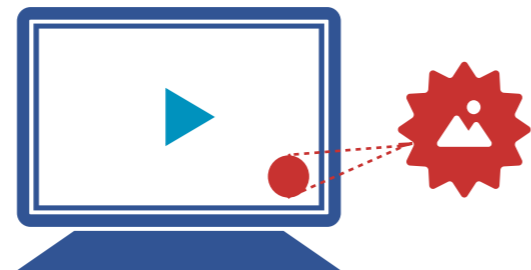
Discussion on making cross-border copyright enforcement more efficacious will also benefit from the continuing development of technological and market-based solutions. Some examples of this already exist—geolocation, content ID (digital watermarks), and the celestial jukebox are among the tools facilitating easier cross-border transactions in copyrighted materials. Further, online access to legal resources and the presenting of evidence in multiple countries will play an important role in internationalising copyright litigation,<sup>131</sup> and could also lower litigation costs for IP holders.

In India, as in several other countries, the cross-border enforcement of IP has been aided by legislation that doesn't necessarily govern IP—for example, by using the customs recordal system intended to forestall cross-border movements of counterfeit or infringing goods through the IPR (Imported Goods) Enforcement Rules of 2007.<sup>132</sup> These rules were framed to tackle cross-border counterfeiting and infringement of goods. A customs IPR Recordation Portal was created for IPR holders to easily record their IPR with Indian Customs.<sup>133</sup>

## CHAPTER 6/ EXTRALEGAL STRATEGIES AND SOFT LAW APPROACHES

*This chapter explores technological and soft law approaches to countering copyright infringement. The first part explores emerging technological methods like watermarking and blockchain technology to trace and prevent illegal content consumption, particularly through digital media. The second part explores soft law options available for enforcement such as public-private partnerships and infringing website lists. It discusses key global developments in countering the monetisation of pirated content and new models for compensating copyright holders.*

### TECHNOLOGICAL METHODS/ WATERMARK TECHNOLOGY



This helps identify the source of pirated content. However, it has been rendered near useless in many circumstances as it cannot prevent the recording, copying or dissemination of video content. Modern watermark technologies now exist in various forms, including:

#### (1) VIDEO WATERMARKING

an important tool used by multiple Hollywood studios and digital cinemas to track illegal redistribution and identify its source. It can effectively trace pirated content to the last authorised user.<sup>134</sup>

#### (2) FORENSIC WATERMARKING

the process of covertly hiding 'identifying information' in each individual copy of a video file. It is almost impossible to modify without damaging the original video. It includes features such as session-based watermarking and invisible digital watermarking.<sup>135</sup>

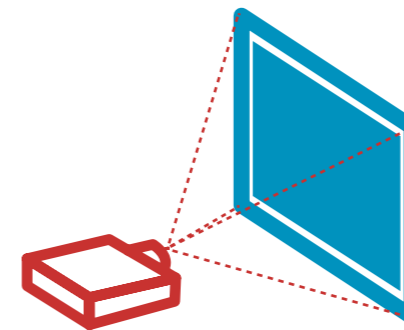
#### (3) SESSION-BASED WATERMARKING

which involves inserting a unique digital ID in the form of a watermark into a video each time someone plays it. The invisible watermark can be detected by servers.<sup>136</sup>

Few studios and distributors could afford forensic watermarking in the past, but now the technology is affordable and accessible to most. Independent software tools also help voluntarily scan for watermarked content

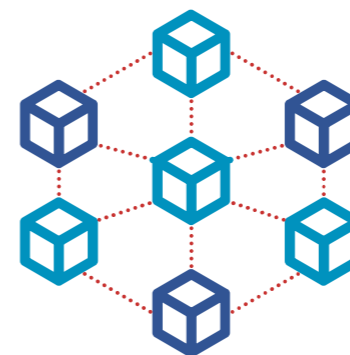
that puts 'humans in the loop' and can reverse piracy attacks to successfully identify the watermark.<sup>137</sup> Through this process, a copy of an online movie can be traced back to the intended recipient, who can directly be proceeded against. The insertion of this invisible watermark in the host video does not affect fair use of the content. The watermark is invisible through normal display, but if used illegally, for example on a P2P file-sharing network, it can be recovered through a forensic extraction service. Thus, forensic watermarking provides a 'chain of custody' throughout the cycle of video distribution, making it easier for copyright owners and distributors to identify the source.<sup>138</sup>

### AMBIENT LIGHTING SOLUTION



This refers to a technology patented by Phillips to effectively curb camcorder piracy, a continuing threat to the film industry. The technology utilises liquid crystals to clutter video frames with noise, objects, and shading. In addition, a light is shone at a certain frequency out of sync with the movie content, so any illegal recording will contain stripes, rendering it unusable. This light does not obscure the viewing quality as long as people are watching through synchronised polarised active shutter glasses, similar to the glasses used in 3D cinemas. If a camcorder attempts to record the screen, the footage itself will be obscured.<sup>139</sup>

### BLOCKCHAIN TECHNOLOGY



Blockchain<sup>140</sup> has potential to revolutionise the digital industry and can protect digital assets more comprehensively than simple visual markers, by providing multiple barriers to infringement, such as safeguards to block the duplication, sharing or even transfer of content. However, the technology at present is not advanced enough to deal with large file sizes.<sup>141</sup> A way forward may be to compress digital files.

A South African-based technology startup called CustosTech has found an innovative way of curbing the illegal distribution of copyrighted content using blockchain and other digital tools. In 2016, they were first to launch a patented blockchain tracking technology through their product 'Screener Copy'. Users would upload their movies, and Custos would watermark them with the technology and send the copy to the intended recipients.<sup>142</sup>

Bitcoins have also been used to expose the piracy of media files exceptionally quickly, usually within a few minutes of illegal sharing. The system turns the downloaders of pirated files anonymously against the uploaders by offering them an embedded Bitcoin reward, which upon retrieval confirms the leak and exposes the identity of the uploader. Screener Copy<sup>143</sup> has used this technology to prevent pre-release piracy in South Africa, a hub of illegal downloading.<sup>144</sup>

There are also developments in combining the use of blockchain technology and forensic watermarking, to embed cryptocurrency bounties within the watermarks of media files. Using a global network of these bounty hunters searching for pirated copies of premium content to claim the crypto bounties as reward, corporations create an incentive for finding pirated content online, and a visible and trackable transaction through blockchain that can alert the copyright owner. This allows copyright owners to decentralise the search for pirated content.<sup>145</sup>

However, blockchain technology is still far from impacting creative economy supply chains at scale. Significant cultural, political, technical, and legal changes must be made for this technology to be exploited at its full potential in India.<sup>146</sup>

## DIGITAL FINGERPRINTING AND RELATED SOFTWARE SOLUTIONS



In 2017, Facebook acquired the content rights management startup ‘Source3’ to combat infringement on its platform and to encourage creators to share their art and monetise their content.<sup>147</sup> Source3 is a tool that can be used to recognise IP in user-generated content, across categories including sports, music, entertainment, and fashion. Although Facebook has not detailed how it uses this software, it is likely being used in conjunction with its Rights Management software (similar to YouTube’s Content ID, a digital fingerprinting system), through which creators can block uploads of their content, or monetise it from those sharing it. In 2018, YouTube also launched its Copyright Match tool, designed to find re-uploads of creators’ content on the platform.

The accuracy of digital fingerprinting software depends on a variety of factors, and it is not yet entirely effective. For instance, YouTube’s Content ID system has been found to be both overly broad<sup>148</sup> and failing to track infringing copies of content.<sup>149</sup> As such digital fingerprinting software becomes more accurate, it may provide an effective way for creators to monetise and control their content.

## PROTECTION OF BROADCAST SIGNALS

Broadcast signal piracy is a major issue relating to live sporting events in India. It usually refers to the interception of broadcast signals to allow unauthorised access to the transmitted content. Since these are often digital signals, those accessing feeds in this manner can obtain perfect digital copies of the content.<sup>150</sup> **Live signal piracy is especially problematic because much of the commercial value that is derived from sports occurs during the matches themselves.** Additionally, many set top boxes are not DRM-equipped and this can also result in instances of cable piracy.<sup>151</sup> Under the Sports Broadcasting Signals (Mandatory

Sharing with Prasar Bharati) Act, 2007 (Sports Act), broadcasting service providers are required to share live broadcast signals of ‘sporting events of national importance’ simultaneously with Prasar Bharati, so the latter can re-transmit them on its terrestrial and direct-to-home (DTH) networks and give the general public access to them.<sup>152</sup> Broadcasters are required to share a ‘clean’ feed—without advertisements or logos—with Prasar Bharati,<sup>153</sup> and it is this feed that can be tapped into and broadcast without authorisation. This is because Prasar Bharati subsequently transmits the feed to its Doordarshan Kendras for subsequent broadcasting on Doordarshan’s terrestrial networks without encryption, leaving the content vulnerable to piracy.<sup>154</sup> Prasar Bharati reportedly had plans to encrypt its free-to-air signals in order to map its subscriber base and counter broadcast signal piracy, and had floated a tender for ‘security-locked’ set top boxes.<sup>155</sup> In a similar vein, Telecom Regulatory Authority of India has also issued multiple consultation papers on the interoperability of set top boxes which, inter alia, discuss encryption. However, this remains an unfinished agenda.

## SOFT LAW APPROACHES

This part of the report delves into various ways in which enforcement mechanisms beyond the written word of the law may be strengthened and applied in India, drawing from some best practices around the world.

### PUBLIC-PRIVATE PARTNERSHIPS AND SOFT ENFORCEMENT MEASURES

In an effort to strengthen and capitalise on public-private collaborations in the UK, the Police Intellectual Property Crime Unit (PIPCU)<sup>156</sup> run by the City of London Police was established in 2013 with the responsibility to investigate and deter serious and organised IP crime by partnering with companies and experts. The unit now cooperates with police in India, the United States, China, and other countries. With the help of companies, PIPCU maintains an IP crime directory to help identify counterfeit goods. PIPCU also collaborates with the UK advertising industry to suspend illegal sites, encourage advertiser replacement, and disrupt the advertising revenues of pirate businesses through the use of an ‘Infringing Website List’.<sup>157</sup> The IWL was introduced as part of PIPCU’s ‘Operation Creative’ initiative—which research shows has reduced advertising on illegal websites in the UK by 64 percent.<sup>158</sup> Similarly, the European Commission initiated public consultations to establish the first worldwide ‘Counterfeit and Piracy Watchlist’ in 2018.<sup>159</sup> The Hong Kong Creative Industries Association also introduced

the IWL scheme in 2017, to disrupt infringing websites’ advertising revenue. It includes a ‘Review Committee’ and an ‘Appeal Panel’ to improve fairness and accuracy and is run with cooperation from the territory’s Customs and Excise Department.<sup>160</sup>

Country-specific IWLs for the purpose of blocking advertising are being increasingly employed in a number of other jurisdictions, including France, Denmark, Taiwan, and Vietnam. In Vietnam the government has used the IWL created by the Vietnam Content Alliance to put pressure on advertisers to pull their ads from sites on the list, making it a joint industry-government effort. In Denmark the list is based only on cases where Danish courts have found infringement, leading to 600 sites being placed on the list.<sup>161</sup>

**The Maharashtra Cyber Digital Crime Unit, a wing of the state’s Cyber Police, was established in 2017. As per industry sources, by October 2019, it had taken down 414 pirate websites impacting a monthly traffic of ~390 million. The unit has also sent notices to 56 brands and 10 ad networks. This model is considered to be a unique collaboration between enforcement agencies and the entertainment industry to prevent the proliferation of IP infringement in the state.**<sup>162</sup>

By the end of March 2019, 235 infringing websites had been suspended on the basis of incomplete KYC details.<sup>163</sup>

India’s Draft National E-Commerce Policy also provides for the creation of an ‘infringing websites list’. The infringing websites are proposed to be identified by a body of industry stakeholders—this list is supposed to be verified, although the E-Commerce Policy does not specify by whom. Steps would then be taken to disable access to the websites, prevent payments from being routed to them, remove them from search results, and prevent them from hosting advertisements.<sup>164</sup>

### TACKLING THE MONETISATION OF PIRATED CONTENT

The UK Piracy Report 2017 mentions monetisation models for IP infringers that may be important to consider.<sup>165</sup> Apart from advertising revenues, which are the low hanging fruit, these include revenues through premium subscriptions and malware. Through subscriptions, pirates encourage users to sign up to ‘premium’ accounts that promise a faster download experience and no advertising, in return for a monthly payment. They also earn revenue by charging other cyber criminals to put malware on their sites, exposing users baited by free digital content to the malware.

Websites hosting pirated content are also likely to contain high-risk advertisements, opening users up malware and making them more susceptible to issues like identity theft.

**A 2015 study<sup>166</sup> of content theft sites in the US found that one in three users had been exposed to malware. Internet users who visited content theft websites were 28 times more likely to get malware from these sites than from legitimate content providers.**

The study found that the organised gangs behind content theft websites were making at least USD 70 million a year by charging hackers to put malware on their sites, which would then infect visitors’ computers, posing credible cybersecurity threats. Several countries including the UK, Spain and Italy have adopted the ‘follow the money’ route to tackle digital copyright infringement.<sup>167</sup>

In the Netherlands, copyright owners have agreed to be bound by a code of conduct, allowing them to deal with infringement amongst themselves. Further, to compensate copyright holders the Netherlands imposes a private copy levy on the sale of recording equipment and/or blank media. This is done to compensate writers and artists for losses suffered as a result of others’ making copies of their music or films for their private use. The compensation takes the form of a tax on blank CDs and DVDs and other electronic products with storage capacity,<sup>168</sup> although it is not clear how this can be done for songs in electronic media and streaming services. Several other countries including Canada and Israel have also adopted these methods to recover losses from piracy.<sup>169</sup>

However, the application of a blank levy/fee is effectively a penalty even on stakeholders who are legitimately transferring information. Thus, regulations on the collection and distribution of the collected fee should be preceded by a fair quantification of losses attributable to piracy. Sweden has seen the development of some interesting new jurisprudence<sup>170</sup> in this regard, to calculate fair compensation to copyright holders whose movies are streamed online illegally.

Another initiative in this regard is of the Trustworthy Accountability (TAG) group in the US. Their mission is to help advertisers and ad agencies avoid damage to their brands from ad placement on websites that facilitate the distribution of pirated content and counterfeit products. They help global advertisers and agencies take reasonable steps to prevent their ads from appearing on such websites, and have also issued certain guidelines in this regard.<sup>171</sup>

## CHAPTER 7/ CONCLUSION: LEARNING FROM GLOBAL REGULATORY AND POLICY BEST PRACTICES

*This chapter considers some key regulatory and policy measures in copyright law and policy that have been undertaken in jurisdictions across the world, to draw lessons to inform Indian policymaking. It specifically examines the National IPR Policy and highlights some areas that could be reformed.*

The framing of any policy or legislation to tackle copyright infringement must be based on an assessment of the drivers of infringement. Copyright infringement in countries such as India remains distinct from piracy in countries with higher levels of literacy and income, or with different social-cultural histories and legal and enforcement mechanisms.

India is unique given the large market for Indian films and music, the recent explosion in access to information and communication technologies, the fragmented supply chains, distinct challenges in enforcement both at the Union and state level, and the still limited access to payment technologies beyond cash transactions. Consequently, this report attempts a holistic approach to understanding digital copyright infringement and enforcement, using the lens of law, economics, and public policy, to draw from these frameworks but also to understand the limitations of each.

In Table I we attempt to capture some key regulatory and policy developments from across the world, in order to understand the evolving best practices in copyright policy. Subsequently, recommendations are made to reform India's National IPR Policy in this context.

### BRAZIL

The Copyright Reform Bill, 2012, is still being considered. Among other changes, this proposes expanding the exceptions and limits to copyright protection and considering measures to regulate the use and exploitation of copyrighted works on the Internet.<sup>175</sup>

### AUSTRALIA

Introduced the Copyright Amendment (Online Infringement) Bill in 2018 to expand the definition of online copyright infringement. Allows copyright owners to apply to the Federal Court for injunctions blocking domestic users' access to overseas online locations that are facilitating copyright infringement. Proposed amendments to expand the threshold test for injunctions to be granted and allow them to be applied to the search results of online search engine providers. The Federal Court will also be able to make responsive orders which can be applied to new online locations without the need for further injunctions.<sup>172</sup> This has since been used to extend injunction orders to mirror and proxy websites, as long as the relevant ISPs do not object.<sup>173</sup>

The Government has also floated a consultation paper on copyright reform.<sup>174</sup> Some of the proposed recommendations relate to expanding the flexible exceptions to copyright infringement, including expanding the 'fair use' provision to accommodate changing community, technology, and business standards—such as non-commercial private use, library and archive use, educational uses, quotations, text and data mining, certain incidental or technical use by online service providers and government uses in the public interest.

### NORTH AMERICA

The US, Canada and Mexico agreed to the new NAFTA agreement (USMCA) in 2018, which only Mexico has ratified.<sup>176</sup> In Chapter 20 of the agreement they agree to adopt measures to prevent the abuse of IP rights by copyright holders, or their resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. The agreement also details coordinated efforts on border control over counterfeit products or pirated copyrighted goods. The three countries also undertook to adhere to a dozen international IPR treaties.<sup>177</sup>

### SOUTH KOREA

Amended copyright legislation to allow for big data<sup>180</sup> and AI innovations, stipulating that copyrighted works can be reproduced if deemed necessary in the process of computerised analysis of information which may include copyrighted works, provided it does not apply to edited works or databases created for the purpose of analysing information.<sup>181</sup>

### EUROPE

The European Parliament voted on the *EU Directive on Copyright in the Digital Single Market* (Copyright Directive) earlier this year. It was introduced as part of the EU's 'Digital Single Market' strategy to, among other objectives, harmonise the legal framework, and for 'keeping a high level of protection for copyright and related rights'.<sup>182</sup> It is best known for Article 17 (previously 13) and Article 15 (previously 11), which have been dubbed the 'upload filter' and 'link tax' respectively by critics of the provisions.

Article 17 was introduced with the aim of compensating rights holders whose content was made available on platforms for user-generated content such as YouTube, and to deal with the 'value gap' between the revenue earned by platforms hosting user-generated content, and the compensation that owners of such content received.<sup>183</sup> The provision requires 'online content-sharing service providers' (OCSSPs) to obtain authorisation from copyright holders before making content available on their platforms, and makes them liable for unauthorised content on their platforms subject to certain exceptions, and, based on the size of the OCSSP, prevents future uploads.<sup>184</sup>

Although the current provision specifies that this does not give rise to a general monitoring obligation (with the European Commission explicitly specifying as much<sup>185</sup>), critics have argued that there is no other way to fulfil the obligation under the provision,<sup>186</sup> and have raised concerns about the antitrust implications of such measures.<sup>187</sup>

Other critics have observed that even the most advanced technologies for filtering content are still largely inaccurate, and tend to over-censor even legitimate material, preventing access to information and impinging on the right to free expression.<sup>188</sup> However, Article 17 has been lauded by copyright holders, who argue that it levels the playing field and enables them to negotiate with online services on fair terms, and be fairly compensated for the use of their content.<sup>189</sup> It remains to be seen what impact these measures will have on preventing piracy.

### JAPAN

The National Diet approved legislation updating the copyright law to provide innovators with flexibility and legal certainty by removing ambiguity about the use of copyrighted works. The amendment expands exemptions for using copyrighted works without consent. These include allowances for users to access data or information in a form where a work's copyrighted expression is not perceived by the user and will not therefore cause any harm to the copyright holder.<sup>178</sup> This includes raw data fed into a computer programme to carry out deep learning activities, fostering AI-based innovations, permitting incidental electronic copies of copyrighted works, and allowing their use for data verification (so as to enable searchable databases).<sup>179</sup>

### SWITZERLAND

Amended its copyright law to target websites hosting content that infringes copyright, while not penalising those who download such content. ISPs are also not required to block access to domains which host content that infringes copyright. Hosting providers are also required to remove content that infringes copyright from their servers but are not required to actively check if any uploaded content is copyrighted.<sup>190</sup>

## THE NATIONAL IPR POLICY

This part of the chapter suggests key recommendations for India's National IPR Policy, keeping in mind national and international best practices in this regard.

India published its National IPR Policy in 2016, with the stated objective of utilising IPR for 'India's economic growth and socio-cultural development, while protecting public interest' and to create awareness of IPR as a 'marketable financial asset and economic tool'.<sup>191</sup> It lists seven objectives<sup>192</sup> and suggests ways to achieve them. It emphasises the need to create public awareness about the 'economic, social and cultural benefits of IPRs among all sections of society',<sup>193</sup> and to strengthen the IPR framework by, among other measures, reviewing and updating IP legislation and guidelines; amending the Indian Cinematograph Act, 1952 to provide for penal provisions for illegally duplicating films; examining the issue of licensing standard essential patents on fair and reasonable terms, and by engaging in the negotiation and framing of international treaties.<sup>194</sup> It also proposes that fact-finding studies be initiated with the relevant stakeholders to assess the extent and reasons behind piracy and counterfeiting, and to explore ways to combat it.<sup>195</sup>

It also looks at ways to 'stimulate the generation of IPRs' and encourage their acquisition,<sup>196</sup> examines ways to simplify the administration and management of IPRs<sup>197</sup> and looks to strengthen enforcement and adjudication by building 'respect' for IPRs among the general public, sensitising copyright holders on their rights, conducting regular workshops/training for judges, and improving coordination between the various agencies involved in enforcement.<sup>198</sup> It is also recommended that the National IPR Policy, 2016 is updated to also provide for soft law measures such as the creation of an independently-verified (either through a Court-appointed body or through an external agency to assist Courts in verification) IWL.

While there are clear positives, the Policy does not explore the drivers of innovation and creativity in India, nor does it commit to specific timelines for achieving its objectives. The Policy also does not make adequate recommendations for enabling businesses to understand, manage and protect their IPR, support easier coordination of enforcement action, assist copyright holders in commercialising and marketing their rights, and establishing systems of sharing knowledge in the country.<sup>199</sup>

Moreover, although the Policy states that IPRs must be balanced against public interest objectives, it does not contain specific steps on how this is to be achieved, and also does not discuss the importance of fair dealing exceptions, for example, or measures that can be used to balance the focus on stronger IPR protections.<sup>200</sup>

**The National IPR Policy should be used as impetus to bring in larger changes to the IPR framework in India, rationalise laws and regulations to make them more effective, and encourage research into the drivers of innovation and causes for infringement in order to inform law-making. It also presents an opportunity to update the Copyright Act to account for media convergence, a constantly evolving content landscape, and changes brought about by emerging technology.**

This would require making existing legislation more effective by, for example, differentiating between different forms of infringement and infringers, particularly by harmonising differences with other laws such as the IT Act; accounting for different kinds of intermediaries and their respective responsibilities; grading penalties under the Copyright Act based on such differentiation; accounting for the challenges posed by content streaming platforms (such as with statutory licensing under Section 31D of the Copyright Act); and providing more effective solutions to pressing issues such as broadcast signal piracy.

There is also a need to reform the functioning of adjudicatory and redressal mechanisms to make them more effective—as an example, no technical member for copyright had been appointed to the Intellectual Property Appellate Board as of August 2019, and the post of technical members for patents and trademarks were vacant as well, leading to the Delhi High Court issuing a notice to the DIPP and requesting a status report.<sup>201</sup> India could also consider other methods to consolidate expertise and address the backlog of cases by setting up specialised IP courts or other administrative frameworks with safeguards to assist the courts. It is important to ensure that any such administrative framework have rationalised powers and be subject to judicial review. An IP ombudsman could also be set up to aid injunction orders, and potentially verify information provided by the parties in such cases.<sup>202</sup>

However, given the impact that a changing IP system would have on a multitude of stakeholders, it is important that revisions to the IP regime (by changing domestic legislation or acceding to international instruments, which will impact the minimum standards of domestic IP protection) should be the result of a consultative process which takes into account the views of all interested stakeholders.

TABLE II: SUMMARY OF RECOMMENDATIONS

### CHAPTER I/ ECONOMIC ANALYSIS OF PIRACY IN THE INDIAN MOVIE AND MUSIC INDUSTRY

- Conduct holistic qualitative surveys to understand the socioeconomic drivers of piracy in India, and conduct an exhaustive review of both legal and market structures at the national level to understand digital copyright infringement better.
- Use alternate models to estimate piracy revenue like measuring the revenues accruing to infringing websites on account of advertisements on these websites.
- Conduct a qualitative and quantitative study to estimate the size of the copyright economy, to properly understand its potential and establish suitable benchmarks.

### CHAPTER II/ REVIEW OF COPYRIGHT LEGISLATION IN INDIA

- Review the current legal framework to focus legal and executive action on commercial infringers.
- Adopt a graded, proportionate and rationalised system of penalties in law, moving from fines and social service to imprisonment, both in Union legislation (Copyright Act) and various state laws, and remove piracy from the ambit of legislation introduced to address serious and bodily harm, such as the Goondas Acts.
- Review existing legislation to address changing dynamics in the content ecosystem and account for the changes brought about by emerging technology.

### CHAPTER III/ JUDICIAL TRENDS

- Use injunction orders such as John Doe orders with discretion, accounting for the different kinds of digital copyright infringement, as for instance between general infringement and infringement in cases of live sports broadcasts.
- Develop clear and unambiguous judicial standards/processes with due safeguards, using best principles from other jurisdictions, especially in cases of dynamic injunctions.
- Use accredited IP investigative bodies or a neutral third party to help courts identify and verify lists of infringing websites and URLs.
- Revisit the framework relating to the protection of broadcast signals, to ensure signal encryption during transit.
- Review and harmonise the IT Act with the Copyright Act to provide clarity on certain issues. For instance, clarity on the intermediary liability framework would help courts understand the different kinds of intermediaries and the varying responsibilities they bear under law, and apply them to copyright infringement cases.

#### CHAPTER IV/ LEGISLATIVE TRENDS

- Explore expedited judicial enforcement processes like in Chile.
- Use administrative frameworks with safeguards, with bodies and tribunals having the power to disable or remove access to infringing content.
- Map the impact of new legislative developments like the Cinematography (Amendment) Bill, 2019 and the Draft Copyright (Amendment) Rules, 2019.

#### CHAPTER V/ CROSS BORDER INFRINGEMENT

- Use international instruments and standardise certain conflict of laws principles to help set minimum standards of IP protection, harmonise enforcement mechanisms, and reduce enforcement costs across jurisdictions.
- Use technology and market-based solutions to help cross-border enforcement like geolocation and digital watermarks.
- Concurrently use legislation and mechanisms other than IP, like the customs recordal system to aid enforcement across borders.

#### CHAPTER VI/ EXTRALEGAL STRATEGIES AND SOFT LAW APPROACHES

- Harness soft law measures to combat piracy, such as Infringing Website Lists or popup notifications on these sites, to redirect public enforcement efforts to big commercial infringers and achieve maximum deterrence for such offences.
- Increase the use of administrative measures in courts, such as an IP ombudsman, specialised IP courts, and administrative frameworks with safeguards to assist judges.

## ANNEXURE I

### LATEST FIGURES FOR REVENUE AND PIRACY LOSSES IN THE MUSIC AND FILM INDUSTRIES

SIZE OF THE MUSIC INDUSTRY (LEGAL SALES)	VALUE OF DIGITAL SALES	REVENUE LOSS DUE TO PIRACY	LOSS AS % SHARE OF THE INDUSTRY	SOURCE
INR 8.5 BILLION	INR 6.65 BILLION	INR 21-27 BILLION <sup>203</sup>	76% (DIGITAL) <sup>204</sup>	IMI DIGITAL MUSIC STUDY <sup>205</sup>
USD 130.7 MILLION	USD 101.9 MILLION <sup>206</sup>	INR 12-15 BILLION	50%-60%	IMI VISION 2022 <sup>207</sup>

SIZE OF THE FILM INDUSTRY (LEGAL SALES)	VALUE OF DOMESTIC THEATRICAL	REVENUE LOSS DUE TO PIRACY	LOSS AS % SHARE OF THE INDUSTRY	SOURCE
INR 142.3 BILLION	INR 99.8 BILLION	INR 180 BILLION	55.8%	FICCI FRAMES <sup>208</sup>
USD 2 BILLION		USD 2.7 BILLION	57.5%	THE NEWS MINUTE <sup>209</sup>
		INR 99.8 BILLION <sup>210</sup>	33%-50% <sup>211</sup>	NIRMAL BANG <sup>212</sup>

*Note: Numbers in blue are imputed from the other two columns with the same assumptions for the substitution rate as in the main text.*



## ANNEXURE II

### DETAILS OF OFFENCES AND PERSONS RELATED TO COPYRIGHT, COVERED UNDER THE GOONDAS ACTS OF RELEVANT STATES

LEGISLATION	RELEVANT PROVISION	PERSONS COVERED
The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers and Video Pirates Act, 1982	Section 2(j)	“Video pirate”, defined as a person who commits, attempts to commit, or abets the commission of copyright infringement in relation to a cinematograph film or a record embodying any part of soundtracks associated with the film, punishable under the Copyright Act.
The Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and Persons engaged in Black-marketing of Essential Commodities Act, 1981	Section 2(f-1)	“Video pirate”, defined as (a) a person against whom one chargesheet has already been filed under the Copyright Act for infringement of copyright relating to cinematograph films or sound recordings; and (b) who commits, attempts to commit, or abets the commission of copyright infringement in relation to a cinematograph film or sound recording, or any part of a sound track associated with the film or sound recording, punishable under the Copyright Act.
The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Gamblers Act, 1985	Sections 2(f) and 2(o)	“Digital offender”, defined as any person who knowingly or deliberately violates any copyright in relation to “any book, music, film, software, artistic or scientific work” and includes a person who uses the identity of another user and illegally uses any computer or digital network for pecuniary gain for themselves or anyone else, or commits offences specified under Section 67-75 of the IT Act. “Video or audio pirate”, defined as a person who commits, attempts to commit, or abets the commission of copyright infringement habitually for commercial gain, in relation to a cinematograph film or a recording embodying any part of the sound track associated with the film, punishable under the Copyright Act.
The Kerala Anti-Social Activities Prevention Act, 2007	Section 2(h)	“Digital data and copyright pirate”, defined as any person who knowingly or deliberately violates any copyright in relation to “any book, music, film, software, artistic or scientific work” and includes a person who uses the identity of another user and illegally uses any computer or digital network for “any illegal personal profit by deceiving any person or any computer system”.

FOR ANNEXURE III CONTINUE TO NEXT PAGE.

## ANNEXURE III

### CASES DEALING WITH PIRACY UNDER THE GOONDAS ACTS AT THE HIGH COURT LEVEL

NAME	YEAR	STATE	BRIEF FACTS	ISSUE	OUTCOME	CITATION
J Ameergani vs State of Tamil Nadu and Others	29 April 2005	TN	A Habeas Corpus petition was filed by the wife of Jaheer Hussain, against a preventive detention order under the TN Goondas Act. Jaheer and his associates were engaged in copying and selling new films and 'obscene' films, and Jaheer was booked under the IPC and Copyright Act but was out on bail. On receiving a complaint, and with a warrant, the police found him copying a new film and he was arrested. He was produced before a Magistrate and was remanded in custody for 2 weeks. On the basis of this incident, the Police Commissioner concluded that he was acting in a manner prejudicial to public order, and that he was a 'video pirate' per the TN Goondas Act. He was subsequently kept under preventive detention.	<p>Whether detention order violated Articles 14, 19, 21 and 22, and whether the state legislature was competent to frame legislation on copyright, which is a Union List subject.</p> <p>Counsel for the petitioner argued that the amendment made to TN Goondas Act primarily related to the Copyright Act, which relates to Entry 49 of List I of Schedule VII. The definition of a 'video pirate' under Section 2(r)(j) of the TN Goondas Act clearly related to 'copyright', which is included in Entry 49 of List I and is beyond the legislative competence of the State Legislature.</p>	<p>Held that the amended provision does not deal with the Copyright Act or any matter in Entry 49 of List I, but is related to preventive detention, which falls under Entry 3 of List III.</p> <p>The Court held: 'Laws relating to preventive detention as envisaged in List III, Entry 3 can be made with reference to the security of a State, the maintenance of public order or the maintenance of supplies and services essential to community. An order of preventive detention is not a punitive measure, but is only preventive aimed at preventing a person from committing a crime which is likely to prejudicially affect security of a State or the maintenance or public order or the maintenance of supplies and services essential to community. It is of no consequence that while enacting such law, the offence in respect of which such preventive detention law is required to be made is an offence under a Central Act enacted as per</p>	2005(2) CTC790; 2005-2- LW(Cr)606
Siva vs the Commissioner of Police	24 June 2005	TN	A Habeas Corpus petition was filed for setting aside detention order of Siva, detained under the TN Goondas Act for video piracy. A police constable lodged a special report stating that Siva and his associates sold pirated VCDs. A search revealed that this was the case, and they were booked under the Copyright Act, IPC, and related legislations. Siva was detained thereafter under the TN Goondas Act for being a video pirate, in order to prevent him from continuing to pirate films.	Whether there is a threat to public order warranting preventive detention.	The Court relied on the decision of the Division Bench in Ameergani vs State of TN and held that the Police Commissioner was well within his rights to classify Siva as a video pirate, especially given the materials found and the pending cases under the IPC and Copyright Act. The Court also held that piracy encouraged the public to not go to movie theatres and thereby caused a massive loss to the film industry and Government through loss of revenue, and also 'result[ed] in confrontation between the various sections of public and the film producers, distributors etc.', and held that Siva's actions were prejudicial to the maintenance of public order.	H.C.P. No. 273 of 2005

## ANNEXURE IV

### ANECDOTAL CASES OF LEGITIMATE BUSINESSES BEING AFFECTED BY INJUNCTION ORDERS

#### 1. THE CASE OF SPICYIP:

In February 2019, the popular IP commentary and blog received a notice from Google Inc. alleging that they had de-indexed one of the blogs after a complaint was filed against it by Saregama India Pvt. Ltd. This was because Saregama had on 28 November 2018 sent Google a list of 99 problematic URLs, one of which SpicyIP. The URL in question was for a blog post on the history of a particular Bollywood song. On examination it was found that there was no mention of the song apart from describing the facts in dispute. Google's response, owing to the peculiarities of US Copyright law, was to de-index the blog first, and notify later. The post was eventually reinstated on January 21 following requests and communication with Google.<sup>215</sup>

#### 2. THE CASE OF INTERNET ARCHIVES:

In 2017, the Madras High Court issued an Ashok Kumar order on July 21 and August 2 to block 2,650 websites as an interim measure against the infringement of copyright of certain films. The suits for copyright infringement were filed by Prakash Jha Films, in respect of 'Lipstick Under My Burqa', as well as by Red Chillies Entertainment, Private Limited, Mumbai for its film 'Harry Met Sejal'. Some 42 defendants were listed, besides eight unknown persons dubbed Ashok Kumar. In the process, Internet Archives, an online library of works in the public domain, was one of the well-known sites blocked as a result of the High Court order. One of the world's largest repositories of legally free books, films, and other historic archival content, the Internet Archives was neither contacted, nor was a specific URL mentioned for blocking—the Court had ordered the blocking of the domain name itself.<sup>216</sup>

#### 3. THE CASE OF INDUNA:

In 2016, the Bombay High Court in a case blocked a number of websites for indulging in copyright infringement. Induna, a website that sold legitimate movie CDs and DVDs, was blocked simply because it mentioned the name 'Great Grand Masti' (the film) on its website, announcing that the DVD would be available soon. It was later revealed that technical agencies hired by the plaintiff (Balaji Motion Pictures) simply used automated crawlers to track any online mention of the movie name and in their list included even those sites that had simply carried reviews of the movie, without any evidence of infringement.<sup>217</sup>

[1] In this report we use the words 'copyright infringement' and 'piracy' interchangeably.

[2] Esya Centre, Sengupta and Giridhar, 'Contemporary Culture and IP: Establishing the Conceptual Framework', available at <[https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/5c879f941905f4dea81f6829/1552392089768/EsyaCentre\\_ContemporaryCulture%26IP.pdf](https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/5c879f941905f4dea81f6829/1552392089768/EsyaCentre_ContemporaryCulture%26IP.pdf)>, p. 2.

[3] Rosemary J. Coombe, Joseph F. Turcotte, UNESCO-EOLSS Sample Chapters, 'Culture, Civilisation and Human Society- Cultural, Political, and Social Implications of Intellectual Property Laws in an Informational Economy', available at <<https://www.colss.net/sample-chapters/Co4/EG-23-24.pdf>>, pp. 6-8.

[4] Supra 2.

[5] Section 51 of the Copyright Act specifies when copyright in a work is deemed to have been infringed. Among other things, it provides that when a person, without requisite permissions from the copyright owner, does anything which only the holder of the copyright is permitted to do (such as disseminating or reproducing the work), or permits any place to be used for such works to be communicated to the public for profit, copyright is infringed.

[6] Yuthika Bhargava, The Hindu, 31 March 2019, 'Music streaming providers like what they hear as listeners tune in', available at <<https://www.thehindu.com/business/Industry/music-streaming-providers-like-what-they-hear-as-listeners-tune-in/article26689631.ece>>.

[7] Michael Brenner, Cisco Blogs, 26 August 2016, 'Beyond DRM: How to prevent video piracy in the digital age', available at <<https://blogs.cisco.com/sp/beyond-drm-how-to-prevent-video-piracy-in-the-digital-age>>.

[8] Peter Kenny, Intellectual Property Watch, 14 September 2017, 'The Many Layers Of Best Practices In The Fight Against Counterfeiting, Piracy', available at <<https://www.ip-watch.org/2017/09/14/many-layers-best-practices-fight-counterfeiting-piracy/>>

[9] Collaborative Community, 'Cultural Sector and Creative Industry, Strategic Consulting and Training Programs', available at <<http://collaborativec.in/what/creative-economy/>>.

[10] KPMG Advisory Services Private Limited for the Ministry of Skill Development & Entrepreneurship, Government of India, 'Human Resource and Skill Development in the Media and Entertainment Sector (2013-17, 2017-22)', available at <<https://nsdcindia.org/sites/default/files/Media-Entertainment.pdf>>, pp. iii-iv.

[11] Press Information Bureau, Government of India, 28 February 2018, 'Cabinet approves Action Plan for Champion Sectors in Services', available at <<http://pib.gov.in/PressReleaseDetail.aspx?PRID=1522078>>.

[12] O.P. Jindal University, Sahni, Jain and Gupta, 'Understanding digital piracy through the lens of psychosocial, criminological and cultural factors', pp. 3-4.

[13] Ibid.

[14] The WIPO Reports on 'The Economic Performance of Copyright-Based Industries', available at <<https://wipo.int/copyright/en/performance/>>

[15] SSRIC, Joe Karaganis, 2011, 'Media Piracy in Emerging Economies', available at <<http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf>>, p. 341.

[16] Gillian Doyle, CREATE Working Paper 2017/01, University of Glasgow, 'Digitization and changing windowing strategies in the television industry: negotiating new windows on the world', pp. 11, available at <<https://zenodo.org/record/55755/files/CREATE-Working-Paper-2017-01.pdf>>

[17] Ministry of Information and Broadcasting, Rajya Sabha, Unstarred Question No. 2638, answered on 19 March 2018, 'Hurdles in growth of film industry'. On a question raised in the Rajya Sabha in 2016, the Ministry of Information and Broadcasting stated that there was no definite data on the instances of piracy of films: See Unstarred Question No. 1273, answered on 8 March 2016, 'Piracy of films'.

[18] Danaher et al. (2019) suggest that to increase legal IP use when faced with a dominant piracy channel, the optimal policy response must block multiple channels of access to pirated content. See: Danaher, Brett and Hersh, Jonathan Samuel and Smith, Michael D. and Telang, Rahul, 'The Effect of Piracy Website Blocking on Consumer Behavior (August 13, 2019). Available at SSRN: <<https://ssrn.com/abstract=2612063>> and <<http://dx.doi.org/10.2139/ssrn.2612063>>

[19] Brett Danaher, Jonathan Samuel Hersh, Michael D Smith, and Rahul Telang, August 2019, 'The Effect of Piracy Website Blocking on Consumer Behavior', available at <<https://ssrn.com/abstract=2612063>>

[20] IMI Vision 2022, Digital Music Study 2018, IFPI and IMI, available at <<http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf>>, p. 22.

[21] Poort, Joost, Paul Rutten, and Nico Van Eijk. 'Legal, economic and cultural aspects of file sharing.' Communications and Strategies 77 (2010):), available at <[https://www.ivir.nl/publicaties/download/Communications&Strategies\\_2010.pdf](https://www.ivir.nl/publicaties/download/Communications&Strategies_2010.pdf)>, pp. 35-54. <[https://www.ivir.nl/publicaties/download/Communications&Strategies\\_2010.pdf](https://www.ivir.nl/publicaties/download/Communications&Strategies_2010.pdf)>

[22] A 2012 study by the UK regulator OfCom found that pirates tend to buy far more legitimate content than their non-pirating counterparts: 'The survey data shows that for music, film and TV programmes, those who consumed a mixture of legal and illegal content claimed to spend more on that type of content over the 3-month period than those who consumed 100% legally or 100% illegally'. Key Findings, p. 3, available at <[https://www.ofcom.gov.uk/\\_data/assets/pdf\\_file/0023/50486/intro.pdf](https://www.ofcom.gov.uk/_data/assets/pdf_file/0023/50486/intro.pdf)>, p. 3; Ofcom, 20 November 2012, 'Online copyright infringement tracker benchmark study Q3 2012', available at <[https://www.ofcom.gov.uk/research-and-data/internet-and-on-demand-research/online-copyright-infringement/copyright-infringement-tracker?utm\\_medium=email&utm\\_source=updates&utm\\_campaign=online-copyright-research](https://www.ofcom.gov.uk/research-and-data/internet-and-on-demand-research/online-copyright-infringement/copyright-infringement-tracker?utm_medium=email&utm_source=updates&utm_campaign=online-copyright-research)>

[23] University of Amsterdam, Institute for Information Law, 'Global Online Piracy Study', available at <<https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study.pdf>>

[24] The Indian Music Industry, 'Digital Music Study 2018', available at <<http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf>>

[25] FICCI and EY Report on India's Media & Entertainment Sector, March 2019, 'A billion screens of opportunity', available at <[https://www.ey.com/Publication/vwLUAssets/EY-a-billion-screens-of-opportunity/\\$FILE/EY-a-billion-screens-of-opportunity.pdf](https://www.ey.com/Publication/vwLUAssets/EY-a-billion-screens-of-opportunity/$FILE/EY-a-billion-screens-of-opportunity.pdf)>, p. 3.

[26] The IMI Digital Music Study 2018 estimates that revenue generated from online sales for the year 2017 was INR 6.65 billion: <<http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf>>

[27] University of Amsterdam, Institute for Information Law, 'Global Online Piracy Study', available at <<https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study.pdf>>

[28] The survey instrument for the Global Online Piracy study can be found at <<https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study-Annexes-.pdf>>

[29] 'In CY 2016, the film industry grew by a mere 3 per cent over the previous year to reach INR 142.3 billion'. 'Media for the masses: the promise unfolds: FICCI-KPMG M&E Report 2017', p. <<http://aibmda.in/FICCI-KPMG-M&E-Report-2017.pdf>>, p. 119. <<http://aibmda.in/FICCI-KPMG-M&E-Report-2017.pdf>>

[30] <European Union Intellectual Property Office, '2019 Status Report on IPR Infringement – Why IP rights are important, IPR infringement and the fight against counterfeiting and piracy', available at <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/docs/2019\\_Status\\_Report\\_on\\_IPR\\_infringement/2019\\_Status\\_Report\\_on\\_IPR\\_infringement\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/docs/2019_Status_Report_on_IPR_infringement/2019_Status_Report_on_IPR_infringement_en.pdf)>

[31] Mobile devices are especially popular in China, with 52% of consumers aged 18-24 who pirate indicating that mobile devices are their preferred devices for consuming pirated content. 'In the Asia-Pacific, more consumers across all ages prefer to watch on Android smartphones in all markets surveyed: China (17%), India (12%) and Indonesia (22%). The exception is Australia, which had an even split between Android, iOS and tablets' p. 9: <<https://resources.irdeto.com/irdeto-global-consumer-piracy-survey/irdeto-global-customer-piracy-survey-report>>, p. 9.

[32] University of Amsterdam, Institute for Information Law, 'Global Online Piracy Study', available at <<https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study.pdf>>

[33] Nandini CP, 2017, 'Criminalization of Copyrights Infringements in the Digital Era with Special Reference to India', in Sinha M., Mahalwar V. (eds) Copyright Law in the Digital World, Springer, Singapore, available at <[https://link.springer.com/chapter/10.1007/978-981-10-3984-3\\_14](https://link.springer.com/chapter/10.1007/978-981-10-3984-3_14)>

[34] The WTO Panel Report DS362 defining counterfeiting or piracy 'on a commercial scale' refers to counterfeiting or piracy at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market: available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/362r\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf)>, p. 7-777

[35] Offence of infringement of copyright or other rights conferred by this Act.

[36] Arul Scaria, Cambridge University Press, 2014, 'Piracy in the Indian Film Industry: Copyright and Cultural Consonance', p. 159.

[37] Article 61, TRIPS Agreement, available at <[https://www.wipo.int/edocs/mdocs/aspac/en/wipo\\_ipr\\_pnh\\_11/wipo\\_ipr\\_pnh\\_11\\_ref\\_113.pdf](https://www.wipo.int/edocs/mdocs/aspac/en/wipo_ipr_pnh_11/wipo_ipr_pnh_11_ref_113.pdf)>

[38] The concept of prescribing imprisonment and a fine can be seen across most IP legislation in India, including the Trademarks Act, 1999 (see sections 103, 104 and 105), the Geographical Indications of Goods (Registration and Protection) Act, 1999 (GI Act—see sections 39, 40, 41) and the Semiconductors Act, 2000. The Patents Act, 1970 is however much more rational in its treatment of offences, and in all cases gives the option of imprisonment or a fine. Even the Designs Act of 2000 prescribes nothing more than a recoverable contract debt, or an injunction, depending on the remedy sought, for piracy of a registered design. Surprisingly, the GI Act also has penalty provisions prescribing imprisonment or fines in certain provisions (see sections 42, 43 and 44).

[39] *Soman v. State of Kerala*, (2013) 11 S.C.C. 382, p. 13.

[40] *Alister Anthony Pereira v. State of Maharashtra*, (2012) 2 S.C.C. 648, p. 69.

[41] Irina D Manta, Harvard Journal of Law and Technology, Vol 24, No 2 Spring 2011, 'The Puzzle of Criminal Sanctions for Intellectual Property Infringement', <[https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1194&context=faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1194&context=faculty_scholarship)>, pp. 515, 518.

[42] WIPO Advisory Committee on Enforcement, WIPO/ACE/11/9, 5 July 2016, available at <[https://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_11/wipo\\_ace\\_11\\_9.pdf](https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_11/wipo_ace_11_9.pdf)> p. 15.

[43] *Supra* 36, pp. 159-160

[44] Please refer to Annexure II for details regarding persons covered under the relevant Goondas Acts of various states.

[45] See Gautam Bhatia, Outlook, 5 August 2014, 'Goondagiri of the Goonda Act', available at <<https://www.outlookindia.com/website/story/goondagiri-of-the-goonda-act/291593>>; Nehaa Chaudhari, SpicyIP, 13 August 2014, 'Guest Post: Karnataka's 'Goondas Act' – An examination', available at <<https://spicyip.com/2014/08/guest-post-karnatakas-goondas-act-an-examination.html>>; Anja Kovacs, Internet Democracy Project, 16 March 2018, 'Unshackling expression: A study on laws criminalising expression online in Asia', available at <<https://internetdemocracy.in/reports/unshackling-expression-a-study-on-laws-criminalising-expression-online-in-asia/>>; Balaji Subramanian, SpicyIP, 18 June 2016, 'Subramanian Swamy and the Constitutionality of Copyright Criminalisation – Part II', available at <<https://spicyip.com/2016/06/subramanian-swamy-and-the-constitutionality-of-copyright-criminalisation-part-ii.html>>

[46] See Prashant Reddy, SpicyIP, 3 May 2009, 'Beware Mumbaikars: The Slumlords Act could detain you for a year for simply buying a pirated DVD', available at <<https://spicyip.com/2009/05/beware-mumbaikars-slumlords-act-could.html>>; T Prashant Reddy, N Sai Vinod, Journal of Intellectual Property Law & Practice, Volume 7, Issue 3, March 2012, 'The constitutionality of preventing 'video piracy' through preventive detention in Indian states', available at <<https://doi.org/10.1093/jiplp/jpr214>>, pp. 194-204; Nehaa Chaudhari, Amulya Purushotama, 28 August 2014, 'Guest Post: Karnataka Goondas Act – A note on Legislative Competence', available at <<https://spicyip.com/2014/08/guest-post-karnataka-goondas-act-a-note-on-legislative-competence.html>>

[47] See, for example, the Statement of Objects and Reasons, Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Gamblers Act, 1985:

'The activities of certain anti-social elements like bootleggers, drug offenders, gamblers, goondas, immoral traffic offenders and slum grabbers have from time to time caused a feeling of insecurity and alarm among the public. The even tempo of life especially in urban areas has frequently been disrupted because of such persons.

(2) In order to ensure that the maintenance of public order in this State is not adversely affected by the activities of these known anti-social elements, it is considered necessary to enact a special legislation to provide as follows:

(a) to define with precision the terms 'bootleggers', 'drug offenders', 'gamblers', 'goondas', 'immoral traffic offenders' and 'slum grabbers'.

(b) to specify their activities which adversely affect public order, and

(c) to provide for preventive detention of the persons indulging in these dangerous activities.

3. Tamil Nadu and Maharashtra State have introduced specific legislation for dealing with these categories of anti-social elements as these classes of offenders could not be effectively dealt with under the National Security Act.

4. It is proposed to make a similar legislation in Karnataka also in public interest.' [emphasis added]

[48] Nehaa Chaudhari, Amulya Purushotama, 28 August 2014, 'Guest Post: Karnataka Goondas Act – A note on Legislative Competence', available at <<https://spicyip.com/2014/08/guest-post-karnataka-goondas-act-a-note-on-legislative-competence.html>>; Balaji Subramanian, SpicyIP, 18 June 2016, 'Subramanian Swamy and the Constitutionality of Copyright Criminalisation – Part II', available at <<https://spicyip.com/2016/06/subramanian-swamy-and-the-constitutionality-of-copyright-criminalisation-part-ii.html>>

[49] Section 13, Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Gamblers Act, 1985; Section 13, Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers and Video Pirates Act, 1982; Section 13, Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons, Video Pirates, Sand Smugglers and Persons engaged in Black-marketing of Essential Commodities Act, 1981

[50] See Section 3, Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Gamblers Act, 1985; Section 3, Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers and Video Pirates Act, 1982. This also effectively amounts to a prior restraint on speech, which the Supreme Court has held to be unconstitutional. See Gautam Bhatia, Indian Constitutional Law and Philosophy, 5 August 2014, 'Karnataka's Amendments to the Goonda Act Violate Article 19(1)(a)', available at <<https://indconlawphil.wordpress.com/2014/08/05/karnatakas-amendments-to-the-goonda-act-violate-article-191a/>>

[51] Section 2(o), Kerala Anti-Social Activities Prevention Act, 2007.

[52] Section 12, Kerala Anti-Social Activities Prevention Act, 2007.

[53] See, Prasad S, Bangalore Mirror, 4 August 2014, 'We the goondas', available at <<https://bangaloremirror.indiatimes.com/bangalore/cover-story/income-tax-IT-Act-Goonda-Act-WhatsApp-group-Indian-Copyright-Act-Supreme-Court-Dowry-Prohibition-Act-State-Public-Prosecutor-cyber-crimes-IPC/articleshow/39564603.cms>>

[54] For a discussion on these cases, see Gautam Bhatia, Indian Constitutional Law and Philosophy, 5 August 2014, 'Karnataka's Amendments to the Goonda Act Violate Article 19(1)(a)', available at <<https://indconlawphil.wordpress.com/2014/08/05/karnatakas-amendments-to-the-goonda-act-violate-article-191a/>>

[55] *Ibid.*

[56] For a summary of a few cases at the High Court level dealing with piracy under the Goondas Acts, refer to Annexure III.

[57] Anviti Chaturvedi, PRS Legislative Research, June 2017, 'Police Reforms in India', available at <<https://www.prsindia.org/policy/discussion-papers/police-reforms-india>>

[58] PRS Legislative Research, 2018, 'Vital Stats – Pendency of cases in the judiciary', available at <<https://prsindia.org/policy/vital-stats/pendency-cases-judiciary#targetText=Pendency%20of%20cases%20in%20the%20Judiciary&targetText=Pendency%20of%20cases%20across%20Courts,High%20Courts-%2C%20and%20subordinate%20courts.&targetText=Note%3A%20Data%20for%202017%20includes%20data%20up%20to%20April%202018.>>

[59] Under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908.

[60] *Taj Television Ltd. & Anr. vs. Rajan Mandal & Ors*, [2003] F.S.R. 22

[61] Anja Kovacs, Internet Democracy Project, 16 March 2018, 'Unshackling expression: A study on laws criminalising expression online in Asia', available at <<https://internetdemocracy.in/reports/unshackling-expression-a-study-on-laws-criminalising-expression-online-in-asia/>>

[62] This relies in part of Justice Gautam Patel's suggestion of prescribing a three-step verification process, and possibly using a third-party neutral body to assist the courts. This three-step verification process required a re-verification of the list of infringing websites by the investigative agency, supported by an affidavit submitted in court by the agency, a verification of the list by both parties, and the submission of another affidavit in court by the petitioner. *Eros International Media Ltd. & Anr v. BSNL*, Suit (L) No. 755 of 2016, available at <<https://spicyip.com/wp-content/uploads/2016/08/Dishoom-John-Doe-Order-26th-July-2016.pdf>>

[63] *The Football Association Premier League Ltd v British Telecommunications Plc and others*, [2017] EWHC 480 (Ch)

[64] *Ibid*, paras 10-19.

[65] *Supra* 63, pp. 20-27.

[66] See paras 262-265, [2014] EWHC 3354 (Ch)

[67] See <<http://copyrightblog.kluweriplaw.com/2018/08/18/high-court-extends-premier-leagues-live-blocking-order-201819-season/>>

[68] See *The Football Association Premier League Ltd v British Telecommunications Plc & Ors*, [2018] EWHC 1828, available at <<http://www.bailii.org/ew/cases/EWHC/Ch/2018/1828.html>>

[69] See *Matchroom Boxing Ltd v British Telecommunications Plc and Others*, [2018] EWHC 2443 (Ch), available at <<http://www.bailii.org/ew/cases/EWHC/Ch/2018/2443.html>>

[70] See *Union Des Associations Europeennes De Football v British Telecommunications Plc and Others*, [2017] EWHC 3414 (Ch), available at <<http://www.bailii.org/ew/cases/EWHC/Ch/2017/3414.html>>; and *Union Des Associations Europeennes De Football v British Telecommunications Plc and Others*, [2018] EWHC 1900 (Ch), available at <<http://www.bailii.org/ew/cases/EWHC/Ch/2018/1900.html>>

[71] CS(COMM) 326/2019 & I.A. 8510/2019 & 8508/2019, *Delhi High Court, Channel 2 Group Corporation v. https://live.mycricketlive.net & ors*, pp. 17, available at <[https://www.livelaw.in/pdf\\_upload/pdf\\_upload-361368.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-361368.pdf)>. This was also held in other cases like *Star India Pvt. Ltd. v Piyush Agarwal*, 2013 (54) PTC 222 (Del), and *Star India Pvt. Ltd. v. Akuate Internet Services Pvt. Ltd.*, SLP (C) No. 29633 of 2013.

[72] Section 52(i)(c) of the Copyright Act, 1957. See also Rule 75(3) of the Copyright Rules, 2013.

[73] *Myspace v Super Cassettes*, FAO(OS) 540/2011, available at <<http://lobis.nic.in/ddir/dhc/SRB/judgement/24-12-2016/SRB23122016FAOOS5402011.pdf>>

[74] Section 79 - Exemption from liability of intermediary in certain cases; Section 80 – Act to have overriding effect.

[75] [(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or]

[76] In this case, the plaintiff was directed to provide an updated catalogue of 'specific' works in which it held copyright along with the location/URL of such work on the appellant's website to the appellant as and when the plaintiff detected infringement.

[77] In the Whatsapp traceability case, the Supreme Court had asked the Central Government to finalise the Draft Information Technology [Intermediaries Guidelines (Amendment)] Rules as soon as possible, <<https://www.medianama.com/2019/09/223-supreme-court-to-meity-intermediary-guidelines-status/>>

[78] See European Commission, 14 September 2016, 'Commission Staff Working Document: Impact Assessment on the modernisation of EU copyright rules', SWD(2016) 301, available at <[https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=17211](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211)>, p 140

[79] *Ibid*, pp. 138-139.

[80] See Felipe Romero-Moreno (2019) 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright, *International Review of Law, Computers & Technology*, 33:2, 187-210, available at <<https://www.tandfonline.com/doi/full/10.1080/13600869.2018.1475906>>

[81] Rishabh Dhara, Centre for Internet and Society, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, available at <<https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>>

[82] See Felipe Romero-Moreno (2019) 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright, *International Review of Law, Computers & Technology*, 33:2, 187-210, available at <<https://www.tandfonline.com/doi/full/10.1080/13600869.2018.1475906>>; European Commission, 14 September 2016, 'Commission Staff Working Document: Impact Assessment on the modernisation of EU copyright rules', SWD(2016) 301, available at <[https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=17211](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211)>, pp 140-141; Daphne Keller, the Centre for Internet and Society, Stanford Law School, 5 October 2017, 'Problems with Filters in the European Commission's Platforms Proposal', available at <<http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>>

[83] EU Copyright Directive is available at <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.130.01.0092.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG)>

[84] João Pedro Quintais (Institute for Information Law (IViR)), 7 June, 2019, *Kluwer Copyright Blog*, available at <<http://copyrightblog.kluweriplaw.com/2019/06/07/the-new-copyright-directive-a-tour-dhorizon-part-1/>>

[85] *UTV v 1337x.to, MANU/DE/1244/2019*. Also see *Warner Bros. Entertainment Inc v. TamilRockers.com & Ors*, CS(COMM) 419/2019, which relied on *UTV v 1337x.to* and also provided dynamic injunctions as a remedy to the plaintiff.

[86] *Disney Enterprises Inc, and Others vs. M1 Ltd and Others*, [2018] SGHC 206.

[87] *Supra* 85, pp. 59.

[88] See *Eros International Media Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors.*, Suit No.751/2016

[89] *Supra* 85, pp. 76-78.

[90] Divij Joshi, *SpicyIP*, 12 April 2019, 'Breaking: Delhi High Court Issues India's First 'Dynamic' Website Blocking Injunction for Copyright Infringement', available at <<https://spicyip.com/2019/04/breaking-delhi-high-court-issues-indias-first-dynamic-website-blocking-injunction-for-copyright-infringement.html>>

[91] *Supra* 86, pp. 26-29.

[92] *Supra* 85, pp. 104-105.

[93] Seemantani Sharma, 28 Marq. Sports L. Rev. 433 (2018), 'Online Piracy of Live Sports Telecasts in India', available at <<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1732&context=sportslaw>>, pp. 437-441.

[94] *The Football Association Premier League Ltd v British Telecommunications Plc and others*, [2017] EWHC 480 (Ch).

[95] Lucas S Michels, *The IP Exporter*, 9 October 2013, 'The Trans Pacific Partnership and Its Implications on Online Copyright Enforcement' available at <<https://theipexporter.com/2013/10/09/the-trans-pacific-partnership-and-its-implications-on-online-copyright-enforcement/>>

[96] WPO Magazine, June 2010, 'Chile Breaks New Ground in Regulating IP Liability', available at <[https://www.wipo.int/wipo\\_magazine/en/2010/03/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2010/03/article_0009.html)>; Lucas S Michels, *The IP Exporter*, 18 December 2015, 'Interview with IP Fridays on the TPP and Online Copyright Enforcement', available at <<https://theipexporter.com/category/chile/>>

[97] Centre for Democracy and Technology, August 2012, 'Chile's Notice-And-Takedown System for Copyright Protection: An Alternative Approach' available at <<https://cdt.org/files/pdfs/Chile-notice-takedown.pdf>>

[98] More information on the Chilean legislation is available at <<https://www.wipo.int/edocs/lexdocs/laws/en/cl/cloo4en.pdf>>

[99] Centre for Democracy and Technology, August 2012, available at <<https://www.cdt.org/files/pdfs/Chile-notice-takedown.pdf>>

[100] Elena Nikolarea Of A. & K. Metaxopoulos And Partners Law Firm, *Troubled Waters for Online Pirates in Greece* available at <<https://www.ilnipinsider.com/2019/01/troubled-waters-for-online-pirates-in-greece/>>.

[101] *Ibid*.

[102] Intellectual Property Office, research carried out by BOP Consulting with DotEcon, 2015, 'International Comparison of Approaches to Online Copyright Infringement: Final Report', available at <[http://observatorpi.md/assets/files/studii/Studiu\\_International\\_Comparison\\_of\\_Approaches\\_to\\_Online\\_Copyright\\_Infringement.pdf](http://observatorpi.md/assets/files/studii/Studiu_International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf)>, p. 74.

[103] *Ibid*.

[104] Ministry of Information and Broadcasting, Government of India, 3 January 2019, 'Public comments sought on Cinematograph (Amendment) Bill', available at <<https://mib.gov.in/sites/default/files/Public Notice - Amendment of Cinematograph Act Bill.pdf>>

[105] Information from PRS Legislative Research, *Cinematograph (Amendment) Bill, 2019*, available at <<https://www.prsindia.org/billtrack/cinematograph-amendment-bill-2019>>

[106] Divij Joshi, *Medianama*, 10 January 2019, 'Cinematograph Act amendments blunt, disproportionate, and stifle fair dealing - SpicyIP', available at <<https://www.medianama.com/2019/01/223-cinematograph-act-amendments-spicyip/>>

[106] See Section 52, Copyright Act, 1957, available at <<http://www.copyright.gov.in/Documents/CopyrightRules1957.pdf>>

[107] *Ibid*.

[108] Shubham Borkar and Priya Rane, *Mondaq*, 27 February 2019, 'India: The Cinematograph Amendment Bill, 2019', available at <<http://www.mondaq.com/india/x/784368/broadcasting+film+television+radio/The+Cinematograph+Amendment+Bill+2019>>

[109] The text of the draft rules is available at <[https://dipp.gov.in/sites/default/files/Draft\\_Copyright\\_Amendment\\_Rules\\_2019.pdf](https://dipp.gov.in/sites/default/files/Draft_Copyright_Amendment_Rules_2019.pdf)>

[110] The Copyright Order is applicable to countries who are members of the Berne Copyright Union, and those who have ratified, accepted, or acceded to the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, or the Universal Copyright Convention, and those that are members of the World Trade Organisation, and have ratified, accepted, or acceded to the Agreement on Trade Related Aspects of Intellectual Property Right. See sections 2(a), 2(c), 2(e) and 2(f) of the International Copyright Order, 1999, available at <<http://copyright.gov.in/Documents/International%20Copyright%20Order.htm>>

[111] Section 40, Copyright Act, 1957.

[112] World Intellectual Property Organisation, 'WIPO-Administered Treaties, Contracting Parties> India', <[https://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=80C](https://www.wipo.int/treaties/en/ShowResults.jsp?country_id=80C)>

[113] WIPO, 'Universal Copyright Convention of 6 September 1952, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI', available at <<https://wipolex.wipo.int/en/treaties/details/208>>

[114] Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, 'A Handbook of Copyright Law', available at <<http://copyright.gov.in/documents/handbook.html>>

[115] Paul Edward Geller, 'International Copyright: The Introduction', published in Lionel Bently (ed.), *International Copyright Law and Practice* (LexisNexis 2018), available at <[https://pgeller.com/Paul\\_Geller-International\\_Copyright.pdf](https://pgeller.com/Paul_Geller-International_Copyright.pdf)>, INT-44

[116] WIPO International Bureau, 'International Protection of Copyright and Related Rights', available at <[https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/international\\_protection.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/international_protection.pdf)>, p. 7

[117] *Ibid*, p 17.

[118] *Ibid*.

[119] Article 11 WIPO Copyright Treaty, Article 18 WIPO Performances and Phonograms Treaty.

[120] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment', *Journal of IPR*, Volume 17, 521-531, available at <http://nopr.niscair.res.in/bitstream/123456789/15020/1/JIPR%2017%286%29%20521-531%20.pdf>, pp. 522, 525.

[121] WIPO Background Brief, 'Protection of Broadcasting Organisations – Background Brief', available at <<https://www.wipo.int/pressroom/en/briefs/broadcasting.html>>

[122] Sharma, Seemantani. (2017), *Economic and Political Weekly*, 65-71, 'India and the Proposed Treaty for the Protection of Broadcasting Organizations', available at <[https://www.researchgate.net/publication/321004776\\_India\\_and\\_the\\_Proposed\\_Treaty\\_for\\_the\\_Protection\\_of\\_Broadcasting\\_Organizations](https://www.researchgate.net/publication/321004776_India_and_the_Proposed_Treaty_for_the_Protection_of_Broadcasting_Organizations)>, p 65.

[123] Seemantani Sharma, 28 Marq. Sports L. Rev. 433 (2018), 'Online Piracy of Live Sports Telecasts in India', available at <<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1732&context=sportslaw>>, p 436; Seemantani Sharma, *The Wire*, 4 July 2018, 'Why Hasn't India Endorsed the Broadcasters Treaty Yet?', available at <<https://thewire.in/law/why-hasnt-india-endorsed-the-broadcasters-treaty-yet>>

[124] Seemantani Sharma, 2017, *Economic and Political Weekly*, 65-71, 'India and the Proposed Treaty for the Protection of Broadcasting Organizations', available at <[https://www.researchgate.net/publication/321004776\\_India\\_and\\_the\\_Proposed\\_Treaty\\_for\\_the\\_Protection\\_of\\_Broadcasting\\_Organizations](https://www.researchgate.net/publication/321004776_India_and_the_Proposed_Treaty_for_the_Protection_of_Broadcasting_Organizations)>, p 67.

[125] Seemantani Sharma, *The Wire*, 25 May 2017, 'Will India Lead the Way for International Broadcasting Rights?', available at <<https://thewire.in/economy/india-broadcasting-treaty-intellectual-property>>

[126] WIPO, 5 February 2019, 'Standing Committee on Copyright and Related Rights', SCCR/37/9, available at <[https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_37/sccr\\_37\\_9.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_37/sccr_37_9.pdf)>, para 36, p 12.

[127] Permanent Mission of India, Geneva, 1 April 2019, 'Opening Statement by India at the 38th session of the Standing Committee on Copyright and Related Rights delivered by Mr. Animesh Choudhury, First Secretary', available at <<https://www.pmindiaun.gov.in/pages.php?id=1917>>; ANI, 1 October 2019, 'India displays significance of innovation, creativity for creating balanced intellectual property system', available at <<https://www.aninews.in/news/world/europe/india-displays-significance-of-innovation-creativity-for-creating-balanced-intellectual-property-system20191001001319/>>

[128] WIPO Advisory Committee on Enforcement, WIPO/ACE/14/9, 18 June 2019, available at <[https://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_14/wipo\\_ace\\_14\\_9.pdf](https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_14/wipo_ace_14_9.pdf)>

[129] Black's Law Dictionary defines conflict of laws as 'that branch of jurisprudence, arising from the diversity of the laws of different nations in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of a foreign country, (the acts or rights in question having arisen under it,) either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable to the case in point.'

[130] Marketa Trimble, 25 *Fordham Intell. Prop. Media & Ent. L.J.* 339 (2015), 'The Multiplicity of Copyright Laws on the Internet', available at <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&context=iplj>>, p. 401

[131] *Ibid.*

[132] The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 were framed under section 156(i) of the Customs Act, 1962.

[133] The portal provides for the recording of major IPR i.e. trademarks, designs, copyrights, and geographical indications. The copyright owner can file an application, submit the relevant documents, and create a Unique Permanent Registration Number, which is recorded with the Customs department and simultaneously made available at all ports. <[http://www.mondaq.com/article.asp?article\\_id=765320&signup=true](http://www.mondaq.com/article.asp?article_id=765320&signup=true)>

[134] Identify-Most-Effective-Watermarking-Technique-Stop-Piracy-Its-Tracks, available at <<https://www.verimatrix.com/blog/201808/identify-most-effective-watermarking-technique-stop-piracy-its-tracks>>

[135] How Netflix protects its contents, available at <<https://medium.com/@PallyCon/how-netflix-protects-contents-part-2-33c1b60002a3>>

[136] *Ibid.*

[137] *Ibid.*

[138] *International Journal of Computer Applications* (0975 – 8887), Vol 63, No 4, February 2013 26, 'Anti-Piracy for Movies using Forensic Watermarking', available at <<https://pdfs.semanticscholar.org/709b/0bd4964e9a4399b41ae7291cd46e40c6484a.pdf>>

[139] ZDNet, Charlie Osborne for Between the Lines, 29 August 2017 'Philips takes on cinema piracy with new ambient light technology', available at <<https://www.zdnet.com/article/philips-takes-on-cam-piracy-with-new-ambient-light-technology/>>

[140] Blockchain technology is essentially a database (or ledger) of virtually any type of recordable information, made up of 'blocks', or stored data, chained together to form a cohesive, unbroken record of that information. Once a piece of information is stored on a block of the chain, it is simultaneously shared with other blocks in the same chain. Each successive alteration of data stored in the blockchain is recorded on all the blocks of the chain in order to create a timestamp or history of the information. Since the information and its successive modifications is recorded on all the different blocks of the chain, it is virtually impossible to hack or falsify the information, <<https://medium.com/coinmonks/blockchain-is-self-regulation-sufficient-5bb68ac7e33f>>

[141] Blockchain may be the missing link for video protection, available at <<https://www.forbes.com/sites/forbestechcouncil/2018/11/08/blockchain-may-be-the-missing-link-for-video-protection/> - 1d4d9b44e770>

[142] CustosTech wants to curb movie piracy using bitcoin, available at <<https://ventureburn.com/2015/06/custostech-wants-to-curb-movie-piracy-using-bitcoin/>>

[143] Information about Screener Copy is available at <<https://www.screencopy.com/>>

[144] Piracy prevention finally available for all filmmakers, producers and videographers, 16 October 2017, available at <<https://www.custostech.com/blogchain/piracy-prevention-finally-available-for-all-filmmakers-producers-and-videographers/>>

[145] NAB 2019: The Blockchain-Based Watermarking Solution this Industry's Been Waiting For, 18 March 2019, available at <<https://www.custostech.com/blogchain/nab-2019-the-blockchain-based-watermarking-solution-this-industrys-been-waiting-for/>>

[146] Chang, Iakovou and Shi, *Blockchain in Global Supply Chains and Cross Border Trade: A Critical Synthesis of the State-of-the-Art, Challenges and Opportunities*, pp. 35, 39-40, available at <<https://arxiv.org/ftp/arxiv/papers/1901/1901.02715.pdf>>; Jabbari and Kaminsky, *Blockchain and Supply Chain Management*, University of Chicago, Berkeley, January 2018, available at <<http://www.mhi.org/downloads/learning/cicmhe/blockchain-and-supply-chain-management.pdf>>

[147] Kirsten Korosec, Facebook has a new tool (and people) to fight piracy, *Fortune*, 24 July 2017, available at <<https://fortune.com/2017/07/24/facebook-buys-source3/>>

[148] Ulrich Kaiser, Can Beethoven send takedown requests?, *Wikimedia Foundation*, 27 August 2018, available at <<https://wikimediafoundation.org/news/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/>>

[149] Mason Sands, Why Copyright will be the biggest issue for YouTube in 2019, *Forbes*, 30 December 2018, available at <<https://www.forbes.com/sites/masonsands/2018/12/30/why-copyright-will-be-the-biggest-issue-for-youtube-in-2019/#1195fbo61c12>>; *Financial Express*, 13 July 2016, available at <<https://www.financialexpress.com/industry/companies/google-says-anti-piracy-effort-delivered-2-bn/315985/>>

[150] See discussion on pre-broadcast signals, p.5, World Intellectual Property Organisation, 16 August 2002, 'Protection of Broadcasting Organisations: Terms and Concepts – Working Paper prepared by the Secretariat', SCCR/8/INF/1, available at <[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_8/sccr\\_8\\_inf\\_1.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.doc)>

[151] Some cable service providers do not supply set top boxes with adequate technological protection measures, which also increases the likelihood of piracy. CNBC TV18, 13 September 2019, 'TV industry worried as piracy of channels rises 300% under new regulatory framework', available at <<https://www.cnbcvt18.com/business/tv-industry-worried-as-piracy-of-channels-rises-300-under-new-regulatory-framework-4346921.htm>>

[152] Section 3, Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

[153] *Ibid.*, read with Rule 3, the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharati) Rules, 2007.

[154] See paras 4, 56, and 57, Board of Control for Cricket in India and another vs Prasar Bharati Broadcasting Corporation of India and Another, LPA No.1327/2007 with WP(C) No.8458/2007 and WP(C) 9610/2007, available at <<http://lobis.nic.in/dhir/dhc/BDA/judgement/04-02-2015/BDA04022015CW84582007.pdf>>

[155] Harveen Ahluwalia, *LiveMint*, 3 February 2017, 'Doordarshan DTH to encrypt free-to-air signals by April', available at <<https://www.livemint.com/Consumer/Fwae756qOKqZGxkHdD1/Doordarshan-DTH-to-encrypt-freetoair-signals-by-April.html>>

[156] More information about PIPCU is available at <<https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/default.aspx>>

[157] *Supra* 8.

[158] Information available at <<https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/Operation-Creative-sees-64-per-cent-drop-in-UK-advertising-.aspx>>

[159] European Commission: public consultation to establish first worldwide 'Counterfeit and Piracy watch list', EUIPO, 31 January 2018, available at <<https://euiipo.europa.eu/ohimportal/en/web/guest/news/-/action/view/4015196>>

[160] More information about the Honk Kong IWL is available at <<http://hkcia.asia/?uid=19.0.0.0>>

[161] Infringing Website Lists: Another Valuable Tool in the Anti-Piracy Toolbox, MPA, 17 April 2019, available at <<https://www.mpa-i.org/2019/04/infringing-website-lists-another-valuable-tool-in-the-anti-piracy-toolbox/>>

[162] Over 200 pirate websites shut down in one year: Government, *Economic Times*, 19 November 2018, available at <<https://ciso.economicstimes.indiatimes.com/news/over-200-pirate-websites-shut-down-in-one-year-govt/66687482>>

[163] Intellectual Property Rights Regime in India: Government Policies and Practices, DPIIT, 22 March 2019, available at <[http://www.nja.nic.in/Concluded\\_Programmes/2018-19/P-1156\\_PPTs/1.Session%203%20IPR%20Regime%20in%20India.pdf](http://www.nja.nic.in/Concluded_Programmes/2018-19/P-1156_PPTs/1.Session%203%20IPR%20Regime%20in%20India.pdf)>, pp. 34

[164] Draft National E-Commerce Policy, available at <[https://dipp.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)>, para 3.20

[165] Cracking down on digital piracy report, September 2017, available at <<https://www.fact-uk.org.uk/files/2017/09/Cracking-Down-on-Digital-Piracy-Report-Sept-2017.pdf>>, pp. 9-10.

[166] Trouble in our digital midst, Digital Citizens Alliance, June 2017, available at <<https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/Trouble-in-Our%20Digital-Midst%20Report-June-2017.pdf>>, p. 11.

[167] Mike Weatherley, Follow the money: Financial Options to Assist in the Battle against Online IP Piracy, available at <<https://asiavia.org/wp-content/uploads/2018/11/PIR-mike-weatherley-follow-the-money-201411.pdf>>, p. 2.

[168] More information on private copy levy is available at <<https://www.government.nl/topics/intellectual-property/question-and-answer/what-is-the-private-copy-levy>>

[169] Anush Yegyzarian, *PC World*, 3 November 2004, 'Tech.gov: Paying for Piracy in Advance', available at <<https://www.pcworld.com/article/118404/article.html>>

[170] The court held that to calculate fair compensation, reliance would have to be placed on the specific information relevant to the case, and on information on existing license fees, actual sales, and illegal streaming. The judgment set out the evidence required when calculating such reasonable compensation. It was particularly insightful in noting that account must be taken of the payment model used to legally disseminate the works, noting that there had been a shift from a copy-making model to a subscription model, which must find relevance in calculating the reasonable compensation awarded to complainants. In future it is expected that there will be more judgments shaping the calculation method for reasonable subscription compensation in the event of copyright infringement. <<http://copyrightblog.kluweriplaw.com/2019/03/11/new-swedish-guidelines-for-reasonable-compensation-in-the-event-of-copyright-infringement/>>

[171] Information on TAG is available at <<https://www.tagtoday.net/wg/piracy/>>

[172] Parliament of Australia, 'Copyright Amendment (Online Infringement) Bill 2018', available at <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1819a/19bdo41](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bdo41)>

[173] Campbell Kwan, ZDNet, 27 August 2019, 'Foxtel could potentially block piracy websites without needing to attend court', available at <<https://www.zdnet.com/article/australias-anti-piracy-laws-used-to-block-proxy-websites-for-the-first-time/>>; Rohan Pearce, *Computerworld*, 27 August 2019, 'Foxtel obtains 'rolling' injunction to block pirate sites', available at <<https://www.computerworld.com.au/article/665704/foxtel-obtains-rolling-injunction-block-pirate-sites/>>

[174] TerraLex, 'Cross-Border Copyright Guide 2019', available at <<https://www.rpc.co.uk/-/media/rpc/files/perspectives/ip/terrallex-crossborder-copyright-guide-2019.pdf#page=12>>, p. 10.

[175] Practical Law, José Mauro Decoussau Machado and Matheus Chucris dos Santos, Pinheiro Neto Advogados, 'Copyright litigation in Brazil: overview', available at <[https://uk.practicallaw.thomsonreuters.com/w-011-0888?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1 - co\\_anchor\\_274718](https://uk.practicallaw.thomsonreuters.com/w-011-0888?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 - co_anchor_274718)>

[176] Information from Information from the Office of the United States Trade Representative, 'United States-Mexico-Canada Agreement', available at <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>>

[177] Chapter 20 of USMA (the United States-Mexico-Canada Agreement), available at <<https://usmca.com/intellectual-property-rights-usmca-chapter-20/>>

[178] This means that use will be permitted only so long as the AI uses the data for its machine learning purposes and the copyrighted work is not perceivable when used. Lexology, Ayako Suga, Kensaku Takase and Daisuke Tatsuno, Baker McKenzie, 'Japan: Amendment to the Copyright Act - Fair Use? ... if you're a computer.', available at <<https://www.lexology.com/library/detail.aspx?g=7fa22bff-54ea-4512-9c81-29908ae28a9f>>

[179] European Alliance for Research Excellence, 3 September 2018, 'Japan Amends its Copyright Legislation to meet Future Demands in AI and Big Data', available at <<http://eare.eu/japan-amends-tdm-exception-copyright/>>

[180] Big data refers 'to a process that is used when traditional data mining and handling techniques cannot uncover the insights and meaning of the underlying data. Data that is unstructured or time sensitive or simply very large cannot be processed by relational database engines. This type of data requires a different processing approach called big data, which uses massive parallelism on readily-available hardware'; definition from <<https://www.techopedia.com/definition/27745/big-data>>

[181] TerraLex, 'Cross-Border Copyright Guide 2019', available at <<https://www.rpc.co.uk/-/media/rpc/files/perspectives/ip/terralex-crossborder-copyright-guide-2019.pdf#page=226>>, p. 224.

[182] See EU Directive on Copyright Directive in the Digital Single Market, <[http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271\\_EN.pdf?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf?redirect)>

[183] Lexology, Francine Cunningham, Bird and Bird, 'Proposed EU Copyright Directive shifts balance of responsibilities between rights holders and platforms', available at <<https://www.lexology.com/library/detail.aspx?g=382c296c-e994-402e-a23c-46789f575a40>>

[184] Article 17, EU Directive on Copyright in the Digital Single Market.

[185] See <European Commission, 'Frequently Asked Questions on Copyright Reform', available at <<https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform>>.

[186] Cory Doctorow, Electronic Frontier Foundation, 19 March 2019, 'The European Copyright Directive: What Is It, and Why Has It Drawn More Controversy Than Any Other Directive In EU History?', available at <<https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any>>; Prarthana Patnaik, SpicyIP, 26 June 2018, 'Article 13 of the Controversial EU Copyright Directive', available at <<https://spicyip.com/2018/06/article-13-of-the-controversial-eu-copyright-directive.html>>

[187] Prarthana Patnaik, SpicyIP, 26 June 2018, 'Article 13 of the Controversial EU Copyright Directive', available at <<https://spicyip.com/2018/06/article-13-of-the-controversial-eu-copyright-directive.html>>; Divij Joshi, SpicyIP, 17 February 2019, 'Update: European Union Agrees on Copyright Directive Text, 'Upload Filters' and 'Link Tax' Closer to Becoming Internet Norms', available at <<https://spicyip.com/2019/02/update-european-union-agrees-on-copyright-directive-text-upload-filters-and-link-tax-closer-to-becoming-internet-norms.html>>

[188] Daphne Keller, The Centre for Internet and Society (Stanford Law School), 5 October 2017, 'Problems with Filters in the European Commission's Platforms Proposal', available at <<http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>>; <https://www.engine.is/the-limits-of-filtering>; Engine, Evan Engstrom and Nick Feamster, March 2017, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools', available at <<https://www.engine.is/the-limits-of-filtering>>, pp. 17-21.

[189] See Europe for instance, Creators, 'Article 13' <<https://www.article13.org/article-13>>; Association Littéraire et Artistique Internationale, 21 March 2019, 'ALAI opinion on Article 13 of the proposal for a Directive on copyright in the Digital Single Market as adopted by the trialogue', available at <<https://www.article13.org/article-13>>; <http://www.alai.org/en/assets/files/resolutions/190321-article-13-proposal-directive-copyright-digital-single-market-en.pdf>>, read with <http://www.alai.org/en/assets/files/resolutions/190321-article-13-proposal-directive-copyright-digital-single-market-en.pdf>>, read with Association Littéraire et Artistique Internationale, 18 February 2017, 'Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means', available at <<http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>>

[190] Bill Toulas, TechNadu, 18 September 2019, 'Piracy in Switzerland Remains Legal for Casual Downloaders', available at <<https://www.technadu.com/switzerland-piracy-remains-legal-casual-downloaders/80350/>>

[191] Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, 'National Intellectual Property Rights Policy', <[https://dipp.gov.in/sites/default/files/National\\_IPR\\_Policy\\_English.pdf](https://dipp.gov.in/sites/default/files/National_IPR_Policy_English.pdf)>

[192] These are: (a) IPR Awareness: Outreach and Promotion, (b) Generation of IPRs, (c) Legal and Legislative Framework, (d) Administration and Management, (e) Commercialisation of IPR, (f) Enforcement and Adjudication, and (g) Human Capital Development.

[193] Objective 1, p. 5, National IPR Policy, p. 5.

[194] See Objective 3, p. 10, National IPR Policy, p. 10.

[195] See p. 17, National IPR Policy, p. 17.

[196] It even recommends that researchers in public funded academic and R&D institutions are incentivised to create IPRs by linking them to funding and career progression. See Objective 2, pp. 7-9, National IPR Policy, pp. 7-9.

[197] See Objective 4, pp. 11-14, National IPR Policy, pp. 11-14.

[198] See Objective 6, pp. 16-17, National IPR Policy, pp. 16-17.

[199] The UK IP Policy for instance recommends all of these: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/653493/Innovation-and-growth-report-2016-17.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653493/Innovation-and-growth-report-2016-17.pdf)>

[200] For instance, the Policy's focus on encouraging the creation of IPRs and making them an incentive to provide grants, especially in a public research context, may significantly skew research priorities and lead to substandard and commercially compromised research, which is counter to the public interest, and thwarts the goal of engendering genuine innovation. See Indian Journal of Law and Technology, Vol. 13(2), Shamnad Basheer and Pankhuri Agarwal, 'India's New IP Policy: A Bare Act?', available at <[http://ijlt.in/wp-content/uploads/2018/07/01\\_shamnad\\_pankhuri.pdf](http://ijlt.in/wp-content/uploads/2018/07/01_shamnad_pankhuri.pdf)>, p. 9.

[201] See Mylan Laboratories Limited vs Union of India, W.P.(C) 5571/2019, available at <[http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=207809&yr=2019](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=207809&yr=2019)> paras 1-2; Rishabh Mohnot, SpicyIP, 30 January 2019, 'IPAB Conducts Hearings and Passes Orders Despite Losing Quorum', available at <<https://spicyip.com/2019/01/ipab-continues-to-pass-orders-and-conduct-hearings-despite-losing-quorum.html>>

[202] See, for example, Shamnad Basheer, SpicyIP, 24 August 2016, 'Of Bollywood "Blocks" and John Does: Towards an IP Ombudsman?', available at <<https://spicyip.com/2016/08/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman.html>>

[203] Since it couldn't be disaggregated if the trends of piracy loss are similar for physical sales, we calculated a range of INR 21-27 billion assuming that revenue leakage occurs only from digital sales for the lower bound and as a percentage share of the entire industry size for the upper bound.

[204] Digital Music Study 2018, IFPI and IMI, available at <<http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf>>, percentage of respondents who said they stream content illegally.

[205] Ibid.

[206] 78% of the revenues are generated from digital sales (p. 10).

[207] Supra 20.

[208] Published 2017.

[209] Information available at <<https://www.thenewsminute.com/article/indian-films-gross-2-billion-piracy-makes-35-more-48603>>

[210] Loss to domestic theatrical sales (as calculated from data in FICCI Frames Report 2017).

[211] Across income groups.

[212] Information available at <<https://www.thenewsminute.com/article/indian-films-gross-2-billion-piracy-makes-35-more-48603>>

[213] Please note that this is a non-exhaustive list.

[214] Please note that this is a non-exhaustive list.

[215] Divij Joshi, SpicyIP, 12 February 2019, 'SaReGaMa Pa-rdon Me, You Have the Wrong Address: On the Perils and Pitfalls of Notice and Takedown', available at <<https://spicyip.com/2019/02/saregama-pa-rdon-me-you-have-the-wrong-address-on-the-perils-and-pitfalls-of-notice-and-takedown.html>>

[216] Venkatasubramanian, India Legal, 24 August 2017, 'Who is Ashok Kumar?', available at <<http://www.indialegalive.com/constitutional-law-news/courts-news/anonymous-copyright-infringement-who-is-ashok-kumar-33450>>

[217] Shamnad Basheer, SpicyIP, 24 August 2016, 'Of Bollywood "Blocks" and John Does: Towards an IP Ombudsman?', available at <<https://spicyip.com/2016/08/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman.html>>



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