

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### INDIA

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that India be retained on the Priority Watch List.

#### **ACTIONS TO BE TAKEN IN 2006**

- **Establish Specialized IP Courts or IP Judges, Increasing Speed of Adjudication of Criminal and Civil Cases, and Increasing Deterrence:** While traditionally the Indian authorities have run raids, the lack of an efficient and deterrent judicial remedy has doomed efforts to significantly lower piracy levels. The Government of India should set up specialized IP courts, or the chiefs of the high courts should appoint special judges in all the states to:
  - ease backlogs;
  - enforce deadlines for adjudication/resolution of piracy cases;
  - encourage completion of a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy;
  - prevent unjustified continuances;
  - adopt case management techniques;
  - treat piracy as a serious economic crime;
  - establish clear standards for damages in civil cases, including implementing a statutory damage system which results in real deterrence.

There have been negligible criminal convictions for piracy in India since January 1, 2000. This likely violates TRIPS Articles 41 and 61. Court procedures are overly burdensome; courts are severely backlogged and there are massive delays in bringing criminal and civil cases to final judgment in violation of TRIPS Articles 41, 41(2), 42 and 61. India should adopt meaningful court reform to decrease burdens, costs and delays, and ensure that cases are concluded promptly with deterrent penalties and damages, including, in particular, setting up IP courts with both civil and criminal jurisdiction;

- **Create a National Anti-Piracy Task Force:** The fundamental missing piece of the enforcement puzzle, in addition to the significant improvements in the judicial process noted above, is the lack of national enforcement coordination (since enforcement in India is a “state” matter). For example, in some cities (such as Delhi, Mumbai and Chennai), specialized police units (IP cells) have been set up to combat piracy. The government announced in 2002 the setting up of 19 such cells. A circular was issued that asked each state to set up special task forces to counter piracy. Only Tamil Nadu and Kerala have set up special audio video anti-piracy cells. Unfortunately, with the exception of the cell in New Delhi and a few other cities, like Chennai, Mumbai, Bangalore and Hyderabad, these cells lack the necessary resources in terms of manpower (making them incapable of raiding larger pirate distribution and production targets), training and funds. A national anti-piracy task force to take criminal and civil actions against piracy that could act across state borders

would be beneficial to right holders in India. If this is not achievable, the government should provide resources to the states to equip and train state IP task forces. The Home Ministry should take the lead in providing training and resources, and the Home Minister should issue a strong and widely publicized condemnation of piracy and the damage it is doing to India and urge all police forces to take immediate action to root it out. In addition, the government should ensure that film piracy issues are coordinated among the various responsible ministries, including the federal Home Ministry and the state home ministries responsible for enforcement; the Ministry of Information and Broadcasting, which regulates the film industry; and the Ministry of Human Resource Development (HRD), which is responsible for the copyright law. Finally, provision needs to be made for the warehousing of infringing goods seized in raiding activity.

- **Increase the Number of *Suo Moto* Raids:** Significantly increasing the number of *suo moto* raids against piracy at all levels will help provide some of the deterrence needed to drive piracy rates down. The government should significantly increase the resources and manpower in the local IPR cells and the local police forces and should also enhance training levels. Enforcement of IPR should be included in the manual provided to the police personnel, and a certain minimum number of IPR-related actions should be prescribed, with appropriate incentives.
- **Pass Optical Disc Regulation:** India, with 20 optical disc plants and known pirate production, should adopt a modern optical disc regulation to license factories, gather sample discs for forensic testing, mandate the use of SID mastering and mould codes, and provide authorities with the ability to run surprise inspections, day or night, to detect illegal production.
- **Enact Copyright Law Amendments Consistent with WCT and WPPT:** Right holders have been waiting for the Government of India to adopt amendments to the copyright law that correct deficiencies and properly implement all the obligations of the WIPO “Internet” Treaties (WCT and WPPT), including protection for temporary copies; adequate and effective protection against the circumvention of technological protection measures; and ISP liability rules that are clear, with narrow exceptions, and with an effective notice and takedown system. Draft amendments fall well short of these goals. HRD should rework the draft to include key protections necessary for the digital age.
- **Legalize Use of Published Materials at Educational Institutions:** The Government should take an active role in combating pirate photocopying on university campuses, starting with a government order to all educational and research institutions that they are to stop use of photocopied versions of books and take appropriate action against on-campus copy shops engaging in illegal activity.
- **Empower Customs to Effectuate Seizures and Destruction of Pirate Goods:** Customs should be empowered to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPS-inconsistent practice must stop. Additionally, the customs process continues to be cumbersome. Customs should take significant action to (a) reduce the substantial imports of pirate product, particularly from Pakistan and Malaysia; (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film’s Indian theatrical run; and (c) investigate and prevent exports of pirate and low-cost India editions of textbooks, including to the U.S.

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

**INDIA**  
**Estimated Trade Losses Due to Copyright Piracy**  
**(in millions of U.S. dollars)**  
**and Levels of Piracy: 2001-2005<sup>1</sup>**

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level		
Records & Music	70.7	55%	67.3	50%	6.0	40%	6.6	40%	NA	40%
Business Software <sup>2</sup>	265.1	74%	239.0	74%	187.0	73%	257.7	70%	256.0	70%
Motion Pictures <sup>3</sup>	NA	NA	80.0	60%	77.0	60%	75.0	60%	70.0	60%
Entertainment Software <sup>4</sup>	65.2	86%	59.5	86%	113.3	84%	NA	NA	NA	90%
Books	42.0	NA	38.0	NA	36.5	NA	36.5	NA	37.0	NA
<b>TOTALS</b>	<b>443.0 +</b>		<b>483.8</b>		<b>419.8</b>		<b>375.8</b>		<b>363.0</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN INDIA**

**Suo Moto Raids Take Hold in India:** A major development begun in 2004 and continuing throughout 2005 was the increasing willingness of police forces to take action *ex officio* (*suo moto*). Starting in Delhi, and continuing with Mumbai and now the four southern states,<sup>5</sup> all are running significantly more raids, with numbers of raids increasing dramatically throughout 2005 in these states. Industry reports that over 1,500 police were involved in over 140 separate raids in the state of Kerala alone in a single day.<sup>6</sup> IIPA commends the Indian government and the various police forces for starting this wave of *ex officio* action. Notwithstanding this very positive development, however, raiding alone will not provide the level of deterrence needed to drive down piracy rates significantly; criminal cases with deterrent sentences actually imposed will be the true arbiter of whether these raids have had their ultimate desired effect.

**Goonda Act:** The Tamil Nadu Government implemented the Goonda Act in 2003, which has had telling impact on piracy. Under this Act, pirates can be placed under preventive detention for up to one year. The inclusion of video piracy within the Goonda Act in Tamil Nadu, with its provisions for detention without trial for up to a year, saw a dramatic decrease in piracy in this state. We understand that burning operations have since moved from Chennai to Pondicherry as a result (still in Tamil Nadu but outside the capital, Chennai, where the police had been more proactive). The music industry also notes the deterrent effect on music piracy

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

<sup>2</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in India, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>3</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

<sup>5</sup> Tamil Nadu is the only state with an audio-video anti-piracy police cell which has been registering a large number of cases against pirates. Kerala is the other state which has set up a cell in each district to counter piracy. Maharashtra and Gujarat are also considering doing the same.

<sup>6</sup> It should be noted that these raids were also the result of complaints to the Chief of Police and Chief Minister of Kerala about a physical attack on Motion Picture Association investigators.

that the Goonda Act has had, as sales of music companies have reportedly increased by more than 30 percent in Tamil Nadu since the implementation of the law.

**Internet Piracy:** Growth of broadband in India increased significantly by 140% in the year from the fourth quarter of 2004 to the third quarter of 2005, with total broadband lines reaching 623,000 at the end of the third quarter of 2005. Thus, it is not surprising that the record industry reports that MP3 music file-sharing and other P2P file-sharing is starting to truly devastate the music market in India.<sup>7</sup> Cell phone “ringtone” piracy has become a major source of damage to the music industry, as an estimated 500,000 unauthorized ringtones are being downloaded in India every day. There are new reports of some downloading of entertainment software and grave concerns about piracy of mobile phone games, a growing market in India. The Business Software Alliance reports that in all of 2004 the number of online software infringements traced to Indian ISPs was 1,672, but that this number grew to 4,112 in the first 10 months of 2005. At that rate, by year’s end it is believed that the number of infringements would have increased by 195% year on year, mainly in the P2P domain. Furthermore, the government announced an initiative to digitize textbooks and offer free access to them over the Internet. There have been reports of up to 200 e-book titles being offered for sale over the Internet. The government must ensure that appropriate permission is obtained from publishers for the making of all such copies, and work with publishers to ensure that copies made as part of this initiative are not diverted to the pirate marketplace. It is crucial that India take urgent steps to shore up its legal infrastructure and put a workable enforcement strategy in place, or Internet piracy will quickly become a major threat to legitimate right holders in India.

The chief enforcement tool used against download sites in 2005 was notice and takedown. In January 2006 the major music industry group in India announced it may soon target the Internet service providers facilitating online infringement; ISP cooperation appears not to be forthcoming.<sup>8</sup>

**Optical Disc Piracy – Some Factory But Predominantly “Burned” Discs:** There was an alarming increase in optical disc (OD) production capacity in India in 2005. There are now as many as 20 OD factories in India, with at least 166 production lines and a capacity of at least 581 million discs per year. It is known that at least one, located just outside New Delhi, continues to produce pirate product.<sup>9</sup> Following persistent pressure for India to adopt an optical disc law like its neighbors in Asia, in 2005 the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. IIPA hopes that FICCI will use the draft model provided to MIB by IIPA and that a strong draft will emerge soon. Notwithstanding some evidence of pirate factory production, the predominant form of optical disc piracy in India markets today consists of “burned” recordable discs, with content including music compilations (MP3 formats, which are smaller and highly compressed so several albums can fit onto one disc), pre-release music (lots of Indian titles and some

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<sup>7</sup> The recording industry identified 875 pirate sites during 2005.

<sup>8</sup> Leslie D'Monte, *Downloads May Run Out of Tune*, Business Standard, January 12, 2006 (reporting the Indian Music Industry (IMI), a body representing the industry, is considering “appropriate civil and criminal action” against over 600 websites and 30 Indian Internet service providers (ISPs), including the Internet Service Providers Association of India (ISPAI) for “not preventing” the unauthorized downloading of online music; and that the ISPAI had “assured co-operation” with the Indian Music Industry on this issue). However, the ISPs subsequently rebuffed IMI, asserting that their actions were not illegal; Moumita Bakshi Chatterjee Nithya Subramanian, *We are not violating Copyright Act: ISPs Music Industry charge refuted*, The Hindu Business Line, January 15, 2006.

<sup>9</sup> There are still reports that a significant number of VCDs are being manufactured locally by at least one factory located just at the border of New Delhi in the State of Rajasthan (Bhiwadi).

international repertoire),<sup>10</sup> motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title) business software, and books/reference materials on CD-ROM. Publishers report, for example, cases where 200-250 best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. Optical discs containing pirated entertainment software, predominately factory-produced but also “burned,” saturate the retail outlets and flea markets in India. The entertainment software piracy level is estimated at over 80%.<sup>11</sup>

**Signal Piracy:** Piracy of cable and satellite broadcasting signals remains rampant, mainly through significant under-declaration of subscribers to content owners. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is 80% with significant losses.

**Piracy of Business Software Causes Massive Losses to the Software Industry:** Corporate end-user piracy (unauthorized use of business software in a business setting) continues unabated in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. Losses increased again in 2005, to US\$265.1 million, while the piracy rate stayed the same – at 74%, much higher than the regional average in Asia of 53%. India is out of step with the region, and there is little sign things can be turned around unless courts begin adjudicating with greater efficiency and meting out more deterrent sentences. To IIPA's knowledge, none of the 164 *suo moto* actions taken by the police across India, dating back to January 2001, have been resolved in court. In the one retail case in which the Business Software Alliance did achieve a conviction in 2002, the matter was successfully appealed by the defendant and that ruling was appealed by the prosecution.<sup>12</sup>

**Book Piracy – Offset Prints and Photocopying Remain Severe Problems:** Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality cover-to-cover photocopies and obviously pirated cheap reprints, to hardbound copies of medical reference volumes and high quality offsets, remain readily available. For instance, about 70 retailers in and around Churchgate (in Mumbai) continue to deal openly in pirate books, with no resistance from law enforcement. Publishers estimate that any bestseller suffers from 50 to 60% piracy, despite the fact that prices for legitimate titles in India are among the lowest in the world.

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<sup>10</sup> Since pirates do not pay taxes, the local Indian music industry association, IMI, has written letters to the Income tax and sales tax departments to take action against pirates.

<sup>11</sup> Increasingly, in addition to continued imports of pirate product from elsewhere in Asia, and particularly Malaysia, it has also been reported that there is now domestic optical disc production of pirated entertainment software products, including “demo games.” Demo games are shortened (sample) versions (i.e., two of ten levels of the full game, ten minutes of play time, one of five playable characters made available, etc.) of legitimate soon-to-be-released or already released full versions of a video game. Demo games can be downloaded for free from legitimate sites on the Internet. However, pirates are also now downloading these demo games and bundling them into compilation discs, thereby putting demo games from various entertainment software publishers onto a single disc. These compilations of demo games are then sold to the public as “multi-games,” deceiving the consumer and creating confusion as well as creating conflicts for the publishers. A pack of 14 of these compilation discs sells for US\$10. When legitimate publishers attempt to market the finished video game product (i.e., the final version of the game, complete with packaging and user manuals, etc.), it is difficult to explain to consumers that they must pay more money for this single game (which may have already been included among the games on the “demo” compilation disc). The consumer does not know that the compilation disc merely includes a copy of a demo and is not the real game. Other pirated entertainment software products on optical discs sell for US\$2.

<sup>12</sup> Around 46 retail cases that have been pending for a few years without reaching court are now time barred.

Percentages may soar even higher for certain individual works.<sup>13</sup> Photocopying remains a problem at public and private educational and research institutions and is on the rise with regard to medical texts.<sup>14</sup> Sales of CD-ROMs medical and technical and reference books are also growing.

The publishing industry continued to be active in addressing all forms of book piracy in 2005. Raids undertaken by publishers have had some effect on this organized commercial piracy. Continued seizures of offset pirate prints have helped to contain the offset print piracy problem somewhat, particularly in New Delhi, where industry reports good cooperation from the authorities.<sup>15</sup> Cooperation has been severely lacking in other cities and regions, however, especially in Bangalore and Mumbai, where efforts by authorities have dissipated, leaving right holders with nothing but a corrupt enforcement system that turns a blind eye to blatant piracy.<sup>16</sup> A national IP task force would help to address such localism (and irregularities). Publishers have still not obtained a single conviction for book piracy. The criminal prosecution system remains as sclerotic as ever with a total of 441 court hearings now backing up the system. Illustrative of the kinds of challenges publishers face is that from April through June, fifteen criminal cases filed under the British Publishers Association campaign came up for hearing and in each case the matter was adjourned.

**Book Exports Harm Markets Outside India:** India is unusual in the world for producing inexpensive but relatively high-quality books in a country from which it is easy to export. High quality pirated books continue to be exported from India to surrounding countries in Asia, and to the Middle East, Europe, and the U.S.<sup>17</sup> Increasingly, the pirates are using the Internet as a means for distribution and/or order management. Sites operated by Indian companies now offer shipment of pirated books in hard copy to users worldwide, including in the United States. Many operators of these websites are highly organized companies with sophisticated acquisition and distribution systems.

**Unauthorized Rental of Motion Pictures:** Piracy via unauthorized rental remains a major problem. Pirate rental libraries now exist all over India and there is virtually no legitimate

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<sup>13</sup> For instance, more than 10,000 pirate copies of the book *Harry Potter and the Half Blood Prince* were seized within four weeks of its worldwide release. Publishers estimate that seizures reflect only 1/5 of total pirate production of the work. This is startling when compared with legitimate sales of the book; just one hundred thousand copies within four weeks of its release.

<sup>14</sup> However, industry reports some government-led effort to crack down on this activity. In December of 2004, a librarian of a government-run medical college was arrested for illegal photocopying and dismissed from his job. An inquiry is ongoing.

<sup>15</sup> Of particular note are three recent actions in Delhi. In July, investigations into sales by juveniles of pirated consumer books at traffic lights resulted in seizures of 5,700 copies of titles including authors Sheldon, Grisham, Coelho, and Dan Brown. Three arrests were made, including that of leading pirate Kailash. In early August, seizures were made of 34,000 trade bestsellers. This activity and the arrests that followed received widespread attention in the press. A key pirate, Amit Wadhvani, was apprehended and spent several days in police custody. In November, a seizure of 23,567 books was made in Delhi with the arrests of several people connected with AK Book Services, the operation apparently supplying the sales at traffic lights.

<sup>16</sup> The nature of the campaign in 2005 changed as the key pirates in the market for pirated books have been identified and raided. As a result, the industry's efforts have been frustrated in some areas where the pirates have influenced the withdrawal of police cooperation, notably in Bangalore and Mumbai. The case of Nasraj of Bangalore, where many days of surveillance of warehouses storing many thousands of books was wasted due to police collusion, is typical of this trend. Other cases abound, including an unfortunate case of collusion in Gurgaon (State of Haryana) involving a repeat offender, L. D. Arora.

<sup>17</sup> The Hindu Business Line, *Low-cost higher education books hit US stores*, February 7, 2006. The report states that "The books are being published in India at lower rates as a special gesture by American publishers for students here."

rental business. A hopeful sign has been the renewed attentiveness of the Indian film industry to this issue. Recent raiding activity has been successful in encouraging many stores to stock original product only.

**Pre-Trial Procedural Burdens, Leaks, Hurdles, Costs and Delays:** Exacerbating the overall non-deterrent effect of criminal actions taken in India are the many procedural barriers erected in the path of a legitimate right holder. For example, obstruction of the raiding process is all too common, such as leaks to the pirates before raids occur. Once the raid is run, police often only seize the specific pirated goods with respect to which the complaint has been filed, rather than seizing all suspected pirated goods, as well as tools and materials the predominant use of which is in the act of infringement (a TRIPS requirement). By virtue of this practice, most pirated goods are not seized. Owing to the lack of pre-raid investigation, larger pirates often set up “decoy owners” who are arrested, while the real owners and pirates get away. Once the raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to larger criminal organizations and pirates, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable.

Another source of harassment for right holders takes the form of counter-cases being filed by pirate syndicates. Pirates who are raided have formed organized groups. Members of these syndicates have hired professionals whose sole job is to disrupt raid and seizure operations conducted at the behest of right holders. These professionals use the slow court system to initiate false cases against those representing right holders in anti-piracy actions. The syndicates then create adverse publicity as an obvious tactic to defame these anti-piracy operations. MPA was targeted by these groups; cases were litigated and MPA was successful in obtaining damages in one case. Many of these cases are still pending, however.

**Court Functioning – Criminal:** The challenge posed by the Indian enforcement system is to make the criminal system work, despite corruption, inefficient court procedures, lack of training and massively long delays, followed by low fines and virtually no significant jail terms. In 2003 and 2004, IIPA reported that in the over 15 years that IIPA has been working on Indian issues, there have been no more than 15 convictions<sup>18</sup> for copyright piracy, as far as industry is able to ascertain. In March 2004, and included in the above figure, was a rare conviction for video and music piracy (1,500 videos plus CDs) in Mumbai, in a case commenced in 1999. The defendant was a retailer who was sentenced to a total of 8 months in jail and a total fine of Rs. 6000 (US\$138) under Articles 63 and 68A of the Copyright Act. As noted, also encouraging are longer pretrial detentions in Tamil Nadu under the Goonda Act, which allows such detentions for up to one year.

**Court Functioning – Civil:** The motion picture and business software industries continue to use civil cases with varying degrees of success. In 2005, the software industry noted that there have been some improvements in the adjudication of civil cases as follows:

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<sup>18</sup> There have been 800 convictions since 1997, in cases brought by the recording industry, for failure to use the required certificate on audio and videograms under Section 52A of the Copyright Act, but virtually none under Section 63B, the criminal piracy provision. The local recording industry also states that the level of penalties being imposed is being increased. As noted in the text below, MPA recently obtained three additional convictions under Section 63B—a welcome development.

- The civil courts have begun to grant higher damage awards.<sup>19</sup>
- The threshold requirements for granting Anton Piller Orders have been progressively simplified. Courts no longer need affidavits from informants. Anton Piller Orders are granted on the basis of affidavits filed by investigators who have had telephone conversations with responsible persons in the target company. This has greatly reduced the time frame within which a right owner could take a case to court.

On the negative side, the courts are now insisting that parties file original documents at the time of the filing of the suit. Thus, right owners would need to file certified copies (which have been notarized and legalized up to the Indian Consulate). This new directive is bound to apply more pressure and inconvenience to right owners.

## **TRAINING**

IIPA member associations continued to conduct training in 2005. For example, the Business Software Alliance (BSA) has a reasonably good working relationship with the police across India and has conducted training on IPR issues with many police divisions. Specifically, BSA provided training to police on software piracy and related IPR law in the following cities: Delhi (Police Training College), Hyderabad, Baroda, and Cochin, and planned to do so in December 2005 in Noida, Gurgaon, Pune, Ludhiana and Ahmedabad. The recording industry conducted over a dozen police training programs in 2005, conducted for various levels in the police force and also at the National Judicial Academy.

The local recording industry association (the Indian Music Industry—IMI) has conducted more than 15 training programs in India in various states. In addition, IMI has had regular meetings with the Directors General of Police in different states to highlight the impact of piracy and ask the police to conduct *suo moto* raids

The MPA has also conducted a number of trainings for police forces in conducting *suo moto* actions. Following one training in Kerala at which 800 training manuals were distributed, the police conducted 140 raids resulting in the arrest of over 67 offenders. Over 1,500 police personnel were involved.

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<sup>19</sup> In a landmark decision by the Delhi High Court, the Court awarded Rs.19.75 Lacs (US\$44,885) as damages to Microsoft<sup>®</sup> Corporation for the infringement of the intellectual property rights in its software programs. The defendants in this case were a company by the name of M/s Dytronics Pvt. Ltd. and its director, Mr. Yogesh Popat. The company operated from Mumbai. The Defendant was indulging in hard disc loading piracy, which typically involves loading of pirated versions of software programs onto computers sold to the customer, free of charge. This is the largest damage award given by a court in India in an intellectual property infringement matter, and the first ever software piracy damages award. The Delhi High Court recently has shown increasing willingness to grant damages in a series of intellectual property suits. However, there have only been a few cases to date that demonstrate increased damages are being awarded, and the case results are only anecdotal. In this case, since the award was made in the absence of the defendant, it may not be indicative of a trend in contested cases.

## **COPYRIGHT LAWS AND RELATED ISSUES**

**Proposed Copyright Amendments Finally Released for Public Comment; Many Proposals Are Deficient:** India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.<sup>20</sup>

IIPA recently became aware that the Copyright Office within the Ministry of Human Resources Development had posted on its website proposed amendments<sup>21</sup> that had been in preparation for the last five years. In prior submissions, IIPA had indicated its grave concern that this amendment process was being conducted in secret and that foreign right holders and the U.S. government were not permitted to participate. IIPA is pleased to see that the Copyright Office has now completed its work and finally opened up the process for full public comment.

While IIPA has not had the opportunity to review fully these proposed amendments (and plans either to provide comments directly or to assist its members in commenting), a cursory review indicates that there are many amendments that are positive. However, there are other proposals which raise grave concern, particularly certain provisions which are intended to implement the provisions of the WIPO “Internet” Treaties (WCT and WPPT). There are also major revisions to the exceptions to protection provisions in the Copyright Act, which appear dangerously overbroad, particularly in the context of Internet transmissions, uploading and downloading of copyright works which are not authorized by the right holders of those works. Below we highlight a few of these concerns:

- **Unclear Protection for Temporary Copies:** The provisions defining the scope of the reproduction right seek to protect copies “stored” in a computer. However, the provisions are ambiguous with respect to whether temporary and transient copies made in the RAM of a computer are reproductions as required by the Berne Convention, the TRIPS Agreement, and the WCT and WPPT. While there are provisions later in the proposed amendments deeming that certain transient and temporary copies are not infringing copies, implying that such temporary copies fall under the reproduction right, the drafting should be much clearer and cover all copies whether they are permanently stored in a computer or merely temporary and transient in computer RAM.
- **Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention:** The proposed amendments seek to implement the anti-circumvention provisions (regarding technological protection measures (TPMs) of the WCT and WPPT. The proposed provision is seriously deficient and if enacted in its present form would be incompatible with the WCT and WPPT. The provision (Article 65A) (a) does not cover access controls and is limited only to TPMs protecting the exercise of exclusive rights; (b) covers only the “act” of circumvention and does not also cover trafficking in circumvention devices or services; (c) does not define an “effective technological measure”; (d) contains an exception which would appear to permit circumvention for any purpose that would not amount to infringement under the act (thereby almost completely eviscerating any protection); (e) creates other overbroad exceptions; and (f) provides for only criminal and not civil remedies.

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<sup>20</sup> See IIPA’s 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

<sup>21</sup> The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

- **Overly Broad Exceptions:** The proposed changes to Article 52 would create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. These include (a) a broad “private copying” exception;<sup>22</sup> (b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”; (e) an overbroad exception with respect to making reproductions of books not available for sale in India; and (f) a change in the scope of the rental right.<sup>23</sup> These and certain other exception would violate India’s obligations under the Berne Convention and the TRIPS Agreement.

**India Should Adopt an Anti-Camcording Criminal Provision:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to bootleg “dealers” throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

## Generalized System of Preferences

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 2004, \$3.3 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 21% of its total exports to the U.S. During the first 11 months of 2005, \$3.8 billion worth of Indian goods (or 22% of India’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 29% increase over the same period in 2004.

## MARKET ACCESS

Many market access barriers in 2005 hindered copyright owners’ abilities to participate fully in the market in India for copyright materials. Excessively high valuations of imported film prints by Mumbai customs remain of concern. Despite the encouragement of the federal government to lower entertainment taxes, disparities in entertainment taxes remain around the country. On average entertainment taxes are believed to be in the region of 35-40% and as such remain of concern to the industry. Another barrier is the discriminatory taxes in Tamil Nadu that are still being in practice applied to films dubbed into Tamil, despite a court order against this (entertainment tax on films dubbed into Tamil is 50%, while only 15% for all other films).

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<sup>22</sup>The motion picture industry is concerned that this exception can also be interpreted to permit the making of camcorder copies in theaters under the pretext of their being for private and personal use.

<sup>23</sup> The proposed amendment in Section 14(d), which in particular includes substitution of the word “hire” with the words “commercial rental” and the further explanation that “commercial rental” will not include rental for nonprofit purposes by a nonprofit library will only give a handle to the pirate libraries to circumvent the law.

Of particular concern to the broadcast industry are the Downlinking Guidelines introduced by the Ministry of Information & Broadcasting in late 2005. While the full impact of these Guidelines is still being reviewed, it appears they place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India. Additionally, a recent Bombay High Court order specifying that all films must be rated for universal viewing is of concern to foreign broadcast channels. While local broadcasters can have their films re-certified for such universal viewing, foreign broadcasters will not find it as easy or cost effective to incur this obligation, particularly bearing in mind those channels broadcast into India from foreign feeds.

A content committee constituted by the Ministry of Information & Broadcasting is currently deliberating various options for regulation of content. It is important that any such guidelines ensure that a level playing field is maintained for all broadcasters, local or foreign, and do not include any measures that would restrict access such as upper limits or quotas for content of foreign origin broadcast by any channel.

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