

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### INDIA

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

## **EXECUTIVE SUMMARY**

Effective enforcement against widespread copyright piracy including, judicial reform and legislative improvements were actively discussed as part of the new U.S.-India Trade Policy Forum (TPF). However, there was little significant progress in any of these areas in 2006 though regular meetings are continuing. Piracy rates and losses remained essentially unchanged and progress on the problems that IIPA and its members have raised over at least the last five years has yet to emerge.

## **PRIORITY ACTIONS TO BE TAKEN IN 2007**

- **Establish Specialized IP Courts or IP Judges, Increase Speed of Adjudication of Criminal and Civil Cases, and Increase Deterrence:** While this topic has been a key part of the TPF, and is an essential ingredient for improvement in this area, there has been no progress to date. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. 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.
- **Adopt a System of Statutory Damages:** Existing law casts the entire onus of proving the amount of damages suffered on the right holder. India should introduce a system of statutory damages in civil cases to provide the right holders with an alternative to proving actual damages.
- **Create a National Anti-Piracy Task Force:** This continues as a major priority. The lack of national enforcement coordination (enforcement in India is a “state” matter) has resulted in low priority for anti-piracy enforcement and the absence of a national policy to provide effective copyright protection. 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.

- **Reinvigorate “IP Cells” within the State Police, Provide them with Significantly Increased Resources and Establish Specialized IP Prosecutors:** While the government announced in 2002 the setting up of 19 such IP cells, few are fully functioning. The local affiliate of the international recording industry, the Indian Music Industry (IMI) reports, for example, that more than 40% of all raids they conduct in Tamil Nadu and Kerala are in conjunction with these IP cells. However, all these cells are woefully under-resourced and in most states they do not function effectively at all. The one in Mumbai is located in the Social Service Branch, and focuses on illegal activities not related to IPR, giving anti-piracy work no priority. The Chennai cell merely acts as a data collection center and does not conduct raids. The lack of resources and manpower make all of these cells incapable of raiding larger pirate distribution and production targets. Training and funds are desperately needed. In addition, the lack of trained prosecutors severely hinders effective enforcement. States should set up specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes, guided and funded by the National Anti-Piracy Task Force and the government.
- **Increase the Number of *Suo Moto* Raids:** In a welcome development, virtually all states are now conducting *suo moto* (*ex officio*) raids in most copyright sectors (book piracy being a glaring exception). However, the number of raids must be significantly increased as part of the creation of the deterrence needed to drive piracy rates down. This means increased resources and manpower to the local IP cells as well as increased training. 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 Regulations:** India has 20 optical disc plants with an estimated 166 lines and known pirate production. Total capacity of these plants is 581 million units annually. Three of these plants were raided in 2006 and a substantial amount of pirate product was seized from two of the plants located in Delhi.<sup>1</sup> India should adopt modern optical disc regulations 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. This legislation has been under discussion for at least three years and must now be adopted without further delay.
- **Enact Copyright Law Amendments Consistent with WCT and WPPT:** After many years of discussion within a “core group” appointed by the Ministry of Human Resources Development (HRD), HRD finally released a draft in early 2006 and sought public comment. Since that time, we have seen no progress in introducing good legislation into the Parliament. 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. The draft amendments still fall well short of these goals. We hope that HRD is reworking its draft to include key

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<sup>1</sup> One plant raided by IMI in Kerala was owned by the wife of the Inspector General of Police. The raid was unsuccessful.

protections necessary for the digital age: An improved Bill should then be promptly introduced into Parliament and adopted into law.

- **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/circular (proposed by the U.S., UK and Indian publishing industries in early 2006 and promised then by HRD) 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. It is inexcusable that this Circular has not yet been issued.
- **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; (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film's Indian theatrical run; and (c) prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Given the vast import and export problem, Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports.
- **Remove Market Access Restrictions in Andhra Pradesh and Tamil Nadu:** Market access restrictions in Tamil Nadu by way of discriminatory taxes on non-Tamil and dubbed films have only been exacerbated in 2006 by a further reduction in taxes on local films. A number of measures were also taken in 2006 in Andhra Pradesh to discriminate against non-Telegu films. These market access restrictions need to be removed.

For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006<sup>2</sup>**

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Records & Music	52.7	55%	56.4	57%	67.3	50%	6.0	40%	6.6	40%
Business Software <sup>3</sup>	318.0	70%	255.0	72%	239.0	74%	187.0	73%	257.7	70%
Motion Pictures <sup>4</sup>	NA	NA	NA	29%	80.0	60%	77.0	60%	75.0	60%
Entertainment Software <sup>5</sup>	85.6	82%	65.2	86%	59.5	86%	113.3	84%	NA	NA
Books	40	NA	42.0	NA	38.0	NA	36.5	NA	36.5	NA
<b>TOTALS</b>	<b>496.3</b>		<b>418.6</b>		<b>483.8</b>		<b>419.8</b>		<b>375.8</b>	

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

**Court Failure to Conclude Cases – Criminal:** The principle challenge posed by the Indian enforcement system is to make the criminal system work despite corruption, inefficient court procedures, lack of training, massively long delays, and few convictions (and even those are followed by low fines and virtually no significant jail terms). There have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63B) since January 1, 2000 – reportedly five for movie piracy, none for software piracy and only a few for music and book piracy. Since 2003, IIPA reported that in the over 15 years that IIPA has been working on Indian copyright issues, there have been no more than 15 convictions for copyright piracy under Article 63B the criminal copyright piracy provision as far as industry is able to ascertain. However, IMI has obtained more than 1200 convictions since 1997 under Section 52A of the Copyright Act which criminalizes failure to use the required certificate on sound recordings (Section 52A also applies to videos and DVDs). Fines in these cases have ranged from Rs. 50 (US\$1.14) to Rs. 200,000 (US\$4,550.00) and imprisonment of one day up to the maximum permitted under the law of three years.<sup>6</sup> While IMI reports increased penalties imposed under Section 52A, most of these cases involve very small fines and only a few have

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of India under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>3</sup> BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in India, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</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>6</sup> Unlike Article 63 which carries minimum fines and jail terms, (Rs. 50,000 (US\$1,140) and six months), Article 52A offenses bear no minimum fine or minimum jail term and historically fines under Article 52A have been notoriously low and non-deterrent.

involved jail time. IMI reports that some states like Tamil Nadu are faster in concluding criminal cases than other states and in Rajasthan, penalties imposed have been more severe than other states.

In July 2006, MPA reported its fifth conviction for video piracy In India. This was in a Mumbai court which imposed a six month jail term on two pirates and fines of Rs. 55,000 each.<sup>7</sup> The case began with raids in 2004 against the defendants' roadside kiosks and it is hoped that these convictions will contribute to some deterrence. However, MPA has over 1,900 pending criminal cases, the publishing industry over 600 cases, the recording industry (mainly Section 52A cases) over 8,000 and BSA has 16 cases.<sup>8</sup> Despite this abject failure to actually convict pirates, pretrial detention (1,308 total days for book pirates over the last six years) and permitted one year maximum detentions under the Goonda Act in Tamil Nadu have resulted in some deterrent effect.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006				
INDIA				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	716	0	2501	3217
NUMBER OF VCDs SEIZED	467,879	0	2,010,925	2,478,804
NUMBER OF DVDs SEIZED	258,465	0		258,465
NUMBER OF CD-Rs SEIZED	37,180	0	1,450,000	1,487,180
NUMBER OF INVESTIGATIONS	1,663	0	2708	4,371
NUMBER OF VCD LAB/FACTORY RAIDS	0	0	3	3
NUMBER OF CASES COMMENCED	698	0	1000	1698
NUMBER OF INDICTMENTS	0	0		0
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	4	0	70	74
ACQUITTALS AND DISMISSALS	0	0		
NUMBER OF CASES PENDING	2,062	16 <sup>9</sup>	8000	8000
NUMBER OF FACTORY CASES PENDING	169	0	4	173
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	0	0	40	40
SUSPENDED PRISON TERMS	0	0		0
MAXIMUM 6 MONTHS	0	0		0
OVER 6 MONTHS	0	0		0
OVER 1 YEAR	0	0		0
TOTAL SUSPENDED PRISON TERMS	0	0		0
PRISON TERMS SERVED (NOT SUSPENDED)	0	0		0
MAXIMUM 6 MONTHS	0	0		0
OVER 6 MONTHS	0	0		0
OVER 1 YEAR	0	0		0
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	0	0		0
NUMBER OF CASES RESULTING IN CRIMINAL FINES	0	0	30	30
UP TO \$1,000	0	0		0
\$1,000 TO \$5,000	0	0		0
OVER \$5,000	0	0		0
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	0	0		0

<sup>7</sup> It is positive and noteworthy that the fines exceeded the Rs. 50,000 minimum provided in the Copyright Law. Courts have generally been ignoring the Law's minimum fine and have imposed actual fines below this figure. In addition the jail terms were the minimum required under the law – six months – also ignored by the courts in many instances.

<sup>8</sup> 112 cases were at the prosecution stage at the end of 2006, with charges framed in 64 cases. In one book piracy case in Jaipur, the Magistrate let the accused go under the Probation Offenders Act 1958 without a prison sentence, and imposed a fine under the statutory limit.

<sup>9</sup> These cases date from as far back as 1998.

**Court Failure to Conclude Cases – Civil:** The business software and motion picture industries continue to use civil cases with varying degrees of success. In the last quarter of 2006, the software industry took four civil end-user actions, via Anton Piller orders, which were granted by the Delhi High Court, and out-of-court settlements are now being finalized. While BSA obtained a significant civil damages verdict in 2005,<sup>10</sup> India is not viewed as a country with a damages culture; there are few such examples in the copyright area. As noted elsewhere in this report, adoption of a statutory damages regime would be most helpful.

MPA had 18 civil actions pending at the end of 2006 but has had considerable success over the years in using the civil system to obtain preliminary injunctions against pirate cable systems and against rental shops. This preliminary relief has had some deterrent effect, even though these cases rarely if ever come to judgment with damages awarded and even contempt proceedings brought for violation of such injunctions rarely (if ever) are concluded.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006:				
INDIA				
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	TOTALS
NUMBER OF CIVIL RAIDS CONDUCTED	0	4		4
POST-SEARCH ACTION	0		3	3
CASES PENDING	27	1		28
CASES DROPPED	0			0
CASES SETTLED OR ADJUDICATED	0	4		4
VALUE OF LOSS AS DETERMINED BY RIGHT HOLDER (\$USD)	0	NA		0
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	0	NA		0

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 must 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.

**Suo Moto Raids Have Now Taken Hold in India:** In IIPA's 2006 report, it was noted positively that many states were taking *suo moto* raids in certain copyright sectors. MPA reports, for example, that they are now receiving such raids in all Indian states in which they operate, including Maharashtra, although, in this state, *suo moto* actions remain largely the exception to the rule. It still regularly requires the filing of a formal complaint. IIPA again commends the Indian state governments and the various police forces for recognizing the importance of and actually taking such *ex officio* action. The recording industry also reports that IMI has been obtaining *suo moto* raids in all parts of the country, especially Kerela, Tamil Nadu, Gujarat, Bihar, and West Bengal. In 2006 *suo moto* raids have become far more commonplace – a

<sup>10</sup> This was viewed as a landmark decision by the Delhi High Court where it awarded Rs.19.75 Lacs (US\$44,885) as damages to Microsoft® 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.

welcome development – but they continue to remain the exception to the rule in the publishing sector. But we know that 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 a positive impact in deterring piracy. Under this Act, pirates can be placed under preventive detention for up to one year. This resulted in a dramatic decrease in piracy in this state. We understand that many OD “burning” operations have since moved from Chennai (where the police had been particularly proactive). The music industry also noted in IIPA’s 2006 report the deterrent effect on music piracy 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. However later reports are that, following the recent change in Government and with a new Chief Minister who is not so closely linked to the entertainment industry, the film piracy provisions of the Goonda Act are no longer being enforced in Tamil Nadu.

**Internet Piracy:** Growth of broadband in India increased by 185% between 3Q 2005 and 3Q 2006. India had 7.7 million Internet subscribers as of June 2006 and at the end of 3Q 2006, 1.825 million broadband subscribers.<sup>11</sup> While overall penetration is still small, the growth rate is very high and it is therefore not surprising that the record industry reports that MP3 music file-sharing and other P2P file-sharing is starting to significantly harm the music market in India.<sup>12</sup> Cell phone “ringtone” piracy has also become a major source of damage to the music industry, with massive numbers of unauthorized ringtones being downloaded in India every day. IMI has also filed two cases involving mobile chip piracy in Bangalore and Mumbai. Internet café piracy is a significant problem for entertainment software publishers. Most, if not all, of the 100,000 Internet cafés in the country use unlicensed entertainment software. An ESA member company also reports that Ebay India is teeming with vendors of pirated video game product. The Business Software Alliance (BSA) reports that online infringements of its members’ software increased significantly to 6,700 in the first 11 months of 2006. Furthermore, the book publishing industry is starting to see an increase in Internet-based book piracy. That Industry has engaged in a number of recent takedowns, with some success, but web sites remain, hosting hundreds if not thousands of scanned books for sale or download. There is still no formal notice and takedown system in the Indian Copyright Law and the copyright law has still not been updated to cover WIPO Treaties obligations. 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 2006 was notice and takedown.<sup>13</sup> In January 2006 the major music industry group in India announced it may soon target the Internet service providers facilitating online infringement; in 2006 ISP cooperation has not been forthcoming.<sup>14</sup>

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<sup>11</sup> Point-Topic, Inc., *World Broadband Statistics Q3 2006*, December 2006, on file at IIPA.

<sup>12</sup> The recording industry identified 875 pirate sites during 2005.

<sup>13</sup> For example, in the book publishing area, a takedown was effectuated by the UK Publishers Association (PA) against an Indian website in the fall of 2006. The infringer paid US\$4000 to the UK PA and US\$3,500 in damages to the Harry Potter series author, JK Rowling. The site was offering 700 e-books.

<sup>14</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

### **Optical Disc Piracy – Some Factory Production but Predominantly “Burned”**

**Discs:** In 2005, IIPA reported an alarming increase in optical disc (OD) production capacity in India. As noted above, there are now 20 OD factories in India, with at least 166 production lines and a capacity of at least 581 million discs per year. In the summer of 2006, the IMI with the cooperation of the Indian Censor Board raided the Deepak Arts OD plant in Delhi and seized over 21,000 infringing discs and over 350,000 inlay cards along with two production lines. In a welcome development the owner of the plant and three other suspects were arrested and remanded into custody. This raid demonstrates the need for India to adopt an effective and modern 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, but a draft law has yet to have been made public and appears to be held up within MIB. A good optical disc law should be adopted this year. Notwithstanding 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 in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),<sup>15</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. 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 are now predominately “burned” product, saturating kiosks and flea-market type venues in the country. Burn-to-order operations are prevalent, with stalls/stores typically carrying little inventory on hand but capable of producing several hundred “burned” pirated products within a 24-hour period. Though large retailers are generally free of pirated video game products, the availability of pirated games at kiosks and informal markets makes it impossible for legitimate business to compete. The entertainment software piracy level is estimated at 82%.<sup>16</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 2006, to US\$318 million (US\$ 706 million for all software publishers and vendors), while the piracy rate fell slightly from 72% to 70%, which is still much higher than the regional average in

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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. Since then there has been no cooperation.

<sup>15</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>16</sup> Entertainment software publishers are continuing to find compilation discs of so-called “demo games” in the market. Demo games are shortened (sample) versions (e.g., 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, that is, putting demo games from various entertainment software publishers onto a single disc.

Asia of 58%. The four civil end user cases brought this year appear to have ended positively but criminal enforcement simply fails to work. In the one retail case in which BSA did achieve a conviction in 2002, the matter was successfully appealed by the defendant. In short, there has never been a successful criminal conviction for software piracy in India.<sup>17</sup>

**Book Piracy–Pirate Printing 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. The industry estimates that publishers lose about 50% of the market to pirates, despite the fact that prices for legitimate titles in India are among the lowest in the world. Percentages may soar even higher for certain individual works.<sup>18</sup> Photocopying remains a problem at public and private educational and research institutions and is on the rise with regard to medical texts.<sup>19</sup> Sales of CD-ROMs, medical, technical and reference books are also growing.

The publishing industry continued to be active in addressing all forms of book piracy in 2006. 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>20</sup> In contrast to IIPA's report for 2005, authorities in Bangalore have been far more cooperative in 2006 and the situation in this city is much improved. While there was some late-year cooperation in Mumbai, authorities' actions there remain spotty as reported in the 2006 report. All in all, the regional and city differences remain a huge problem. A national IP task force would help to address the uneven enforcement in various states and cities. Publishers have still not obtained a single conviction for book piracy.

One initiative new for 2006, on which there has been no progress and much disappointment, centers around the issuance of a circular to universities in India concerning illegal reproduction of academic materials by students and lecturers on campuses. After a high level delegation of U.S. and U.K.-based publishers visited India in February 2006, HRD agreed to work with appropriate administrations to make sure the circular is publicized and implemented. Industry reports that, despite much encouragement from their side, nothing has happened with this promise. Circulating and implementing this notice would be a good first step toward taking active measures to combat illegal copying of materials on India's university campuses.

**Book Exports Harm Markets Outside India:** For years publishers have complained about the unauthorized export to other countries of low cost reprints licensed for sale in India only. Action has rarely been taken despite repeated requests. However, in 2006, after several

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<sup>17</sup> Around 46 retail cases that have been pending for a few years without reaching court are now time barred.

<sup>18</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>19</sup> Raids on the All-India Institute of Medical Sciences in Delhi, India's pioneer medical education institution, revealed that the originals used for making photocopies by the pirates were issued by that institution's library. In another action in Kanpur in the State of Uttar Pradesh, the copy shop raided by the police was found to be owned by an assistant Librarian of Kanpur Medial College, who was arrested. An inquiry is ongoing.

<sup>20</sup> But the problem remains severe for popular titles. For example, on October 26, 2006, the Bangalore police raided a number of printing enterprises, seizing more than 16,000 pirated trade best sellers and more than 40,000 covers.

months of investigation, Customs was finally persuaded to intercept a shipment of India-only reprints bound for Nigeria. 650 cartons were impounded at the port and the exporter was called in for questioning. Finding the name of the wholesaler will allow publishers to determine no longer to deal with those who export these books without authorization. Hopefully this action will send a clear message to those who engage in these practices. Pirates have also been increasingly 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 has been a problem but in 2006 MPA has achieved some success in bringing civil and criminal actions against these rental shops, resulting in obtaining preliminary injunctions and citations for contempt for violation of those orders. However, pirate rental libraries exist all over India and it will take some time for the legitimate rental business to become established. It is hoped that these actions will deter some of this conduct.

**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 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 against MPA. Pirates who are raided have formed organized groups, and 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.

## **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>21</sup>

IIPA has reviewed the new draft copyright amendments placed on the Copyright Office's website at the beginning of 2006.<sup>22</sup> These had been in preparation for the last five years. In prior

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<sup>21</sup> See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

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 was pleased to see that the Copyright Office has now completed this initial work and finally opened up the process for full public comment. However, since that time, IIPA has heard of no further developments, though a number of IIPA members have filed comments on the draft.

IIPA has reviewed the draft and notes that there are many positive amendments. 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.
- **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>23</sup> (b)

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<sup>22</sup> The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

<sup>23</sup> The motion picture industry is concerned that this exception in Section 52(1)(a)(1) can also be interpreted to permit the making of camcorder copies in theaters under the pretext of their being for private and personal use. It appears that the HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theatres by further limiting the exception for private use to “private and personal use”. However this does not alleviate the foreseeable difficulties with such an exception as such a broad exemption can completely undermine the anti piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use” is covered under the three-step test in the Berne Convention and TRIPS. Since India must adhere to *minimum* international standards of copyright protection and its treaty obligations and for clarity in application, MPA strongly urges the HRD to further revise this Section to explicitly incorporate the three - step test into the law and remove any potential for camcording in theatres as permitted personal use.

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 reproduction of books by libraries; (f) an overbroad exception with respect to making reproductions of books not available for sale in India; and (g) a change in the scope of the rental right.<sup>24</sup> These and certain other exception would violate India’s obligations under the Berne Convention and the TRIPS Agreement.

- **ISP Liability and Exceptions thereto:** While not required by the Treaties, the issue of secondary liability of ISPs and exceptions to such liability has been dealt with in the laws of most countries implementing the WIPO Treaties. Clarity on such issues is indispensable to the fight against online piracy, and implicate the enforcement provisions of the Treaties and of TRIPS. The draft appears to deal with this issue, at least in part in Section 52(1)(c)(ii), but that treatment is far too terse and oversimplified as to be appropriate for this complex area. We urge that this provision be substantially revised or replaced by detailed provisions modeled on the way these sets of issues were dealt with in the U.S., the EU and in many other countries in Asia.

**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. The MPA strongly supports legislation, in addition to copyright law amendments, that specifically make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the United States prohibiting “camcording” has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India’s motion picture industry.

## **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 provides “adequate and effective” copyright protection. In 2005, \$4.2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 22.3% of its total exports to the U.S. During the first 11 months of 2006, \$5.1 billion worth of Indian goods (or 25.8% 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 35.2% increase over the same period in 2005.

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<sup>24</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.

## **MARKET ACCESS**

Many market access barriers in 2006 hindered copyright owners' abilities to participate fully in the market in India for copyright materials. For the motion picture industry, entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is reasonably estimated to be 35 - 40%, and constitutes a significant disincentive to the much-needed cinema construction in India. Additionally, at the request of their local state film industries, a few states now follow a differential tax regime under which the local state language films are charged nil or lower tax rates while the non-state language films are charged higher rates.

For the business software industry, high excise taxes on packaged software have increased the price of legitimate software, increasing the use and sale of pirated software. These taxes should be eliminated.

Of particular concern to the broadcast industry are the Downlinking Guidelines introduced by the Ministry of Information & Broadcasting in late 2005. These guidelines place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India and their requirement that all sport events be shared with the local Indian public broadcaster. Additionally, a 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.

The MPA also reports market access restrictions in the states of Andhra Pradesh and Tamil Nadu. In the former, three major problems arose in 2006. At the start of the year the Telegu Film Producers Council ("TFPC") effectively prevented television advertisements of non-local language (i.e. non-Telegu) movies by booking all the available advertising slots for television advertisements and quoting exorbitant resale prices for their subsequent use. Non Telegu movie companies also faced unfair restrictions against the simultaneous release of their movies in multiple languages and had to instead wait until several weeks after the first single language release before releasing other language versions. To make matters worse, on November 6, 2006 a Notice was issued by the TFPC to its members. The Notice asked that the TFPC's members immediately register all films already dubbed with the TFPC before November 6, 2006, and that no further films should be dubbed following that date.

In Tamil Nadu, the current tax structure has been heavily weighted against non-Tamil movies for some time. While Tamil movies with Tamil titles get complete state-wide tax exemptions, non-Tamil movies are currently effectively taxed at 50%. In Mid 2003 the Tamil Nadu State Government, under the then leadership of Chief Minister Jayalitha, via a Notification imposed a double rate of taxation on all films dubbed into Tamil. As the then prevailing rate of entertainment taxes was 25%, the tax for dubbed films became 50%. Lobbying by various local

groups (including MPA, the Film Federation of India (FFI), the Film and TV Producers Guild (FTPG) of India and also the local Tamil Film Industry Associations (SIFCC, TN Film Exhibitors Association, TN Dubbed Film Association etc.)) to move the Tamil Nadu State Government to withdraw this penal rate of double taxation on films dubbed into Tamil was unsuccessful and the local Government refused to recant on the notification. Accordingly, the Tamil Nadu Dubbed Films Distributors Association applied to the Madras High Court, which granted a Stay Order against the levy of the enhanced double rate of taxation on dubbed films. Local exhibitors are however continuing to pay the dubbed entertainment taxes at 50% on dubbed films and keep this money on deposit. The reasoning for this move is said to be as a contingency in case the high court removes the order. The local Government subsequently further reduced entertainment taxes from 25% to 15% on all non Tamil Films. However as the dubbed films (into Tamil) case was then pending before the High Court, this reduction was not made applicable to taxes on dubbed films. Consequently taxation of dubbed films continued, and continues, at 50% instead of at least a reduction to 30% (i.e. double the rate of 15% on normal non Tamil language films).

## **TRAINING**

IIPA member associations continued to conduct training in 2006. In February 2006 BSA's counsel in India spoke at the National Judicial Academy, Bhopal, to about 40 High Court Judges drawn from various High Courts in India on the issue of "Copyright Enforcement with Special Reference to the Entertainment and Software Industry". On 13th October 2006, BSA provided 35 officers of the Pune Police training on software piracy and product identification. In addition BSA's counsel also addressed the Delhi Police on 29-30 November 2006 on software piracy issues.

In November 2006, Electronic Arts (an ESA member company) participated in a cyber crime training program in New Delhi. The program, organized under the auspices of the Federal Bureau of Investigation (FBI), the U.S. Chamber of Commerce and the STOP! Initiative, was targeted to domestic police and related enforcement personnel.

The local recording industry association (IMI) has conducted more than 75 training programs in India in various states for the police, judiciary and public prosecutors. 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.