

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2009.

Executive Summary: Piracy — physical, Internet and over mobile devices — worsened in 2008. While pockets of some progress can be seen in the enforcement system, it remains ineffective to deter piracy. Police should increase the number of *suo moto* raids; and reforms at every level are needed to root out corruption, reduce huge court backlogs, eliminate procedural hurdles, and address endless court delays that result in rare convictions and even rarer damage awards in civil cases. There has been little progress on any of these fronts in 2008. Further, anti-piracy enforcement remains fragmented and the enforcement agencies lack training to undertake Internet piracy cases. Nor has there been progress in completing the process of implementing and ratifying the WIPO Internet treaties — the copyright amendment process has been stalled for ten years with little word that it will be revived soon. Both optical disc and anti-camcording legislation are needed. With strong copyright industries and fast growing Internet and broadband penetration, India should take action immediately to redress these deficiencies before they become more serious problems.

Priority actions to be taken in 2009: IIPA requests the following actions by the government of India, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Establish specialized IP courts or IP judges, increase the speed of adjudication of criminal and civil cases, and increase deterrence through higher fines and imprisonment
- Create a national anti-piracy task force
- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources and establish specialized IP prosecutors
- Train police authorities to be more effective in addressing rapidly growing mobile chip piracy
- Increase the number of *suo moto* raids
- Legalize use of books and journals at educational institutions
- Empower customs to effectuate seizures and destruction of pirate goods

Legislation

- Adopt a system of statutory damages in civil cases; allow compensation to be awarded in criminal cases
- Adopt an optical disc law
- Enact Copyright Law amendments consistent with the WCT and WPPT
- Adopt an anti-camcording criminal provision

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.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: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	36.2	55%	13.8	55%	52.7	55%	56.4	57%	67.3	50%
Business Software ³	1060.0	66%	1013.0	69%	574.0	71%	255.0	72%	239.0	74%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	NA	29%	80.0	60%
Entertainment Software ⁵	NA	NA	129.9	89%	85.6	86%	65.2	86%	59.5	86%
Books	NA	NA	38.0	NA	40.0	NA	42.0	NA	38.0	NA
TOTALS	1096.2		1194.7		752.3		418.6		483.8	

UPDATE ON PIRACY IN INDIA

Most copyright sectors report that piracy worsened in India over the last year. Physical piracy, particularly at the retail level (and corporate end user piracy for the software industry), is still the biggest problem, with mobile device and Internet piracy growing.

Optical Disc Piracy: There were a reported 36 OD factories in India in 2007. In 2005, the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. IIPA provided its draft model OD law for use in this drafting process. A draft law was made public in 2007 but there was no progress made by MIB in 2008. The delay is being caused by objections from the largest OD factory in India, Moser Baer, which opposes the inclusion of blank disc licensing in the bill. The recording and motion picture industries continue to press for passage.

Local factory pirate production is reported to be increasing. As reported in past years, imports of pirate discs, from Malaysia, Pakistan, Bangladesh and some southeast Asian countries, continue to be a problem. However, the predominant form of optical disc piracy in Indian markets today consists of burned discs, with content including music compilations in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),⁶ motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of business software and books/reference materials. Publishers continue to report, for example, cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less.

A survey of the market for pirated PC games found that the bulk of the pirated product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Pirated PC game product continues to be primarily burned CD/DVD discs, cheaply finished with handwritten titles, in a clear plastic sleeve with a badly photocopied cover

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at <http://www.iipa.com/pdf/2009spec301methodology.pdf>. For information on the history of India under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission.

² The recording industry's loss figures include \$5 million in losses due to mobile chip piracy.

³ BSA's 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in India, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

⁴ MPAA's trade losses and piracy levels for 2006, 2007 and 2008 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁵ 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.

⁶ 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. Unfortunately, enforcement actions, despite violation of many other laws, is almost entirely conducted by state police under the copyright law.

slipped in with the disc. The pirated PC game products available in the market appear to be copied from pirated versions produced in Southeast Asia. Pirated console games, on the other hand, appear to largely be in pressed CD format. Pirated games continue to be played on console hardware that has been modified ("chipped") to allow them to be played. Circumvention devices or "mod chips" are available freely on the Internet and in retail stores and kiosks, or the consoles are sold already modified. Pirated PC and console games are widely available in smaller retail establishments that make no attempt to conceal their sale.

Retail piracy: The pirate retail trade is vast throughout all big cities in India. Factory-produced, imported and burned discs are sold openly. Storage media for mobile phones, fueling piracy of music and sound recordings, are sold in cell phone retail shops, computer shops and other retail outlets. As discussed further below, the pirate book trade is also alive and doing well. Video piracy has been so prevalent for so long that India now has thousands of shops renting pirate videos at very low prices. As a result there is virtually no rental market in India and pirate rental libraries are ubiquitous. Software piracy at the retail and wholesale level is also prevalent, including hard disk loading and the open sale of pirate software in pirate markets throughout India.

Corporate end-user piracy of business software: Corporate end-user piracy (unauthorized use of business software in a business setting) continues in both large and small Indian companies. Trade losses to the software industry from this and all other types of piracy increased in 2008, to US\$1,060 million, while the piracy rate fell from 69% to 66%. BSA welcomed the partnership of the State Government of Karnataka in a software legalization campaign initiated in late 2008 that continued into 2009 and hopes that this is just the first of many public-private partnerships to come to educate businesses on managing software as an asset.

Pirate printing and photocopying of books: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry, despite the fact that prices for legitimate titles in India are among the lowest in the world. All varieties of pirate books, from poor quality cover-to-cover photocopies and obviously pirated cheap reprints, to hardbound, high quality copies of medical reference volumes, remain readily available. The marketing of trade books at stoplights in New Delhi has reached epidemic proportions, despite repeated complaints to the Delhi authorities. These pirated copies sell even when more expensive than the legitimate books.⁷ A circular issued from the Crime Branch of the Economic Offence Wing to the Delhi police units seems to have had little to no effect. On the positive side, publishers report that Delhi seems to have no centralized, designated marketplace for the sale of pirated books, and that retail piracy of trade books has diminished in Cochin, Chennai and Mumbai.

Photocopying remains a severe problem for the academic and professional sectors of the industry. Increasingly sophisticated techniques are allowing photocopy shops to tap into high end medical markets more than ever before. Raids in 2008 revealed use of high-quality scanning techniques to produce color copies of medical titles, printed straight from the electronic file created on the shop's computer. This allows for clearer reproduction of drawings and figures for students, and such reproductions have been marketed to medical colleges in Madhya Pradesh, Maharashtra, Karnataka, Rajasthan, Delhi, Mumbai and elsewhere. Copying continues at educational institutions as well, sometimes even condoned by the institutions.⁸ Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of coursepacks, or "self instructional material" (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. IIPA has received reports of unauthorized compilations by the distance learning departments of universities such as Maharishi Dayanand University, Rohtak and the Institute of Management Technology, Ghaziabad. In addition, some publishers report web sites or student-run blogs offering hundreds or thousands of books for download, especially in the scientific, technical and medical sectors.

In 2006, the Ministry of Human Resource Development (HRD) committed to issue a government order/circular (proposed by the U.S., UK and Indian publishing industries) to all educational and research institutions to combat illegal photocopying on university campuses. HRD has still not issued this circular and the problem remains acute. There is no

⁷ A major trade publisher reports pricing a bestseller at 95 rupees to boost legitimate sales, only to find the pirated versions selling like mad at 150 rupees!

⁸ Publishers recently found a notice on the board of a prominent college, espoused by the department head, offering photocopying services for students in a particular course. This notice was removed upon publisher complaint.

excuse for having failed to take this very small step toward trying to raise awareness of the devastating effects of illicit copying on the academic publishing industry. HRD should take a much more active role in facilitating use of legitimate materials on India's campuses and in the country's distance learning programs, encouraging universities to develop and implement action plans to quell this problem. Much more must be done in 2009.

On a positive note, the industry reports stellar cooperation in preventing export of South Asian editions of books to neighboring or international markets. Export of these editions without authorization by the copyright holder is illegal under Indian law. 2008 saw several notable seizures of outward bound shipments by Indian Customs as well as good cooperation from courier and postal services in this respect.⁹ This incredibly positive development, if continued, will help to ensure the continuation of the immense investment that foreign publishers have made in the Indian market.

Internet and mobile device piracy: There were an estimated 81 million Internet users in India at the end of 2007.¹⁰ Broadband subscriber statistics are more current and were estimated at 5.45 million, still low by Asian standards, but with a growth rate of over 100% from the end of 2007 to December 2008.¹¹ India was the fastest growing market in the world for mobile phones, with total users at 346.9 million at the end of 2008, up almost 50% from 2007.¹² While Internet piracy was reported as a growing concern by all copyright industries, only the software industry counted it as a significant one. The Indian recording industry reported that mobile chip piracy¹³ was, after physical piracy, its biggest problem. For that industry mobile phone technology is making possible steadily increasing revenues from legal downloads of primarily ringtones but also recorded music, with India expected to become second to South Korea in developing a major market for cell phone downloads.¹⁴ This growth path is severely stunted, however, by widespread mobile chip piracy. Piracy losses to the music and recording industry from mobile chip, physical, Internet and public performance piracy were US\$36.2 million in 2008, with piracy levels at 55%. Losses from mobile chip piracy are estimated to be about US\$5 million.

The motion picture industry reports that sites like rapidshare.com, megaupload.com and gigashare.com are the most popular with pirate download sites, but that P2P sites are also being used. Recently, illicit high compression files have been found, indicating that the viewing and downloads to mobile phones is growing. E-bay India continues to be a point of sale for pirated PC games. BSA reports that online software piracy is becoming more open and blatant. In one case pamphlets were being distributed with the morning newspaper offering pirated software and referring readers to the website www.cd75dvd150.20m.com to place orders. BSA worked with the police in September 2008 to cut off this site and a criminal case was commenced.

BSA has sent over 1,500 takedown notices to ISPs and the Indian recording industry association (IMI) has sent over 1000. IMI reports that pirate content has been taken down despite the lack of a formal notice and takedown system in the Indian copyright law.

Signal Theft and Public Performance Piracy: Piracy of cable and satellite broadcasting signals remains a major problem, mainly through significant under-declaration of subscribers to rights holders. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is at 80% with significant losses. Small video parlors in small and medium sized cities often show pirated film product. These parlors are often licensed by the state governments and compete with legitimate theaters. Public performance piracy is widespread also for the recording industry and, at this point in time, causes greater losses than Internet piracy.

⁹ The Ministry of Communication issued a circular in September 2006 directing the India Speed Post not to accept parcels bound for other regions that contain books meant for sale only in India or South Asia.

¹⁰ <http://www.itu.int/ITU-D/ICTEYE/Indicators/Indicators.aspx>

¹¹ <http://telecom.broadbandindia.com/>

¹² <http://in.reuters.com/article/companyNews/idINDEL38927620090121>

¹³ This type of piracy occurs in retail establishments selling or offering for free flash cards or other storage devices for mobile phones. These are sold either preloaded with music to customers, given away to purchasers of mobile phones or the shop lets the customer load the chip with music stored on a hard drive, laptop or desktop. Music is originally sourced either from CDs or is downloaded from pirate websites or through P2P filesharing services.

¹⁴ Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," The Hindu, March 25, 2007.

UPDATE ON ENFORCEMENT IN INDIA

Criminal Enforcement: In IIPA's 2008 submission, we reported a disappointing drop in *suo moto* (e.g., *ex officio*) raids in 2007. Unfortunately, the lower level of raids continued through 2008 (after having increased throughout 2005 and 2006). As in 2007, the raids that did occur were principally in the south of India (Kerala, Tamil Nadu and Bangalore) and only on rare occasions in Mumbai and New Delhi. When the police act only on complaint, it becomes necessary for a witness for the complainant to be available for all court hearings. Typically, this process can take up to several years after the raid has occurred and is sometimes an airplane trip's distance away. This ends up making criminal enforcement substantially more expensive and often results in the dismissal of the case if the complainant's witness cannot be, or is no longer, available. *Suo moto* raids, where the police involved become the witnesses, result in expedited trials and more actual convictions (though usually under Article 52A of the Copyright Act, see discussion below).

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). IIPA reported in its 2008 submission that there have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63) since January 1, 2000 – reportedly only six for movie piracy (including a 2007 conviction with a seven month prison sentence and a Rs. 55,000 fine (US\$1,332)), and none for software or book piracy. However, that conclusion must now be corrected since, as a result of the police in Tamil Nadu conducting *suo moto* raids, 2007 saw an additional 59 convictions for video piracy, but not under Article 63 but under Article 52A, which criminalizes failure to use the required certificate on videos or sound recordings. Article 52A carries a much smaller maximum fine, the offense is easier to prove, but fines actually imposed are usually very low and rarely exceed \$1000. In the 15 years (through 2007) that IIPA has been working on Indian copyright issues, it has been able to count no more than 16 Article 63 piracy convictions. This appears to be changing, however. The Indian recording industry association, IMI, reports that in 2008 they obtained 60 convictions under Article 63 (and a larger number under Article 52A). IMI also reports that over 2,800 raids were run throughout India in 2008 (2,200 of which were in the south of India), with 193 convictions, most under Article 52A. By contrast, only 63 raids were run in New Delhi, where *suo moto* raids are rare. These raids resulted in the seizure of over 3 million units of pirate ODs. The recording industry also reported increased penalties imposed under Section 52A and Section 63 in 2007, although most still involve small fines and only a few have involved jail time. IMI reports that relationships with the police have improved in 2008 and that 300 criminal cases were commenced.

IMI also was able to work with the police to secure 327 raids against mobile chip piracy. This proved difficult to achieve, however, given the police's lack of awareness and training, and piracy rates in this area continue to grow.

MPA counted 453 raids taken nationwide in 2008. Two raids were made involving Internet piracy and there are 4 Internet piracy cases now pending with the police (from 2006).

Statistics show clearly the problems with the Indian judicial system. MPA has over 3,500 pending criminal cases, the publishing industry 126 cases, the recording industry (mainly Section 52A cases) over 8,000 cases, and BSA has 16 cases. Despite the few convictions for piracy, pretrial detention and permitted one year maximum detentions under the Goondas Act in Tamil Nadu continue to result in some deterrence.

BSA reports again for 2008 that the criminal system has not worked for software piracy. There has never been a criminal conviction for software piracy in India. In 2008, BSA conducted a criminal enforcement action in Bangalore on September 10, 2008 against an individual who was in the business of burning/replicating software of BSA member companies and then selling them at cheap prices to consumers. The modus operandi of this individual was to circulate pamphlets/leaflets in newspapers listing out various software programs and the prices at which they could be purchased from him. He had also provided his mobile number on the pamphlet so that potential consumers could contact him. The impunity with which he was operating is indicated by the fact that he clearly stated on the pamphlet that he was in the business of providing pirated software to those who could not afford genuine software. BSA contacted the Central Crime Branch at Bangalore and informed them of this illegal activity. The Police then agreed to conduct a criminal action against the target based on BSA's complaint.

The publishing industry reports good cooperation from authorities in smaller cities such as Jabalpur, Gwalior and others, with less even cooperation in the major metropolitan areas (Delhi, Mumbai, Kolkata, etc.). Long delays between complaints and action result too often in information leaks or distribution of pirate stock prior to enforcement action. In Mumbai in particular, the industry notes that the IPR section of the police is affiliated with the Social Service Branch, which has other priorities and thus is putting little effort into copyright enforcement. *Suo moto* raids have been almost nonexistent, with Bangalore being the occasional exception.¹⁵ Enforcement on university campuses is rare, especially outside New Delhi. Overall, the industry has seen a decline in the resources and priority given to enforcement against domestic pirate enterprises, and has still not seen a single conviction for domestic piracy. This contrasts sharply with the remarkable cooperation the industry has gotten from Customs officials in preventing export of South Asian editions of books. In June 2008, Customs authorities at Nhava Sheva, Navi Mumbai confiscated and prosecuted a case of export in violation of the copyright law, imposing a fine of Rs 12 lakhs (US\$24,707) on the defendants.

In order to deal with the lack of training and political will of local police, India created a total of 19 IP cells in 2002. However, many of these have stopped functioning as separate units. They continue to exist in certain cities -- IMI reports that the cells that function most effectively are in Tamil Nadu and Kerala (and they conduct many *suo moto* raids). BSA reports that they work with the cells in Delhi and Mumbai, as well as with those in Bangalore, Chennai and Hyderabad.¹⁶ However, even these are under-resourced and incapable of raiding larger production and distribution 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.

Court procedures are overly burdensome; courts are severely backlogged and there are major delays in bringing criminal (and civil) cases to final judgment implicating TRIPS Articles 41, 41(2), 42 and 61. Not only are the penalties imposed woefully inadequate but there are continuing 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 pirates higher up in the supply chain, 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 or otherwise fail to appear, which only further delays the trial. By the time of trial, evidence is often missing or unusable.

What is desperately needed in India, and particularly for the Indian copyright industries, is a national anti-piracy strategy at the central government level, with the ability to link in the State governments (IPR enforcement is a state, not central government, responsibility) in a meaningful, enforceable way. Such a strategy could start with a National Anti-Piracy Task Force with a membership that includes judges, prosecutors and police coupled with significant technical training. Most challenging, however, would be judicial reform. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. Recommendations would certainly include the need for reinvigorating the IP cells, setting up special IP prosecutors in each state and establishing specialized IP courts or appointing specialized IP judges.¹⁷ The principal objectives of such courts or judges would be to:

- ease backlogs (IP judges or courts should begin free of backlogs);
- enforce deadlines for adjudication/resolution of piracy cases, and prevent unjustified continuances;
- encourage completion of a set number of "model" cases with deterrent penalties to deliver a message to the Indian public about piracy;
- adopt case management techniques (we understand progress has been recently made on this and on instituting plea bargaining); and,
- treat piracy as a serious economic crime.

¹⁵ Even then, problems remain with incorrect procedures being followed in the filing of the First Information Reports.

¹⁶ http://www.mumbaiipolice.org/%5Cspecial%5Corg_fun5.htm. The Mumbai police have both a copyright cell, dealing with OD and other piracy and a cybercrime cell which deals with software piracy. See also http://indiaedunews.net/Delhi/100_Delhi_Police_officers_get_training_in_Cyber_Crime_at_IP_University_5386/

¹⁷ BSA reports that a criminal and civil IPR court (e.g. the appointment of judges to handle IP cases) was set up in Bangalore in June 2008.

Civil enforcement: The business software industry uses civil litigation as the preferred enforcement route, given the difficulties in the criminal system. The motion picture industry has also used the civil route in certain areas, like cable and satellite broadcast piracy. In 2008, the software industry scaled up its enforcement activity and took 26 civil end-user actions – the most ever. BSA reports that the Delhi High Court has been good at issuing *anton piller* orders (*ex parte* search orders). In July 2008, that court issued a seminal decision establishing a reasonableness test on what type of information it is necessary to present to show the existence of pirate software at a particular location. As a result of these cases, injunctions have been issued and good settlements reached. BSA is also pressing for the courts to allow the grant of John Doe orders to allow court-appointed commissioners to enter the premises of any suspected infringer whose name is unknown and therefore not named in the complaint and collect evidence of infringement. On the negative side, however, 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 right holders with an alternative to proving actual damages. India should also consider awarding restitution (e.g. damages) to right holders in criminal cases on the basis of per unit seized, given the ineffective civil system in India.

MPA had 16 civil actions pending at the end of 2008 and has had some success over the years in using the civil system to obtain preliminary injunctions against some of the estimated 40,000 pirate cable systems that transmit U.S. films and TV programs without authorization. These preliminary orders against entire cable networks have had some deterrent effect, even though these cases rarely, if ever, come to judgment with damages awarded. Even contempt proceedings brought for violation of such injunctions rarely, if ever, are concluded. Moreover, some networks continue to operate in contravention of the law and in violation of these specific court orders. Proceedings to enforce these injunctions are costly and time-consuming.

A promising development has been the engagement of the courts in a judicial reform process, which has brought some progress in civil cases through alternative dispute resolution and reports are that “plea bargaining” may be instituted in some criminal courts. If the latter is the case, this would greatly help in clearing backlogged dockets and in expediting the criminal process.

Enforcement at the Border: 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) continue the good action taken in 2008 to prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports, given the vast import and export problem.

COPYRIGHT LAW AND RELATED ISSUES

Proposed copyright amendments remain deficient: India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.¹⁸

IIPA reviewed the new draft copyright amendments that were placed on the Copyright Office’s website in 2005.¹⁹ In its submissions made prior to 2005, 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 when the Copyright Office in HRD announced that it had completed its work (after at least 6 years in preparation) and was finally opening up the process for full public comment. However, since that time, there has been absolutely no word of further developments and the draft seems completely stalled within HRD.

¹⁸ See IIPA’s 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

¹⁹ The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>. These long-delayed amendments were drafted by a “core group” of Indian government officials and selected Indian private sector and academic experts beginning in 1999-2000.

IIPA reviewed the draft in its 2007 submission and noted 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). Because of the importance of revising this draft to fully implement those treaties, we summarize that analysis again this year:

- **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;²⁰ (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 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.²¹ 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 directly referenced in the Treaties (though required, IIPA believes, under the Treaties enforcement obligations), the issue of secondary liability of ISPs and exceptions to such liability, has been dealt with in the laws of most countries implementing them. Clarity on such issues is indispensable to the fight against online piracy. 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 again 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.

Most countries in the region (and over 100 countries globally) have implemented the WIPO treaties in domestic law. Given its size and the importance of its copyright industries to economic and job growth in India, it should no longer delay establishing the legal infrastructure for a functioning system for electronic commerce.

²⁰ 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 the copies 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 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.

²¹ 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 enable the pirate libraries to circumvent the law.

India should adopt an optical disc law: With 36 optical disc factories, India should adopt an effective optical disc law. FICCI has been engaged in the drafting process and IIPA has presented a draft to it and the government as well. The lack of progress to date is not justified. Many countries, and most of India's neighbors, have adopted optical disc laws which also cover blank discs -- Hong Kong, Indonesia, Macau, Malaysia, Philippines, Thailand, Turkey, Bulgaria, Montenegro, Ukraine and Nigeria. There has been no evidence that coverage of blank discs in such laws has posed any hardship on companies that are subject to them. Moreover, without such coverage, commercial optical disc burning in large or small venues would not be subject to the law, creating a major loophole that the law should prevent.

Pending criminal procedure amendments on arrest: It has been reported that there is a Code of Criminal Procedure (Amendment) Bill, 2006, which has been passed by the Lok Sabha and the Rajya Sabha and is awaiting presidential assent. It contains a disturbing amendment that would allow for issuance of written warnings instead of arrests for crimes with punishments less than seven years. The amendment leaves the decision of arrest or warning to the investigating officer's discretion. This amendment could have a devastating impact in India by undermining an already weak system of deterrence by sparing defendant's even the hassle and embarrassment of being arrested and having to produce bail.

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 theater, 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 pirates 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 separate legislation, in addition to copyright law amendments, that specifically makes it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre, without the need to establish the ownership or subsistence of copyright in the motion picture. Legislation passed in the U.S. and other countries 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.

TRAINING

IIPA member associations continued to conduct training in 2008.

MPA conducted a training in Bangalore for approximately 70 judicial magistrates in 2008. It launched a Hindi language anti-piracy movie trailer in Mumbai in 2007 that was dubbed into many local languages. It produced a 23-minute documentary on creativity and copyright, which was distributed to students.

The local recording industry association (IMI) conducted more than 75 police training programs throughout the country in 2008. It also sponsored a public relations campaign on piracy for radio, television and the print press.

BSA participated in a Judges Round Table organized by the Tamil Nadu Judiciary Academy and FICCI in July, 2008. Thirty-five judges from the State High Court and judicial officers from the District Courts participated and covered a range of topics on IP protection, information technology, piracy and their impact on the country. BSA also partnered with the Karnataka Center for E-Governance to launch a campaign "Karnataka -- a Leader in Software Asset Management" in November 2008. In April 2008, BSA sponsored and participated in a FICCI/Department of Industrial Policy and Promotion (DIPP) and Ministry of Commerce and Industry seminar on "Harnessing Intellectual Property for National Development." At the seminar, the Minister of State for Industry launched a year long (April 2008-March 2009) campaign, including seminars, workshops and specialized training programs, on the full range of IPR, judicial and enforcement issues in India.

Along with launching the co-branded program with the Karnataka Government mentioned above, BSA also sent out 700 educational mailers to small and medium enterprises in the IT/ ITES sector in Karnataka as well as conducted an in-depth educational seminar on the benefits of Software Asset Management in Bangalore.

BSA conducted 2 in-depth tutorials for CIOs from leading Indian private and public sector companies in partnership with the Computer Society of India in Mumbai on the principles of effective Software Asset Management.

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 2008, \$3.96 billion worth of Indian goods entered the U.S. under the duty-free GSP program.

MARKET ACCESS

Many market access barriers in 2008 continue to hinder copyright owners' abilities to participate fully in the market in India.

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 27 to 36%, and constitutes a significant disincentive to the much-needed cinema construction in India. MPA, in association with the Film Federation of India, continues to encourage the federal and various state governments to rationalize the high taxation levels and the Government of India has also stepped in to persuade various state governments to impose a uniform entertainment tax not exceeding 60%. On a positive note, Delhi entertainment taxes have been lowered from 30% to 20%. Citing revenue considerations, however, most other states are reluctant to conform.

In addition, the Indian government regulates uplink and downlink of satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, licensed by the government, and pay prescribed fees per channel beaming into India. In August 2006, the Ministry of Information and Broadcasting released a draft Broadcast Services Regulatory Bill, established a Broadcast Regulatory Authority (BRAI) tasked with setting policies on programming codes, licensing conditions, content regulation, and censorship. The MPA made a submission urging careful consideration of the existing restrictive nature of the marketplace, noting that further restrictive provisions in the draft Bill such as content quotas, foreign ownership limitations would have a significant impact on the growth and expansion of the industry.

Also in August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated "U" can be broadcast on TV channels, reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only "U" rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.

In January 2007, the Telecom Regulatory Authority of India (TRAI) issued regulations prohibiting broadcasters from granting exclusive contracts with any distributors and obligating broadcasters to provide channel programming to all requesting distributors on a non-discriminatory basis. The exclusive contract prohibition, along with "must provide" requirements, eliminates all potential for competition and any incentive to develop programming or buy any "rights." The MPAA presented nine submissions over the past three years, opposing restrictions in the functioning of India's cable and satellite market, arguing that the draft regulation would remove private parties' ability to negotiate standard free market transactions and opining that any restriction on exclusivity limits the quality and quantity of content available to consumers. These recommendations were summarily disregarded. Consultations on tariffs for non-CAS areas remain pending.

Additionally, the MIB amended the Direct to Home (DTH) Guidelines to include, among other things: prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard.

The U.S. motion picture industry faces numerous other market access barriers, including foreign ownership restrictions. Impermissible customs valuation practices that reference projected royalties resulting from the distribution and exhibition of the work, rather than the value of the physical medium on which the work is recorded, are worse than ever and home video and theatrical products are continually held up in customs for several months at a time. Customs continues to demand proprietary and financial documents for the past five years to determine supposedly delinquent taxes, refusing to release products into the market.

Entertainment software publishers' experience with the Indian market is one hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30 percent), console game products (tariffs also as high as 30 percent), and game console hardware. Information from companies active in the market suggests that these rates are actually closer to 35 percent. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where penetration rates of unauthorized (grey market) consoles are only a fraction of what they would be under less restrictive market conditions. There is also excise duty assessed on PC and other locally replicated products. The current duty rate is at 8.24 percent of the wholesale price, or about 5 percent of the MRP. With tariff rates at this level, the ability of legitimate publishers to compete in the market and establish legitimate distribution channels will continue to be severely hampered.

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.