

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2010.

Executive Summary: Piracy — physical, Internet and over mobile devices — continues at high levels in India. While there was some enforcement progress in 2009, enforcement is still not effective in deterring piracy. Police should increase the number of *suo moto* (e.g., *ex officio*) raids; and reforms at every level are needed to reduce huge court backlogs, eliminate procedural hurdles, and address long court delays that result in an insufficient number of criminal convictions and damage awards in civil cases. Anti-piracy enforcement continues to be fragmented and the enforcement agencies lack training to effectively undertake Internet piracy cases.

This year a copyright amendment bill is expected to be introduced — after years of delay — into the Parliament. Until the bill is actually introduced, however, we will not know whether it has been modified from prior drafts to fully and properly implement the WIPO Internet treaties. Prior drafts were woefully inadequate and India desperately needs an effective regime to counter growing Internet piracy. 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.

Significant market access restrictions that effect the motion picture, entertainment software and business software industries continue uncorrected.

Priority actions to be taken in 2010: 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;
- Continue training police authorities to be more effective in addressing rapidly growing mobile device and Internet piracy;
- Increase the number of *suo moto* raids and raids against corporate end-user piracy;
- Address unauthorized photocopying of books and journals at educational institutions;
- Empower customs to effectuate *ex officio* seizures, followed by 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.

Market Access

- Eliminate onerous market access barriers on the motion picture, entertainment software and business software industries;



For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>

UPDATE ON PIRACY IN INDIA

The copyright industries report some progress dealing with piracy in 2009, though piracy rates continue at high levels. Hard goods piracy, particularly at the retail level, illicit camcording, and corporate end-user piracy of software are still the biggest problems, with Internet and mobile device continuing to grow as Internet and mobile device penetration deepens.

Optical disc piracy: There were a reported 36 OD factories in India in 2009. 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 MIB has made no progress on it largely because the largest OD factory in India, Moser Baer, opposes the inclusion of blank disc licensing in the bill.

Local factory pirate production is reported to be increasing. As reported in past years, imports of pirate discs, from Malaysia and other Asian countries, also continue to be a problem. However, the predominant form of optical disc piracy in Indian markets today continues to consist of burned discs, with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of business software, entertainment 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.

As in 2008, most of the pirated PC videogame product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Vendors primarily sell burned CD/DVD discs, which are generally copied from pirated versions produced elsewhere in Asia. Pirated console games, on the other hand, appear to largely be in factory-pressed CD format. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass technological protection measures (TPMs) that ordinarily prevent the illegal copying of games and the playback of pirated copies. Because India has yet to implement the protection for TPMs mandated in the WCT and WPPT, vendors openly sell circumvention devices on the Internet, in retail stores and kiosks, or sell game consoles that are already modified.

Retail piracy: The pirate retail trade is vast throughout all big cities in India. Factory-produced, imported and burned discs are sold openly. 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 for legitimate product and pirate rental libraries are ubiquitous. According to a 2008 report "The Effects of Counterfeiting and Piracy on India's Entertainment Industry" published by the U.S. India Business Council and Ernst & Young, the Indian film industry lost an estimated US\$959 million and 571,896 jobs due to piracy. Software piracy at the retail and wholesale level is also prevalent, including hard disk loading and the open sale of pirate software in markets throughout India. Pirated PC and console games are widely and openly available in smaller retail establishments throughout the country.

Corporate end-user piracy of business software: Corporate end-user piracy (unauthorized use of business software in a business setting) causes by far the largest losses to the U.S. software industry in India (and globally). Trade losses to the software industry from this and all other types of piracy increased in 2009, to an estimated **US\$1,509** million, while the piracy rate fell from 68% in 2008 to **66%** in 2009. As part of its strategy to

grow the use of licensed software among Indian companies, BSA has successfully partnered with the State Government of Karnataka in executing a state-wide Software Asset Management (SAM) program, including recognizing companies for their compliance efforts in 2009. The State Government of Maharashtra also launched an educational and awareness program directed at companies in December 2009. BSA hopes that other states, and particularly the central government, will join these efforts as well.

Camcording piracy: In September 2009, the MPA's President, Dan Glickman, announced the commencement of a major initiative to train theater employees and increase enforcement against camcording piracy, which last year accounted for 14 forensic matches traced back to cinemas in India. This initiative was strongly supported by the theater owners throughout India. Illegal camcording globally accounts for 90% of the newly released movies that end up appearing illegally on the streets and on Internet sites.

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. Book piracy occurs in a variety of ways in the country: illegal photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and digitized books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on sites created and maintained by university students. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues at educational institutions, sometimes even condoned by the institutions.¹ 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. The overall piracy situation has not improved as law enforcement authorities, in part given their limited resources, do not undertake *suo moto* actions against open and notorious book piracy. They are, however, continuing to be responsive when rights holders file an infringement complaint. The sale of pirate trade books at traffic junctions in New Delhi appears to have lessened; last year it was at epidemic proportions.

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. This is but a small step toward trying to raise awareness of the devastating effects of illicit copying on the academic publishing industry, and it is inexplicable why HRD has not acted on its commitment. 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. It is hoped that 2010 will yield progress in this regard.

The industry reports excellent cooperation in preventing export of South Asian editions of books to neighboring or international markets.² Allowing the export of these editions would cause significant harm to foreign and domestic publishers alike. It appears, however, that recent proposed revisions to the long-awaited copyright law amendments may seek to overturn this practice, and in so doing, remove any incentives for publishers to continue to make available high quality academic and professional books for a fraction of the cost of such texts in other markets. Publishers would have no choice but to price such books at the rate for higher-priced markets given the very real danger that the low-priced South Asian editions would now be permitted to be exported from India. If these revisions were to be adopted as part of the copyright law amendments, Indian students and researchers would likewise be disadvantaged as their access to high-quality publisher content (in the scientific, technical and medical fields) through these low-priced editions would inevitably cease. The publishing industry hopes that the government will reconsider

¹ In 2009, publishers reported the posting of a notice at a prominent college, espoused by the department head, offering photocopying services for students in a particular course. The notice was removed upon publisher complaint.

² 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.

the proposed revisions, which if adopted, would not only lead to the loss of the low cost reprint market in India, jeopardize the immense investment foreign publishers have made in the Indian market, but also adversely impact the growing indigenous Indian publishing industry. Publishers utilize local publishing support services (such as printing, page make up, manuscript keying, document scanning, etc.), pouring millions of dollars into such support services, thereby bolstering the domestic economy and helping to create and support the infrastructure now in place for a growing domestic publishing industry.

Internet and mobile device piracy: There were an estimated 52 million Internet users in India at the end of 2008.³ Broadband subscriber statistics are more current and were estimated at 7.4 million, still low by Asian standards.⁴ India is the second largest (after China) and one of the fastest growing markets in the world for mobile phones, with total users at 471.7 million at the end of September 2009.⁵ As of this date, 127 million of these users are able to access the Internet over their mobile phone.⁶ Internet piracy was reported as a growing concern by all copyright industries. The Indian recording industry reported that mobile chip piracy⁷ 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. IIPA reported in its 2009 submission that India expected to become second to South Korea in developing a major market for cell phone downloads.⁸ This growth path is severely stunted, however, by widespread mobile chip piracy. Piracy losses to the music and recording industry from physical piracy only in 2009 was **US\$17.7 million** in 2009, with piracy levels at **60%**, an increase of 5% from 2008. The piracy rate for music in the online space is estimated at 99%.

In December 2009 the MPA released two studies which demonstrate that online copyright infringement for filmed entertainment is a major and growing problem in India. These studies show that India was among the top 10 countries in the world for illegal filesharing (P2P) activities. Most of this piracy occurs over BitTorrent filesharing networks, via cyberlockers and via web-based file hosts like Rapidshare or HotFile. Video streaming sites are also popular, though usage is lower than BitTorrent and cyberlockers.

The major international BitTorrent portals are heavily used by Indian downloaders. In one survey involving MPA member films, 6.5% of IP addresses were traceable back to Indian users. This made India the fourth largest downloader behind the U.S., Great Britain and Canada. With its smaller Internet penetration, however, India has the highest level of piracy of any English-speaking country. India is one of the largest users of cyberlockers as well. One study found that 8.2% of visitors to the top ten cyberlockers worldwide are located in India.

BSA reports that online software piracy is increasing significantly. Piracy is on auction sites and on websites selling pirate software. 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. However, the police have yet to even file a charge sheet in this case.

The entertainment software industry reports an alarming rise in online piracy in India, including over eBay India which continues to be a primary point of sale for pirated PC games. The Entertainment Software Association

³ http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/InformationTechnologyPublic&RP_intYear=2008&RP_intLanguageID=1

⁴ [http://www.broadbandindia.com/\(as of October 2009\)](http://www.broadbandindia.com/(as%20of%20October%202009))

⁵ http://www.trai.gov.in/Reports_list_year.asp

⁶ *Id.*

⁷ 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.

⁸ Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," *The Hindu*, March 25, 2007.

(ESA) estimates that approximately 328,800 infringing copies⁹ were made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in India during December, 2009. This comprises approximately 3.41% of the total number of illegal copies made by P2P users globally during this period. Despite a relatively low level of broadband penetration, these figures place India amongst the top 10 nations in terms of overall volume of P2P game downloads. Moreover, these figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. Breakdowns by ISP show that subscribers of National Internet Backbone (NIB), Bharti Broadband, and Mahanagar Telephone Nigram were responsible for approximately 83% of this activity occurring in India — more than 275,000 downloads during the one-month period.

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 music and sound recording industry and, at this point in time, causes greater losses than Internet piracy.

UPDATE ON ENFORCEMENT IN INDIA

Criminal Enforcement: The principle challenge posed by the Indian enforcement system is to make the criminal system work more effectively despite inefficient court procedures, lack of training, very long delays, occasional corruption, and relatively few convictions (and even those are followed by low fines and virtually no significant jail terms). In a welcome development, criminal convictions did increase in 2009 in both the music and video area under the criminal copyright piracy provision of the Copyright Act (Section 63) and under Section 52A, which criminalizes failure to use the required certificate on videos or sound recordings. Criminal convictions under Section 63 are still relatively rare, though the Indian music industry (IMI) reported that they received an unprecedented 60 convictions under Section 63 in 2008 and this section carries far more severe penalties than Section 52A. Fines under this latter section rarely exceed \$1000 but the offense is far easier to prove.

A key element in creating an effective criminal system is increasing the number of *suo moto* raids by the police. While such raids increased in 2009 for the music industry in a number of states, the software, motion picture and publishing industry have not experienced any improvement. 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.

Raid and convictions for the Indian music industry were not available in time to include in this submission report, but did report that the situation improved significantly in 2009 with respect to enforcement against high levels of 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.

⁹ This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

MPA counted 393 raids taken nationwide in 2009. While convictions have shown a welcome uptick in 2009, the statistics continue to illustrate the problems with the Indian judicial system in the criminal area. For example, MPA has roughly 1,900 pending criminal cases.

BSA reports again that for 2009 the criminal system continued not to work against software piracy, and initiated no criminal cases in 2009. There has never been a criminal conviction for software piracy in India, though BSA is now exploring the possibility of using the plea bargaining provisions in the Criminal Procedure Code (discussed below). 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 again reports good cooperation from authorities in smaller cities such as Jabalpur, Gwalior and others, with less 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 the last quarter of 2009, however, a major operation was conducted in Delhi against a printer, binder and distributor producing pirated academic and scientific, technical and medical (STM) books. The pirate printer/distributor was caught with 80,000 prints and 124 negatives of a publisher's title on hand. Two warehouses belonging to the distributor were also subject to search, and at the first location, upwards of 25,000 academic and STM titles for several publishers (both international and domestic) were seized. A subsequent search of the second warehouse was also conducted following the arrest of one of the distributors. In total, 135,000 pirated STM books were seized during the raid operation. Of those 135,000 pirate copies, only 35,000 were books whose copyright is owned by international publishers. Clearly, this large scale piracy operation was harming not just international publishers but also Indian publishers.

This was the largest ever seizure of pirated academic and STM books in the country. The publishing industry hopes that this matter will be pursued vigorously by the Indian authorities so as to send a strong message against those engaged in book piracy that it will no longer be tolerated. It is of note that there have, to date, been no convictions for book piracy in India, and this case would certainly be an opportunity to demonstrate that the government will no longer tolerate the ruinous activities of large scale piracy operations.¹⁰

Pretrial detention of up to a one year maximum under the Goondas Act in Tamil Nadu continues to result in some deterrence. This remedy should be expanded to other states.

In order to deal with the continued 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 Delhi, Tamil Nadu and Kerala. BSA reports that they work with the cells in Delhi and Mumbai, as well as with those in Bangalore, Chennai and Hyderabad.¹¹ 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

¹⁰ The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

¹¹ http://www.mumbaipolice.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/

effective enforcement. States should set up more trained IP cells and specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes.

Of late, the Punjab state government proactively took initiatives to tackle video & audio piracy. A state-level anti piracy cell has now been constituted to check and take action against audio and video piracy. BSA has made a representation to the state government to include software piracy under their campaign.¹²

As a result of overly burdensome court procedures, courts are severely backlogged and there are major delays in bringing both criminal and civil cases to final judgment – implicating TRIPS Articles 41, 41(2), 42 and 61. Further problems include the lack of deterrent penalties and the existence of procedural barriers that impede remedies for legitimate rights holder. For example, obstruction of the raiding process is still common — with pirates often being tipped off about impending raids. Once raids are 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.

However, significant court reforms in 2009 may streamline the judicial process in certain regions. The Tis Hazari court in Delhi approved a 2006 Ministry of Home Affairs notice that outlined a plea bargaining system under the Criminal Procedure Code, and appointed a plea-bargaining judge (<http://delhicourts.nic.in/plea%20bargaining.pdf>). In October 2009, IMI was successful in getting a conviction pursuant to this process including a Rs. 12 lakh (US\$26,036) criminal fine (<http://iitrade.ac.in/news-detail.asp?news=1214>). If continued, this would greatly help in clearing backlogged dockets, in expediting the criminal process, and in creating much-needed deterrence.

BSA is also working with specific state governments to encourage the inclusion of piracy of software in the prevention of criminal activities legislations (Goondas Act) which are state specific legislations. Most recently BSA submitted a request urging the state governments of Punjab, Delhi and Maharashtra to include software piracy under the purview of such Acts.

Despite this progress, what continues to be urgently needed in India, and particularly for the Indian copyright industries, is a central government-led initiative to coordinate enforcement with and between the state governments (IPR enforcement is a state, not central government, responsibility). IIPA and the copyright industries have for years sought the creation of a National Anti-Piracy Task Force with a membership that includes judges, prosecutors and police, coupled with significant technical training, and which is given authority to advise the highest levels of the central government on the IPR enforcement system. Further judicial reform is also needed. 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, including judges with plea-bargaining authority.¹³ The principal objectives of such courts or judges would be to:

¹² <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>
<http://www.businessofcinema.com/news.php?newsid=12189>
<http://www.newkerala.com/news/fullnews-40121.html>
<http://www.samaylive.com/news/huge-cache-of-pirated-cds-seized-in-punjab/671991.html>
<http://www.punjabnewslines.com/content/view/22673/143/>
<http://www.in.com/news/entertainment-news/punjab-police-seized-pirated-dvds-mp3s-cds-worth-lakhs-amritsar-on-a-tipoff-from-the-indian-music-industry-imi-punjab-police-tuesday-conducted-a-major-antipiracy-raid-at-manav-music-centre-baba-deep-singh-marg-amritsar-punjab-and-seized-a-larg-12152139-2937c242e2e3cf9256e42b72f85be127578d20a5-rhp.html>

¹³ 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.

- 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 further case management techniques and extend plea bargaining further; and,
- treat piracy as a serious economic crime.

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. BSA continues to report that the Delhi High Court has been good at issuing *anton piller* orders (34 *ex parte* search orders were issued in 2009, the most ever) and that these can be served anywhere in India. This has encouraged infringers to settle cases quickly rather than have their computers and other goods seized and face long-delayed court sessions. On July 7, 2009, that court fined a corporate end-user of unlicensed software Rs. 20 lakhs (US\$43,393) as compensatory and punitive damages. BSA has commenced many end-user actions in civil courts, but this is the first that has gone to judgment with a damages award. Similar orders were issued in three other end-user matters as well. It is worthwhile to mention here that these cases proceeded *ex parte* and the courts have yet to award damages in a contested end-user piracy case. Damage awards have been issued against hard disk loading of software (copying software onto the hard disk of a computer which is then sold to consumers). 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, proving actual damages in software cases remains quite difficult. IIPA and BSA urge India to introduce a system of statutory damages in civil cases to provide right holders with an alternative to proving actual damages. This would speed up the civil court process and bring additional deterrence through the civil court system. India should also consider awarding restitution (e.g. damages) to right holders in criminal cases on the basis of per unit seized, given the difficult civil system in India.

MPA had 16 civil actions pending at the end of 2009 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.

As for extrajudicial remedies, BSA has sent over 1,500 takedown notices to ISPs and the Indian recording industry association (IMI) has sent over 1000. IMI reports that occasionally pirate content has been taken down despite the lack of a formal notice and takedown system in the Indian copyright law. Given the growing losses due to Internet piracy, it is essential that the long-pending copyright amendments be approved and that they contain such an effective system. No actions have been taken in India against P2P filesharing. Before this phenomenon spins totally out of control, the Indian government should ensure that ISPs and right holders cooperate in establishing a fair and workable “graduated response” system.

Enforcement at the Border: Customs enforcement has improved somewhat in the last few years. Customs should be empowered to seize *ex officio*, 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, while improving, 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 strong action taken in 2008 and 2009 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; however, it does not yet contain the necessary provisions to deal effectively with Internet infringements. IIPA detailed the positive and negative provisions in that law as far back as its 2003 submission.¹⁴

IIPA reviewed the new draft copyright amendments that were placed on the Copyright Office's website in 2005.¹⁵ IIPA was pleased when the Copyright Office in HRD announced that it had completed its work (after at least 6 years in preparation) and when it finally opened up the process for full public comment in 2006. However, since that time, there has been no movement on introducing a Bill into Parliament until this summer when it was reported that the Bill would be introduced in the winter 2010 session. This has not yet occurred.

IIPA reviewed the public draft in its 2007 submission and noted that there were many positive proposed amendments. However, that draft raised a number of grave concerns, particularly certain provisions which are intended to implement the provisions of the WIPO "Internet" Treaties (WCT and WPPT). It has been rumored that the draft that will be introduced into Parliament in 2010 has changed from the draft made public in 2006. However, neither the U.S. government nor anyone in the copyright industries has been able to confirm this and the draft continues to remain under wraps and will only be made public when introduced into Parliament. For this reason and because of the importance of revising this draft to fully implement those treaties, we summarize our analysis of the 2006 draft, much of which may have survived and be included in the Bill that is expected to be introduced shortly.

- **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 manufacturing, trafficking in, or distributing 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;¹⁶ (b) overbroad exceptions for copying of computer programs, including

¹⁴ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

¹⁵ 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.

¹⁶ 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

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.¹⁷ 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 is critical that India join other developed and developing countries in creating this legal infrastructure this year to enable a functioning system for electronic commerce.

India should adopt an optical disc law: With a reported 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 draft has long been delayed by the controversy over coverage of blank discs. 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: Last year, IIPA reported that there was a Code of Criminal Procedure (Amendment) Bill, 2006, which has been passed by the Lok Sabha and the Rajya Sabha and was awaiting presidential assent. It contained a disturbing amendment that would allow for issuance of written warnings instead of arrests for crimes with punishments less than seven years. The amendment would leave the decision of arrest or warning to the investigating officer’s discretion. The Criminal Procedure Code (Amendment) Act 2008 came into force with effect from December 31, 2009, but sections 5, 6 and 21b of the Act are still not in force, e.g., the provisions relating to the powers of the police to make arrests and also the power of the court to grant and refuse adjournment of cases. 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.

industry concerns that the exception for private use could be read to permit video recording or camcording in theaters 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.

¹⁷ 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 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 offense to use a video camera or other device to make a copy of a motion picture while inside a theater, 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 anti-camcording training for over 250 theater managers throughout the country during 2009.

The local recording industry association (IMI) conducted more than 60 police training programs throughout the country in 2009.

In 2009, BSA supported a seminar on harnessing IP awareness for small and medium enterprises organized by the Ministry of Commerce, Ministry of Micro-small and medium Enterprises and FICCI. During the same time period, BSA also released a series of educational advertisements both in print and online media promoting the importance of intellectual property in software.

BSA launched a Software Asset Management (SAM) program promoting the use of genuine software in the industry in Maharashtra in late 2009 along with State Government of Maharashtra and FICCI. BSA also represented the software industry's interests at several forums organized by CII (Confederation of Indian Industry) and FICCI on software piracy and counterfeiting.

BSA conducted a full-day workshop on IP & Law Enforcement for Rajasthan Police Officers in May 2009. Around 40 officials, including Inspectors, Deputy SPs, Addl SPs, SPs (IPS officers) & the Deputy Inspector General (DIG) of Police participated in this workshop. BSA now plans to organize such workshops in other cities as well collaborating with other State Police, CBI & Police Training Schools.

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 2009, \$2.8 billion worth of Indian goods entered the U.S. under the duty-free GSP program.

MARKET ACCESS

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

The U.S. motion picture industry faces numerous 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, sometimes refusing to release products into the market in the absence of inflated duty payments. MPA has repeatedly petitioned Indian government officials for the prompt resolution of these concerns.

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.

Entertainment software publishers continue to be 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.

The packaged software industry in India continues to be doubly-taxed – attracting service tax at the central level and value-added tax at the state level due to a discrepancy between central and state level policies of treating software as a service vs. a good. This discrepancy results in non-uniform and higher pricing of packaged software sold to consumers which in turn encourages lack of availability of genuine software by retailers due to lower demand. Indirectly, this also fuels the growth of the illegal software market. India is expected to introduce the GST (goods and services tax) regime in 2010 which will dispel these discrepancies to an extent and will prescribe a uniform central and state goods and services tax code for the country. This is still under government deliberation.

The industry is also concerned about moves by the government to consider mandating the use of open source software and software of only domestic origin. Though such policies have not yet been implemented, IIPA and BSA urge that this area be carefully monitored.