

PAKISTAN

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

Special 301 Recommendation: IIPA recommends that Pakistan remain on the Watch List.¹

Executive Summary: Pakistan's copyright market has been a disappointment to the copyright industries over the years. For example, Pakistan remains principally a pirate market for books. While IIPA appreciates the government's actions to combat piracy in the Urdu Bazaars, the piracy situation has improved only slightly. The National Book Foundation continues to claim it may avail itself of compulsory licenses to copy books even though doing so is incompatible with Pakistan's international obligations under the Berne Convention. The situation is not much better in the category of business software. Unlicensed use of software by businesses, so-called end-user piracy of business software, causes significant losses each year to the software industry. There was a slight decline in the business software piracy level from 86% in 2008 to 85% in 2009, with losses also decreasing from US\$80 to US\$73 million. A software industry study concludes that reducing piracy by ten percent would bring high-paying jobs, tax revenues, and increased flow to Pakistan's gross domestic product.

Over the years, through cooperation with publishers, the authorities, especially the Federal Investigations Agency (FIA), Islamabad, have taken some timely and positive actions against book piracy in the Urdu Bazaars, but much more needs to be done. Also, the Pakistani government has been supportive about legalizing government use of software, and putting into place healthy procurement practices to foster such legitimate use. Unfortunately, little has been done to address end-user piracy which causes most of the losses to the business software industry in Pakistan. The Pakistani government in its Submission in the Special 301 report discussed the "5th Meeting of the Central IPR Enforcement Coordination Committee, Islamabad held on the 17th January, 2009,"² and while IIPA is appreciative that the committee is considering ways to improve the piracy situation, actions are needed to follow through on those discussions.³

The United States continues to engage with the government of Pakistan through a Trade and Investment Framework Agreement signed between the two countries in 2003. Intellectual property remains on the economic and trade agenda between the two countries.⁴ IIPA hopes that the TIFA talks can spur the government of Pakistan to follow through on copyright protection consistent with the country's international obligations, so that creative industries can once again consider Pakistan a hospitable place to do business.⁵ Pakistan's Intellectual Property Office (IPOP) has made overtures of interest as to implementation and ratification of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Given increasing Internet usage in the country and digitization of copyright materials (for example, publishers note unauthorized digitizations of books in the educational setting), the interest in establishing a legal framework for copyright protection in the online environment is welcome.

¹ For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² See Government of Pakistan, *Special 301 Review 2009*, February 27, 2009, submitted to [regulations.gov](http://www.regulations.gov) (on file with IIPA).

³ IIPA appreciates the discussion in Pakistan's Special 301 Submission regarding FIA activities, and agree that ongoing specialized training for FIA officers and judges will be helpful. IIPA also notes the assertions by FIA that "prosecution is very weak to give deterrent sentence on violation of IP rights," which we think indicates a need for improvements in the deterrent effect of criminal judicial enforcement.

⁴ See United States Trade Representative, *United States-Pakistan Trade and Investment Framework Agreement (TIFA) Meeting Joint Statement, April 27, 2009*, at http://www.ustr.gov/assets/Document_Library/Press_Releases/2009/April/asset_upload_file784_15596.pdf. This was the third meeting of the United States-Pakistan Trade and Investment Council, which is the implementing body of the U.S.-Pakistan TIFA.

⁵ Pakistan once had a vibrant creative industry including cinema, but in recent years, very little creative activity has taken place or been supported. Cf. *Cinema of Pakistan*, at http://en.wikipedia.org/wiki/Cinema_of_Pakistan (unverified).



Priority Actions Requested in 2010: IIPA requests that the government of Pakistan take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Undertake significant action against pirate booksellers in the Urdu bazaars to clean up that market, taking legal actions as appropriate for deterrence.
- Take actions against business software end-user and hard-disk loading piracy, including inspections against businesses suspected to be engaged in the unauthorized use of software, prosecutions brought where warranted, and deterrent sentences at court.

Legislation

- Repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law, and ensure that the National Book Foundation ceases all reproduction thereunder.
- Amend the Pakistan Copyright Ordinance to enhance enforcement; create deterrence, including mandatory minimum sentences including fines and imprisonment for committing a crime of copyright infringement; provide exclusive rights for sound recordings including an exclusive communication to the public/making available right; and protect against circumvention of technological protection measures, circumvention services, and trafficking in circumvention devices.
- Fully implement and join the WCT and the WPPT.

PIRACY AND ENFORCEMENT CHALLENGES IN PAKISTAN

Previous reports have discussed the many piracy challenges faced in Pakistan,⁶ including book piracy; National Book Foundation compulsory reprints; end-user piracy of business software; pirate CDs, DVDs, and recordable discs in the retail markets; Internet-based piracy; and pay TV piracy due to illegal cable hookups.⁷ The following sections provide brief updates to the piracy and enforcement situation in Pakistan, but failure to mention other specific issues does not indicate that those problems have been fully resolved.

Update on Workings of Pakistani Policy and Enforcement Authorities: IIPA appreciates the ongoing work of the FIA. Its officers have been instrumental in bringing the incremental improvements for some copyright sectors. FIA's Advisory Council on IPR which is inclusive of industry has been helpful, and its officers have responded to complaints of piracy by carrying out raids. The Intellectual Property Office of Pakistan (IPOP) has improved marginally, but only as far as responding to requests for meetings and carrying on a dialogue, and in policy issues such as increased engagement on the area of seeking industry input on legislation. Unfortunately, no concrete outcomes or results have been achieved by IPOP, due perhaps to power struggles within the organization and under-inclusiveness of industry in its Board.

Book Piracy Situation in Bazaars: Pakistan remains a predominantly pirate book market, with print piracy and to a somewhat lesser extent illegal photocopying being the primary problems in the country. The Urdu Bazaars in Karachi (which have at times featured 350 booksellers and wholesalers) and Lahore (which have at times featured 700 sellers) remain the main sources of pirated books in the country, though book piracy has spread beyond just bazaars and is rampant. Pirate booksellers are highly organized, well-connected, and often succeed in convincing

⁶ Losses due to piracy of business software in 2009 are estimated at US\$73 million with an 85% piracy rate. The piracy rate has hovered around 85%, only dipping to 84% in 2007, and standing at 86% in 2005, 2006, and 2008. Losses in 2007 were \$63 million and in 2008 were \$80 million. The book publishing and music industries had reported consistent piracy losses of around US\$80 million through 2007. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010Spec301methodology.pdf. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Pakistan. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.

⁷ See International Intellectual Property Alliance, *Pakistan*, at <http://www.iipa.com/rbc/2009/2009SPEC301PAKISTAN.pdf>.

authorities to drop cases immediately after any enforcement action or avoid enforcement action altogether. In some cases, they have even resorted to threats of violence and intimidation to try and avoid enforcement.⁸ All types of books are pirated. Practically anything that can sell more than a few hundred copies is a target for the pirate market. English language novels and other trade books are popular among pirates, harming U.S. publishers of mainstream commercial fiction and non-fiction. Some pirate enterprises are now able to produce fairly high-quality counterfeit copies that are difficult to differentiate from legitimate versions.

The situation improved slightly in 2009, due to periodic raids by FIA officers upon complaint of rights holders that have had a positive, though marginal, effect on the market for legitimate books. The police, however, have not been as helpful to date. Nonetheless, the government has recognized the severity of the problem and for that, IIPA and publishers are appreciative. In its March 2009 Submission in the Special 301 report to USTR, the Pakistani government noted,

"[t]ill 2004 the book piracy situation was as follows ... Foreign publishers had mostly considered Pakistan as a closed market. There were no offices of foreign publishers here in the country, except for 1 or 2. Book piracy was rampant with Urdu Bazaars being considered as the hub of organized piracy; ... Original book sales in Pakistan was negli[g]ble; and ... No publisher was willing to invest, but in the past 3 years, 90 raids had been carried out on printing presses, 165 on book binders, and 322 on 'Godowns.'"

The government presented the following evidence of increases in volume sales of legitimate book sellers in Pakistan, which it suggests are the result of actions taken in the Bazaars:

City	2005	2006	2007
Lahore	9.5	13.6	14.8
Karachi	10.89	18.65	20.99
Rawalpindi (including Peshawar)	6.51	7.21	10.51

The government also cites 59 raids by FIA and 168 actions from November 2006 to January 2009 by the Pakistani Intellectual Property Service against book piracy. IIPA and the publishers remain unclear as to how the government sales figures represented in the chart were derived, but even taking them at face value, given that piracy levels have not improved much if at all, increased sales still do not account for continuing piracy at the Bazaars. Nonetheless, IIPA and AAP are appreciative of the government's attention to this piracy phenomena and look forward to continuing work to eradicate piracy from the Bazaars. Further, publishers look forward to greater transparency with FIA officials in 2010 regarding potential book piracy targets and then follow up on activities taken as a result of consultations.

Educational Book Sector Experiences Significant Piracy: The potential market for elementary and high school materials in English is immense, given the number of children in English language schools. Unfortunately elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is worse, with piracy rates around 90%. A newly emerging problem includes digitized resources being pirated by schools. The piracy of English language teaching (ELT) books used at language schools is of particular concern as most language schools charge a consolidated fee covering tuition and the cost of books. Invariably, rather than providing legitimate copies of the books, the pirated versions of the ELT books are supplied to the students. Among the worst offending universities in this respect are the College of Business Management in

⁸ The FIA's assistance is greatly appreciated, since often in Pakistan, carrying out such enforcement can subject the officers or industry representatives to threats of violence. During a recent raid in Karachi by the FIA on a few shops selling pirated editions of IIPA members' books, a couple of booksellers from these shops were handcuffed and arrested by the FIA and were being taken in a car to the FIA office. This car was surrounded by a group of men from the market who blocked the passage of the car and tried to pull out the arrested men. They withdrew and allowed the car to proceed only when faced with the threat of force by the officers. It is believed the same men who had surrounded the car then vandalized and caused property damage to one of the IIPA member association's company members' offices.

Karachi, Punjab College of Business Education in Lahore, and NED University, and Karachi University in Karachi. U.S. publishers receive routine and suspicious requests for free supplementary materials from professors who say they have adopted the book when there are no legitimate sales. Unauthorized compilations in the form of course packs are on the rise as well.

Unfortunately, university administrators appear to have little to no interest in addressing piracy occurring on university campuses (with campus book stores actually stocking pirated books). Indeed, some university professors have been known to inform pirates of the books they intend to assign to their class and the pirates will then produce pirated copies of the book in bulk for the class. Some medical titles have been pirated, usually in one color, so they have misleading and inaccurate illustrations. By contrast, publishers report a higher rate of legitimate sales of reference materials to libraries. This is likely attributable to the high cost of producing such materials and the relatively small market over which to spread production costs, making it unattractive to pirates. This may also be due to the Pakistani government's "National Education Policy 1998-2010" which states in part, "School, college and university libraries shall be equipped with the latest reading materials/services." The Pakistani authorities have to date not been willing to take appropriate action to eradicate illegal uses of published materials at educational institutions. The only action taken by the Ministry of Education has been to instruct university librarians not to purchase pirated books, but whether the institutions comply is not monitored.

National Book Foundation Must Cease Allowing Unauthorized Reproductions of Books: The Ministry of Education's National Book Foundation (NBF) has at times sent signals that it was prepared to cease the unauthorized reproduction of books under the guise of a royalty-free compulsory license, under Section 36(3) of the Copyright Act as amended in 2000, which clearly violates the Berne Convention and TRIPS. However, reports also indicate that NBF is still using the compulsory license. The periodic overtures of NBF have been accompanied by advocacy to foreign publishers and their governments to grant NBF license agreements. Voluntary licensing is made impossible by the NBF's continued unauthorized activities. As a condition precedent to any licensing discussion, the publishers would expect the immediate cessation of all unauthorized reproductions of U.S. publishers' titles, and a written commitment from NBF that it will no longer avail itself of the compulsory license and will engage in transparent business practices. It would also be important and timely for the government to commit to repeal Section 36(3) of the Copyright Ordinance.

Business Software End-User Piracy Is Endemic: Despite significant public awareness and enforcement drives by the Business Software Alliance over the past two years, unauthorized use of software by businesses – so-called end-user piracy – remained a serious problem in 2009. At 85%, Pakistan has one of the highest software piracy levels in the world. Reducing piracy levels would not only help software copyright owners create a legitimate market in Pakistan, but would also lead to very positive economic benefits for Pakistan. A study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy from 2008 by 2011 (i.e., from 86% to 76%) would deliver more than 11,700 new jobs, US\$23 million in tax revenues for the Pakistani government, and US\$160 million in economic growth in Pakistan.⁹

IIPA is pleased that the government has taken some steps over the years to legalize government use of software, and software procurement rules are in place to ensure that legitimate software prices are quoted with tender offers to supply hardware. Unfortunately, inspections are not being run against businesses suspected to be engaged in the unauthorized use of software, and prosecutions are not being brought where warranted. In addition, while many prosecutions were brought in previous years against those engaging in hard-disk loading of pirate software onto computers, the slow pace of court processes and lack of deterrent sentences has meant those engaging in this activity are also not deterred. Steps should be taken to reverse these trends.

⁹ Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Pakistan*, January 2008, at http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/-/media/Files/idc_studies/bsa_idc_pakistan_final%20pdf.ashx.

Court Cases Involving Piracy Almost Never Lead to Deterrence: The copyright industries' experiences with the courts in Pakistan have been mixed over the years. In recent times, publishers note that criminal court cases involving book piracy have not resulted in either timely or positive outcomes. As noted below, maximum penalties are non-deterrent to begin with, and there are no minimum penalties. As a result, magistrates use their discretion in favor of the accused by imposing fines as low as a few hundred Rupees (RP100 = \$1.15) and no jail sentences. The prosecution of cases is subject to chronic delays inherent in the system and process. The judiciary is understaffed with an enormous backlog of cases. Also, IPR cases are given low priority and pirates are viewed in many instances as sympathetic defendants.

COPYRIGHT LAW AND RELATED ISSUES

Penalties in Copyright Law Fail to Deter Piracy: Copyright protection in Pakistan is provided under the Copyright Ordinance, 1962 (as last amended in 2000), which provides generally strong tools to fight piracy.¹⁰ The Ordinance includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan.¹¹ Also, copyright offenses are cognizable, meaning the FIA can act on its own cognizance (*ex officio*), and non-bailable (meaning defendants need not be brought before a magistrate to determine whether bail is appropriate). Problems in the ordinance include criminal fines that remain far too low to deter piracy, and in part to remedy this, the Ordinance should be amended to provide minimum jail sentences and fines for crimes involving copyright infringement. For example, if the minimum fine were even increased to PKR500,000 (US\$6,300), reasonable by any estimation, the law would stand a better chance at achieving deterrence. There are some other problems with the Ordinance in its current form, including some overly broad exceptions to protection and unclear full retroactive protection for works and sound recordings as required by TRIPS.

Royalty-Free Compulsory License for Books Is Out of Step with International Standards: One of the most significant deficiencies in the Ordinance as amended was the addition of Section 36(3) that allows a royalty-free compulsory license of books. Specifically, it provides, "[t]he Federal Government or the Board may, upon an application by any government or statutory institution, in the public interest, grant a license to reprint, translate, adapt or publish any textbook on non-profit basis." Included in "government or statutory institution" is the National Book Foundation (NBF), which, as noted, has engaged in the unauthorized reproduction of books under the guise of this license. This royalty-free compulsory license violates the Berne Convention and TRIPS and Pakistan must delete it from the Ordinance.

Pakistan Should Implement the WCT and WPPT: Pakistan should fully implement and join the WCT and the WPPT, which establish the framework for the protection of copyrighted works in the online environment. Pakistan should also adopt the 1971 (Paris) text of the Berne Convention and should join the Geneva (Phonograms) Convention. In particular, the Ordinance should be amended to include broadcasting and public performance rights for phonogram producers and provide an exclusive making available right and protection of technological protection measures and rights management information. The Ordinance should also provide proper incentives for service providers in the online space to cooperate with right holders, through adequate provision of liability for P2P file sharing, adequate liability for service providers engaging in direct infringement or facilitating infringement, and should in addition include a robust notice and takedown system. IIPA has shared with IPOP its thoughts on these issues in the past, including more detail than is contained in this report. IPOP has recently inquired once again about needed

¹⁰ Three essential remedies exist in Pakistan for copyright infringement: i) civil remedies, including permanent injunctions, damages and wrongful profits, seizure of goods, etc.; ii) administrative remedies through IPO Pakistan, Customs, or the FIA; and iii) criminal prosecutions through the Police. Criminal penalties for knowingly infringing or aiding and abetting infringement of copyright include imprisonment of up to 3 years, and/or a fine of up to PKR100,000 (US\$1,260) (double for a recidivist). Section 74-A provides for restitution to the complainant (50% of the fine) in addition to any civil damages. In case an offense is committed by a company, every person who was in charge of and responsible to the company for the conduct of the business at the time the offence was committed is deemed guilty of the offence and punished accordingly.

¹¹ Please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf>, for a full discussion of the Pakistan Copyright Ordinance.

amendments to implement the WCT and WPPT. IIPA hopes IPOP will take the opportunity to amend its Ordinance to fully modernize the law.

Cybercrime Legislation Should Be Amended to Include Copyright Crimes: On December 31, 2007, the President of Pakistan (in the absence of a National Assembly, which was dissolved at the time) passed the Prevention of Electronic Crime Ordinance, 2007, which we understand was promulgated again in 2009 as an Ordinance. The Ordinance criminalizes certain computer activities, including some forms of reverse engineering of software. The Ordinance does not provide a remedy for copyright infringement consistent with the Council of Europe Cybercrime Convention (2001) (to which the United States is a party). Article 10 of the Council of Europe Cybercrime Convention provides that a party to the Convention will

“establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system.”

It would be helpful if the government of Pakistan revised the Ordinance to implement this provision of the COE Cybercrime Convention.

The Coming of the Internet in Pakistan, and Need for ISP Accountability: One noteworthy development in 2009 was the rising use of the Internet in Pakistan. Pakistan now has a 10.6% penetration rate overall, with an estimated 18.5 million users (using 3.7 million Internet subscriptions), according to the International Telecommunications Union, with an estimated 320,500 broadband connections (188,500 DSL and 132,000 cable), according to Point-Topic. Yet, for about the first time, development and deployment of broadband in Pakistan is taking off, with Pakistan's broadband growing a rapid pace.¹²

As such, the government could, as discussed above, take the opportunity now to enact a system fostering cooperation by Internet service providers with right holders for infringements occurring online, including notice and takedown and an effective and fair mechanism to deal with repeat infringers. As of now, the Prevention of Electronic Crime Ordinance, 2007 (re-promulgated 2009) requires “licensed service providers” to retain real time collection of traffic data which may be requested by any law enforcement or intelligence agency, which could be very helpful going forward. IIPA notes that there is a limitation of liability set out in the Ordinance, namely, network service providers are absolved from any liability civil and criminal for the reason of use of their telecommunication system in certain circumstances (e.g., in connection with the contravention of the Electronic Transaction Ordinance, 2002).

GENERALIZED SYSTEM OF PREFERENCES

Pakistan participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Pakistan meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2004, USTR agreed to review Pakistan's eligibility to retain its GSP trade benefits based on a petition by IIPA. In IIPA's petition, several problems were identified, including a massive optical disc piracy for export problem, and book piracy issues. In 2006, the review was terminated.¹³ As a result of termination,

¹² For example, according to Point-Topic, Pakistan's DSL connectivity grew from 173,500 to 188,500, and cable modem connectivity grew from 118,000 to 132,000 in the third quarter 2009. Pakistan had the sixth highest quarterly growth of broadband connections in the world during the same period, and was the tenth highest in terms of annual growth (third quarter 2008 to third quarter 2009).

¹³ In June 2004, the United States Trade Representative agreed to accept IIPA's petition to evaluate whether Pakistan remained eligible to retain its GSP trade benefits. On January 24, 2005, IIPA endorsed the termination of the Generalized System of Preferences (GSP) piracy investigation of Pakistan by USTR due largely to successful enforcement efforts against optical disc piracy. IIPA called upon the Pakistani government to remain vigilant against book piracy.

Pakistan enjoys duty-free status for imports of certain products into the United States. During 2008 \$183.9 million of Pakistani products that entered the United States enjoyed duty-free status, or 5.1% of its total imports to the U.S. In 2009, \$169.5 million of Pakistani products that entered the United States enjoyed duty-free status, or almost 5.7% of its total imports to the U.S. The government of Pakistan must continue to meet the discretionary criteria in this U.S. law if it expects to continue receiving favorable treatment at this level.

Specifically, IIPA, in making its recommendation, noted,

"Vigilance will be needed, however, to ensure that the problem of massive optical disc piracy does not return to Pakistan. The plants must remain closed and the Government should implement mechanisms to ensure that optical disc piracy remains in check. In addition, other forms of piracy, especially book piracy, remain serious problems in Pakistan. The Pakistani Government must continue to address these outstanding issues, and the U.S. Government should continue to press to resolve these issues."