

# PAKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:<sup>1</sup> IIPA submits this Special Mention filing to note some improved cooperation in the past year with low- or mid-level Pakistani authorities, and highlight Pakistan's market potential for publishers. At the same time, IIPA notes the publishers still face a market primarily dominated by piracy, and the Pakistani Government seems to lack political will to impose deterrent remedies to reduce piracy. Three areas of focus in 2011 should include:

- Law reform: The government has indicated interest in modernizing its law and joining the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and the government needs to repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law and ensure mandatory minimum sentencing is available so piracy cases have a deterrent effect.
- Judicial reform: Court officials must come to recognize piracy as a serious commercial infraction against the state, and changes could usefully include sentencing guidelines imposing mandatory minimum sentencing to avoid recidivism.
- Enforcement reform: While available on paper, *ex officio* authority seems to be missing in practice, which should allow authorities to take enforcement action on an *ex officio* basis on suspicion of piracy and without a complaint.

The United States holds Trade and Investment Council meetings under the 2003 Trade and Investment Framework Agreement,<sup>2</sup> and we strongly urge the U.S. Government to pursue these issues in that forum, with the IPO, through engagement with judicial officials, and through ensuring changes are made allowing the Federal Investigations Agency (FIA) to take actions when piracy is suspected without the need for a complaint. We also urge the authorities to take actions against enterprise end-user software piracy and hard-disk loading piracy, including running inspections against businesses suspected to be engaged in the unauthorized use of software, bringing prosecutions where warranted, and seeking deterrent sentences at court.

## PIRACY AND ENFORCEMENT UPDATES IN PAKISTAN

Previous IIPA reports discussed the many piracy challenges faced in Pakistan.<sup>3</sup> The following provides brief updates on the book piracy problem, enterprise end-user software piracy, and overarching issues related to the enforcement system<sup>4</sup> and the courts.

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<sup>1</sup> For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> United States Trade Representative, *Joint Statement from U.S. Pakistan Trade and Investment Council Meeting*, April 26, 2010, at <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/joint-statement-us-pakistan-trade-and-investment-cou>. USTR noted, "[t]he parties ... discussed a full range of investment climate issues, including intellectual property rights concerns...."

<sup>3</sup> Losses due to piracy of business software in 2010 are estimated at US\$79 million with an 82% piracy rate. The methodology used by IIPA member associations to calculate estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Pakistan. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), available at <http://portal.bsa.org/globalpiracy2009/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.

<sup>4</sup> In the government of Pakistan's February 2010 review of its performance on IP issues throughout 2009, the government noted, "IPO-Pakistan, since its establishment in 2005, have developed a coordination system with enforcement agencies especially Federal Investigation Agency (FIA), Pakistan Customs, Pakistan Electronic Media Regulatory Authority (PEMRA), Police Department and Private Sector Detection Agencies." See Government of Pakistan, *2010 Special 301 Review: Progress Made by Pakistan in IPRs Enforcement During 2009*, February 25, 2010, submitted to regulations.gov (on file with IIPA).



Book Piracy Remains Dominant, Although Raids Are Beginning to Have an Impact: Pakistan remains a predominantly pirate book market, although print piracy is slowly giving way to pirate photocopying. The Urdu Bazaars in Karachi and Lahore remain major sources of pirated books in the country, though book piracy has spread beyond the Bazaars. Pirates now focus attention on illegal photocopies made from one master/source copy legitimately purchased online or overseas, and slapping on a higher-quality color-printed book cover. The printing of title covers has taken on a new dimension, since pirates now often print the pirated book obscuring the authors' names, publishers' names, logos, ISBN numbers, etc. Print piracy consists of smuggled books from Iran and Afghanistan by land, or overruns by legitimate printers in Pakistan. Unauthorized India-only reprints are also being imported into Pakistan. All types of books are pirated, from English language novels to fiction and non-fiction trade books.

The publishers operating in Pakistan report that overall the situation in Pakistan has improved slightly due to increased raiding activity, and that piracy levels are proportionately similar to Bangladesh, Iran, and Sri Lanka. The authorities, especially the Federal Investigations Agency (FIA),<sup>5</sup> Islamabad, have taken some timely and positive actions against book piracy in the Urdu Bazaars.<sup>6</sup> The chief piracy hurdles in the country include: 1) lack of *ex officio* enforcement authority among the Police or the FIA (although FIA has been good about taking raids upon complaint based on information provided by publisher representatives identifying the target and its location); 2) lack of political will even when complaints are lodged, e.g., the Intellectual Property Office of Pakistan (IPOP) is inactive and disengaged in part due to in-fighting and the Police are preoccupied with other criminal activity in the country, and 3) lack of understanding, even among the Pakistani authorities, of jurisdiction over piracy cases, and bureaucracy; and 4) lack of deterrence in cases from raid to court. Industry has met with the Pakistani Intellectual Property Services (PIPS/G9) about approaches to book piracy in Pakistan and solutions proposed.

Educational Book Sector Experiences Significant Piracy: Piracy remains serious on university campuses, estimated at 90% piracy, where campus book stores stock pirated books, and some university professors even inform pirates of the books they intend to assign to their class, and pirates 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. The piracy of English language teaching (ELT) books used at universities and language schools is of particular concern (language schools charge a consolidated fee covering tuition and the cost of books, but then provide pirated versions of ELT books). Among the worst offending universities in this respect are the College of Business Management in 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. The potential market for elementary and high school materials in English (EIH market) is immense given the number of children in English language schools, but unfortunately, these schools routinely feature pirate versions of books.

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<sup>7</sup> has been to instruct university librarians not to purchase pirated books, but whether the institutions comply is not monitored. It has been difficult to get law enforcement for raids on university campuses due to fears of backlash from students. There is also no built-in mechanism in the university campuses to monitor the presence of pirated books.

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<sup>5</sup> In Pakistan's February 2010 Special 301 filing, they note, "FIA's Advisory Committee on IPR enforcement was established for effective coordination with right holders and to remove unnecessary hindrances in IPR enforcement," and also note that "IPC Investigation Field Units have been put in place throughout Pakistan on regional basis," and "IPR Intelligence Units are also being established." IIPA is unaware of how these units are functioning but hopes that they will help in the fight against book piracy and other infringements in the country. *See id.*

<sup>6</sup> A recent Supreme Court of Pakistan decision reportedly confirmed that the Federal Investigation Authority is authorized to entertain complaints from private individuals involving copyright infringement under the Copyright Ordinance 1962, and may also investigate and run inspections regarding such complaints.

<sup>7</sup> The 2010 Pakistani Government Special 301 submission indicates, "IPO has established a sub-committee of Central Enforcement Coordination Committee with members from Higher Education Commission (HEC), National Book Foundation (NBF) and IPO to devise solutions to eradicate book piracy." We urge these authorities to focus on such efforts and move from their positions regarding a royalty-free compulsory license under the current Copyright Ordinance. *See infra.*

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 Ordinance (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.

Courts Require Sensitization to IP Theft as an Economic Crime: The copyright industries' experiences with the courts in Pakistan have been mixed over the years, but in general, criminal court cases involving book piracy have not resulted in either timely or deterrent outcomes. 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 = US\$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. There are also indications that the judges, applying sympathy to defendants, consistently permit delays, issue acquittals even in open-and-shut piracy cases, or apply non-deterrent sentences. For example, one publisher reports 12 cases in Karachi, Lahore and Rawalpindi lower courts pending for many years. There is also evidence of inadequate investigations by the police, some tampering with evidence and even some undue influence.

Influence of Organized Crime in Piracy: We have heard several disturbing incidents involving organized book pirates who may have influence with local political party leaders and area police. Industry representatives have received threatening phone calls from pirates. In Karachi, an Urdu Bazaar shop keeper who had been raided is suspected of being involved in property damage against one of the publishers' sales outlets. In Lahore, similar incidents occurred, including one in November 2010, resulting in injuries to FIA officials. These incidents are the exception in recent years, since persuasion, sustained campaigns, and dialogue have led to greater cooperation and assistance from the unions running the bazaars.

Business Software End-User Piracy Is Endemic: Despite significant public awareness and enforcement drives by the Business Software Alliance over the past several years, enterprise end-user software piracy remained a serious problem in 2010, as 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 recent study by International Data Corporation with the Business Software Alliance 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.<sup>8</sup>

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. By contrast, 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.

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<sup>8</sup> 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](http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/-/media/Files/idc_studies/bsa_idc_pakistan_final%20pdf.ashx).

Internet Piracy: Internet use continues to rise in Pakistan. Pakistan had 11.5% penetration rate as of June 2010, with more than 20.3 million, according to ITU, with an estimated 320,500 broadband connections in 2009, according to Point-topic.<sup>9</sup> As a result, online piracy in Pakistan increased in 2010. Publishers report that reference books, online journals, and trade books are being digitized and provided by schools. Thus far, no steps have been taken to address increasing online piracy or illegal digitizations.

## COPYRIGHT LAW AND RELATED ISSUES

Copyright Reforms Should Move Forward, as Current Ordinance Fails to Deter Piracy: Copyright protection in Pakistan is provided under the Copyright Ordinance, 1962 (as last amended in 2000). The Ordinance provides generally strong tools to fight piracy.<sup>10</sup> 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). Unfortunately, the *ex officio* authority is not exercised. Other problems in the Ordinance (including those mentioned in previous IIPA submission) should be remedied through amendments, and the law should otherwise be modernized to make it compatible with the WCT and WPPT, in line with the IPO's stated intent to implement these treaties.<sup>11</sup>

- **Non-Deterrent Criminal Penalties:** Criminal penalties 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 increased to PKR500,000 (US\$5,900), reasonable by any estimation, the law would stand a much better chance at achieving deterrence.
- **Berne-Incompatible Royalty-Free Compulsory License for Books:** One of the most significant deficiencies in the Ordinance is Section 36(3) that allows a royalty-free compulsory license of books. This royalty-free compulsory license, which has been used by the National Book Foundation to create unauthorized reproductions of books, is incompatible with Pakistan's obligations under the Berne Convention and TRIPS.
- **WCT and WPPT:** The Ordinance should be amended to fully amend the WCT and WPPT, including: 1) ensuring broadcasting and public performance rights for phonogram producers, and 2) providing an exclusive communication to the public right, including the interactive "making available" right. The amendments should also protect against the circumvention of, or trafficking in devices, components, or other technologies used to circumvent, technological protection measures (defined to include both technologies that control access and that prevent the exercise of exclusive rights).

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<sup>9</sup> 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).

<sup>10</sup> Previous IIPA submissions have discussed the weaknesses in the current Ordinance in greater detail. 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\$1,180) (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. The Ordinance also includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan. The 2010 Pakistani Government Special 301 filing also indicates that improvements have been made to Customs provisions in the Customs Act, 1969, including 1) documentary proof may be submitted by any right holder to the Preventive Collectorate, Karachi to seize a consignment which is violating IP rights; 2) Sections 15 and 16 of the Customs Act, 1969 have been amended to include IPR violations and counterfeit goods under the list of items that are prohibited for import and export, for which strict penal actions such as detention, seizure and confiscation are available remedies under Section 156 of the Act; and 3) some "books" were seized in 2009, although the main focus of Customs appears to be on counterfeit goods, not copyright piracy. See Government of Pakistan, 2010 Special 301 Submission, *supra* note 4.

<sup>11</sup> We note here the support of The Pakistan Software Houses Association for IT and ITES (P@SHA) and Center for International Private Enterprise (CIPE) in their 2009 report of recommendations. Included in the IP recommendations is for the Government of Pakistan to "[a]mend the Copyright Ordinance 1962 to provide for protection as available under the WIPO Treaties and additional provisions as provided under the Digital Millennium Copyright Act 1998. See CIPE and P@SHA, *Business Agenda for the Pakistan IT & ITES Sector 2009*, at 10. The report usefully notes, "[t]he need for Pakistan to invest in its creativity ... is so important that it directly equates to our strategic national interest," and "IPR protection of digital rights is vital for not just FDI, but also for Pakistani businesses and for the protection and security of the intellectual capital and innovation of Pakistan's dynamic youth, researchers, and entrepreneurs." *Id.* at 10-11.

- Amend Laws to Deal With Online Infringements: Given the rise of Internet piracy in the country, IPOP should propose amending the law (or issue regulations) to provide proper incentives for service providers in the online space to cooperate with right holders to takedown infringing content (including a robust notice and takedown system) and deal with the non-hosted environment including illegal P2P filesharing including an effective and fair repeat infringer policy. The Prevention of Electronic Crimes Ordinance 2007, which criminalized certain computer activities, lapsed in the first quarter of 2010 and has not been re-enacted, but in any event, the laws should be amended to provide a remedy for copyright infringement consistent with the Council of Europe Cybercrime Convention (2001).<sup>12</sup>

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Pakistan enjoyed preferential trade benefits under the program. One of the discretionary criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2010, US\$165.0 million worth of Pakistan’s goods entered the U.S. under the duty-free GSP code, accounting for 4.7% of its total imports to the U.S. Pakistan needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

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<sup>12</sup> The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.