

PAKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Pakistan be on the Watch List in 2013.¹

Executive Summary: In 2012, the National Assembly unanimously passed the Intellectual Property Organization of Pakistan Act, 2012 (IPO Act), with effect from August 28, 2012.² This positive development came after the April 23, 2012 IPO Ordinance was promulgated by President Asif Ali Zardari, preserving the IPO Pakistan. Now, under the new Act, a permanent coordinating structure for intellectual property protection, awareness, and importantly, enforcement, is established in Pakistan. The Act not only creates a funding structure for the IPO, but vests it with enforcement authority. On top of this, the Act provides for the establishment of specialized IP “Tribunals” throughout the country, and which will adjudicate IP disputes through the use of cadres of trained judges in the areas of IP. This development, along with some improvements in enforcement cooperation noted in previous IIPA reports with low- or mid-level Pakistani authorities, and news that the Pakistani government is beginning to look at further amending the Copyright Ordinance, warrant an adjustment in the Special 301 ranking for Pakistan.³ The potential exists to create a permanent and sustained IP structure which fosters effective protection for creators and a better climate for legitimate creative commerce in Pakistan. This potential development subsists in the face of continuing challenges over blatant physical piracy and rapidly expanding online and mobile piracy in the market. Publishers still face a market primarily dominated by piracy. In late April 2012, the United States and Pakistan held the sixth round meeting of the Trade and Investment Framework Agreement (TIFA) Council meetings under the 2003 TIFA.⁴ Intellectual property enforcement is on the agenda, and the two sides have agreed to specific sectoral discussions on the margins of those meetings. We strongly urge the U.S. government to pursue the issues below in the next meeting forum.

PRIORITY ACTIONS REQUESTED IN 2013

Legislative

- Modernize the Copyright Ordinance and join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law.
- Ensure mandatory minimum sentencing is available in courts and in the new IP Tribunals under the IPO Act, 2012, so that piracy cases have a deterrent effect.
- Amend landlord-tenancy laws that would hold liable and impose fines on landlords who rent out business premises to known or convicted pirates.

Enforcement

- Implement the IPO Act, 2012, fully funding the IPO, vesting it with enforcement authority, and establishing specialized IP “Tribunals” throughout the country. Establish enforcement arms of IPO in all provinces, since the

¹For more details on Pakistan’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²*Intellectual Property Organization of Pakistan Act, 2012*, effective August 28, 2012, at http://www.na.gov.pk/uploads/documents/1349842758_779.pdf.

³In its 2012 Special 301 Report, the United States Trade Representative indicated the following about developments in Pakistan:

“Pakistan remains on the Priority Watch List in 2012. Pakistan continued its efforts on IPR enforcement, including through raids, seizures, and arrests by various enforcement authorities. However, widespread counterfeiting and piracy, particularly book and optical disc piracy, continue to present serious concerns for U.S. industry. Pakistan should provide ex officio authority to its enforcement officials, and should provide for deterrent-level penalties for criminal IPR infringement. Pakistan should also take the necessary steps to reform its copyright law.”

⁴*US, Pak Discuss Ways to Improve Indo-Pak Trade Ties*, OneIndia News, April 26, 2012, at <http://news.oneindia.in/2012/04/26/us-pak-discuss-ways-to-improve-indo-pak-trade-ties.html>.



provincial governments are more in control of budgets, allocation of resources, and calendars, and will therefore be in a better position to support IPO by having an administrative grip over enforcement.

- Ensure the Federal Investigations Agency (FIA) may take actions when piracy is suspected on an *ex officio* basis, i.e., without the need for a complaint.
- Take effective actions against Internet and mobile piracy, book piracy, 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 and at the new IP Tribunals once they are established.
- Take steps to ensure judges and prosecutors recognize piracy as a serious commercial infraction against the state, including sentencing guidelines imposing mandatory minimum sentencing to avoid recidivism.
- Ensure oversight of SHO (local police) to maintain piracy logs in the jurisdiction, with penalties for not maintaining information if piracy takes place within the jurisdiction, and direct police and enforcement departments to cooperate fully with companies and businesses approaching them for IP violations.

PIRACY AND ENFORCEMENT ISSUES IN PAKISTAN

Previous IIPA reports have discussed the many piracy and enforcement challenges faced in Pakistan.⁵ The following provides brief updates on these and highlights growing Internet and mobile piracy, the continuing problems plaguing book publishers, the enduring problem of enterprise end-user software piracy, and overarching issues related to the enforcement system and the courts.⁶

Growing Internet Piracy: According to the International Telecommunications Union (ITU), Internet penetration in Pakistan stood at close to 9% in 2011, up from 6.5% in 2006,⁷ while mobile phone penetration reached 61% (108.9 million).⁸ Broadband penetration remains relatively low, as 2010 statistics indicate only 0.4% of Pakistanis enjoy fixed-line broadband (737,778), according to the ITU, although according to some indicators, wireless broadband is beginning to pick up,⁹ and according to Internet Service Providers Association of Pakistan (ISPAK), the estimated number of Internet users *via* mobile phones has reached 15 million.¹⁰ As a result, Internet piracy in Pakistan continues to increase. Pre-release music, movies, software, games, and publications are all available through online portals, including some of the most notorious websites in the world for online piracy.¹¹ Reference books, online journals, and trade books are being digitized and provided by schools. Thus far, few steps have been taken to address increasing online piracy or illegal digitization of copyright materials.

⁵Please see previous years' reports at <http://www.iipa.com/countryreports.html>.

⁶In 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).

⁷ITU internet penetration statistics for Pakistan were reexamined and calibrated in 2011 due to "a discrepancy in past data in which the percentage of internet users in Pakistan was found to be an overestimation compared to countries with similar characteristics." See Freedom House, *Freedom on the Net 2012 - Pakistan*, 25 September 2012, available at: <http://www.unhcr.org/refworld/docid/5062e89c1e.html>, accessed January 10, 2013.

⁸For 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).

⁹International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

¹⁰Muhammad Yasir, *Internet Users Cross 25m Mark*, Daily Times, September 20, 2012, at http://www.dailytimes.com.pk/default.asp?page=2012%5C09%5C20%5Cstory_20-9-2012_pg5_15, accessed on January 10, 2013.

¹¹USTR listed *warez-bb* in its latest Notorious Markets Report, it as a "forum site, which is ... described as a hub for the sharing of copyrighted works, including pre-release music, software and video games" and as a site that "has a global reach, and is among the top 200 sites visited in Belgium, Croatia, Serbia and Pakistan, according to Alexa.com." USTR also listed *Kat.ph* (formerly *kickasstorrents*) as "notable for its commercial look and feel" and as being "ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri Lanka." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, listed *1channel.ch* (Estonia) (previously *Letmewatchthis.com*) as "a particularly popular linking site in Canada, the UK, Ireland, and Pakistan, coming in the top 200 most visited sites in those countries according to Alexa.com." See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf.

Book Piracy Worsened in 2012: Pakistan remains a market saturated with pirate books, consisting of both print piracy and widespread unauthorized photocopying. The Urdu Bazaars in Karachi and Lahore remain major sources of pirated books in the country, and were listed by USTR as “Notorious Markets” in its review conducted in late 2012.¹² Pirates now focus attention on producing unauthorized photocopies made from one master/source copy legitimately purchased online or overseas, to which a higher-quality color-printed book cover is then affixed. 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 editions are also being imported into Pakistan. All types of books are pirated, from English language novels to fiction and non-fiction trade books to higher education textbooks. The publishers operating in Pakistan report no improvement in the overall situation in Pakistan.

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, which are then produced as pirated copies 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 only the pirated versions of ELT books). Unauthorized compilations in the form of course packs are also on the rise. The potential market for elementary and high school materials in English (Elhi market) is immense given the number of children in English language schools, but unfortunately, these schools routinely use pirate versions of books.

Royalty-Free Reproductions of Books Must Cease: While it is reported that the Ministry of Education’s National Book Foundation (NBF) has recently ceased 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), publishers ask that NBF confirm this change with a written commitment to refrain from any further unauthorized reproduction of copyrighted works. Moreover, because Section 36(3) of the Copyright Ordinance violates the Berne Convention and TRIPS, the government should likewise commit to repeal this section of the Copyright Ordinance.

Courts Require Sensitization to IP Theft as an Economic Crime; New IP Tribunals Provide Hope: The copyright industries’ experiences with the courts in Pakistan have been mixed over the years, but in general, criminal court cases involving 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 (PKR100 = US\$1.01) and no jail sentences. It is reported that there are more than 20 cases in Karachi, Lahore and Rawalpindi lower courts that have been pending for multiple years. As such, prosecution of cases still appears subject to chronic delays inherent in the system and the judiciary remains understaffed with an enormous backlog of cases. To help remedy this situation, publishers hope that the government of Pakistan will implement the IPO Act by setting up a sufficient number of specialized IP Tribunals in a timely manner. Publishers note that there is still a lack of clarity as to the jurisdiction of these IP Tribunals with respect to the Pakistan Criminal Code, but urge the government of Pakistan to afford authority over such cases to these specialized courts.

Influence of Organized Crime in Piracy: There have been several reports of 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

¹²USTR wrote in its December 13 report, “The Urdu Bazaars in Karachi and Lahore reportedly remain the main sources of pirated books in the country, where book piracy is widespread and extends beyond such bazaars.”

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.

Software Piracy Is Endemic: Despite significant public awareness and enforcement drives by BSA | The Software Alliance over the past several years, software piracy, including by businesses that use unlicensed software, remained a serious problem in 2012. Pakistan has one of the highest software piracy rates in the world, at 86% in 2011, with the commercial value of such unlicensed software rising to \$278 million that year.¹³ 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.¹⁴ 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.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Reforms Should Move Forward: 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.¹⁵ 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 by FIA. Other deficiencies in the Ordinance 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.¹⁶ The following enumerates some of the more significant changes that should be contemplated in amending the Ordinance:

¹³BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Pakistan was 86%, representing a commercial value of unlicensed software of US\$278 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

¹⁴A 2008 study by IDC and BSA demonstrated that a 10 point reduction in software piracy from 2008 by 2011 (i.e., from 86% to 76%) would have delivered 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. BSA 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.

¹⁵Previous IIPA submissions have discussed 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 (around US\$1,000) (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 6.

¹⁶We 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 Pakistani government 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.

- **Provide 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 (around US\$5,000), reasonable by any estimation, the law would stand a much better chance at achieving deterrence.
- **Remove 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. 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 previously 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.
- **Fully Implement the WCT and WPPT:** The Ordinance should be amended to fully implement 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 act or service of circumventing technological protection measures (TPMs) used by right holders to protect their works from unauthorized access to, or exercise of exclusive rights in, works or other subject matter of copyright, or the trafficking in devices, components, or other technologies used, aimed, or promoted, to circumvent such TPMs.
- **Address Online Infringements:** Given the rise of Internet piracy in the country, amendments should 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 non-hosted infringements, including an effective and fair treatment of repeat infringers. 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).¹⁷

New Intellectual Property Organization of Pakistan Act, 2012: The IPO Act, 2012, was enacted last year, with effect from August 28, 2012. This Act creates a permanent coordinating structure for the IPO as well as a funding structure, and vests IPO with enforcement authority, authority over strengthening intellectual property protection, and public awareness for the importance of IP protection in Pakistan. The Act provides for the establishment of specialized IP “Tribunals” throughout the country, which will adjudicate IP disputes through the use of cadres of trained judges in the areas of IP. Specifically, under Article 13 of the Act, “Powers and functions of the Organization,” Clauses (xviii) through (xx) deal with enforcement.¹⁸

¹⁷The 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.

¹⁸Article 13(xviii) gives IPO the power to “initiate and monitor the enforcement and protection of intellectual property rights through designated law enforcement agencies of the Government, Federal or Provincial, and collect related data and information.” Article 13(xix) gives IPO the power to “initiate and conduct inquiries, investigations and proceedings related to offences in the prescribed manner.” Article 13 (xx) gives IPO the power to “refer matters and complaints, related to offences under the laws specified in the Schedule [including the Copyright Ordinance], to the concerned law enforcement agencies and authorities as may be necessary for the purpose of this Act.”

GENERALIZED SYSTEM OF PREFERENCES

Pakistan enjoys preferential trade benefits under the Generalized System of Preferences trade program. One of the discretionary criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2011, almost US\$130.7 million worth of Pakistan’s goods entered the U.S. under the duty-free GSP code, accounting for more than 3.4% of its total imports to the U.S. In the first eleven months of 2012, more than \$175 million of Pakistan’s exports to the U.S., or 5.2% of its total exports to the U.S., received duty-free treatment under the GSP code. Pakistan needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.