The 2010 Special 301 report is more of the same, slightly less shrill

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Pranesh Prakash examines the numerous flaws in the Special 301 from the Indian perspective, to come to the conclusion that the Indian government should openly refuse to acknowledge such a flawed report. He notes that the Consumers International survey, to which CIS contributed the India report, serves as an effective counter to the Special 301 report.

The United States Trade Representative has put yet another edition of the Special 301 report which details the copyright law and policy wrongdoings of the US's trading partners. Jeremy Malcolm of Consumers International notes that the report this year claims to be "well-balanced assessment of intellectual property protection and enforcement … taking into account diverse factors", but:

> [I]n fact, the report largely continues to be very one-sided. As in previous editions, it lambasts developing countries for failing to meet unrealistically stringent standards of IP protection that exceed their obligations under international law.

More the report changes, the more it stays the same. Despite having wider consultations than just the International Intellectual Property Alliance (IIPA, consisting of US-based IP-maximalist lobbyists like the Motion Picture Association of America, Recording Industry Association of America, National Music Publishers Association, Association of American Publishers, and Business Software Alliance) and the Pharmaceutical Research and Manufacturers of America (PhRMA, consisting of US-based pharma multinationals), things haven't really changed much in terms of the shoddiness of the Special 301 report.

India and the 2010 Special 301 Report

The Special 301 report for 2010 contains the following assessment of India:

> India will remain on the Priority Watch List in 2010. India continues to make gradual progress on efforts to improve its legislative, administrative, and enforcement infrastructure for IPR. India has made incremental improvements on enforcement, and its IP offices continued to pursue promising modernization efforts. Among other steps, the United States is

encouraged by the Indian government's consideration of possible trademark law amendments that would facilitate India's accession to the Madrid Protocol. The United States encourages the continuation of efforts to reduce patent application backlogs and streamline patent opposition proceedings. Some industries report improved engagement and commitment from enforcement officials on key enforcement challenges such as optical disc and book piracy. However, concerns remain over India's inadequate legal framework and ineffective enforcement. Piracy and counterfeiting, including the counterfeiting of medicines, remains widespread and India's enforcement regime remains ineffective at addressing this problem. Amendments are needed to bring India's copyright law in line with international standards, including by implementing the provisions of the WIPO Internet Treaties. Additionally, a law designed to address the unauthorized manufacture and distribution of optical discs remains in draft form and should be enacted in the near term. The United States continues to urge India to improve its IPR regime by providing stronger protection for patents. One concern in this regard is a provision in India's Patent Law that prohibits patents on certain chemical forms absent a showing of increased efficacy. While the full import of this provision remains unclear, it appears to limit the patentability of potentially beneficial innovations, such as temperature-stable forms of a drug or new means of drug delivery. The United States also encourages India to provide protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. The United States encourages India to improve its criminal enforcement regime by providing for expeditious judicial disposition of IPR infringement cases as well as deterrent sentences, and to change the perception that IPR offenses are low priority crimes. The United States urges India to strengthen its IPR regime and will continue to work with India on these issues in the coming year.

This short dismissal of the Indian IPR regime, and subsequent classification of India as a "Priority Watch List" country reveals the great many problems with the Special 301.

On Copyrights

1. The report notes that there are "concerns over India's inadequate legal framework and ineffective enforcement". However, nowhere does it bother to point out precisely *how* India's legal framework is inadequate, and how this is negatively affecting authors and creators, consumers, or even the industry groups (MPAA, RIAA, BSA, etc.) that give input to the USTR via the IPAA. Nor does it acknowledge the well-publicised fact that the statistics put out by these bodies have time and again proven to be wrong:

2. Apart from this bald allegation which has not backing, there is a bald statement about India needing to bring its copyright law "in line with international standards" including "the WIPO Internet Treaties". The WIPO Internet Treaties given that more than half the countries of the world are not signatories to either of the WIPO Internet Treaties (namely the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty), calling them 'international standards' is suspect. That apart, both those treaties are TRIPS-plus treaties (requiring protections greater than the already-high standards of the TRIPS Agreement). India has not signed either of them. It should not be obligated to do so. Indeed, Ruth Okediji, a noted copyright scholar, states:

   > Consistent with their predecessors, the WIPO Internet Treaties marginalize collaborative forms of creative engagement with which citizens in the global South have long identified and continue in the tradition of assuming that copyright's most enduring cannons are culturally neutral. [...] The Treaties do not provide a meaningful basis for a harmonized approach to encourage new creative forms in much the same way the Berne Convention fell short of embracing diversity in patterns and modes of authorial expression.

1. Some of the of the 'problems' noted in the report are actually seen as being beneficial by many researchers and scholars such as Lawrence Liang, Achal Prabhala, Perihan Abou Zeid and others, who argue that lax enforcement has enabled access to knowledge and promotion of innovation. In a panel on 'Access to Knowledge' at the Internet Governance Forum, Lea Shaver, Jeremy Malcolm and others who have been involved in that Access to Knowledge movement noted that lack of strict enforcement played a positive role in many developing countries. However, they also noted, with a fair bit of trepidation, that this was sought to be changed at the international level through treaties such as the Anti-Counterfeiting Treaty Agreement (ACTA).
2. The scope of an optical disc law are quite different from copyright law. The report condemns "unauthorized manufacture and distribution of optical discs", however it does not make it clear that what it is talking about is not just unlicensed copying of films (which is already prohibited under the Copyright Act) but the manufacture and distribution of blank CDs and DVDs as well. The need for such a law is assumed, but never demonstrated. It is onerous for CD and DVD manufacturers (such as the Indian company Moserbaer), and is an overbearing means of attacking piracy.
3. The report calls for "improve[ment] [of India's] criminal enforcement regime" and for "deterrent" sentences and expeditious judicial disposition of IPR infringement cases. While we agree with the last suggestion, the first two are most unacceptable. Increased criminal enforcement of a what is essentially a private monopoly right is undesirable. Copyright infringment on non-

> commercial scales should not be criminal offences at all. What would deter people from infringing copyright laws are not "deterrent sentences" but more convenient and affordable access to the copyright work being infringed.

On Patents

Thankfully, this year the Special 301 report does not criticise the Indian Patent Act for providing for post-grant opposition to patent filings, as it has in previous years. However, it still criticises section 3(d) of the Patent Act which ensures that 'evergreening' of drug patents is not allowed by requiring for new forms of known substances to be patented only if "the enhancement of the known efficacy of [the known] substance" is shown. Thus, the US wishes India to change its domestic law to enable large pharma companies to patent new forms of known substances that aren't even better ("enhancement of the known efficacy"). For instance, "new means of drug delivery" will not, contrary to the assertions of the Special 301 report and the worries of PhRMA, be deemed unpatentable.

The United States has been going through much turmoil over its patent system. Reform of the patent system is currently underway in the US through administrative means, judicial means, as well as legislative means. One of the main reasons for this crumbling of the patent system has been the low bar for patentability (most notably the 'obviousness' test) in the United States and the subsequent over-patenting. An American judgment even noted that "anything under the sun that is made by man" is patentable subject matter. It is well-nigh impossible to take American concerns regarding our high patent standards seriously, given this context.

Miscellanea

The harms of counterfeit medicine, as we have noted earlier, are separate issues that are best dealt under health safety regulations and consumer laws, rather than trademark law.

Data exclusivity has been noted to be harmful to the progress of generics, and seeks to extend proprietary rights over government-mandated test data. It is [clear from the TRIPS Agreement][de-trips] that data exclusivity is not mandatory. There are clear rationale against it, and the Indian pharmaceutical industry [is dead-set against it][de-india]. Still, the United States Trade Representative persists in acting as a corporate shill, calling on countries such as India to implement such detrimental laws.

Conclusion

Michael Geist, professor at University of Ottowa astutely notes:

> Looking beyond just Canada, the list [of countries condemned by the Special 301 report] is so large, that it is rendered meaningless. According to the report, approximately 4.3 billion people live in countries without

> effective intellectual property protection. Since the report does not include any African countries outside of North Africa, the U.S. is effectively saying that only a small percentage of the world meet its standard for IP protection. Canada is not outlier, it's in good company with the fastest growing economies in the world (the BRIC countries are there) and European countries like Norway, Italy, and Spain. In other words, the embarrassment is not Canadian law. Rather, the embarrassment falls on the U.S. for promoting this bullying exercise and on the Canadian copyright lobby groups who seemingly welcome the chance to criticize their own country.

His comments apply equally well for India as well.

IIPA's Recommendation for the Special 301 Report

Thankfully, this year IIPA's recommendations have not been directly copied into the Special 301 report. (They couldn't be incorporated, as seen below.) For instance, the IIPA report notes:

> 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.

Breaking that into two bit:

Open Source

Firstly, it is curious to see industry object to legal non-pirated software. Secondly, many of BSA's members (if not most) use open source software, and a great many of them also produce open source software. HP and IBM have been huge supporters of open source software. Even Microsoft has an open source software division. [Intel][intel], SAP, Cisco, Dell, Sybase, Entrust, Intuit, Synopsys, Apple, Borland, Cadence, Autodesk, and Siemens are all members of BSA which support open source software / produce at least some open source software. And *all* BSA members rely on open source software (as part of their core products, their web-server, their content management system, etc.) to a lesser or greater extent. BSA's left hand doesn't seem to know what its right hand – its members – are doing. Indeed, the IIPA does not seem to realise that the United States' government itself uses [open source software], and has been urged to look at FOSS very seriously and is doing so, especially under CIO Vivek Kundra. And that may well be the reason why the USTR could not include this cautionary message in the Special 301 report.

Domestic Software

As this insightful article by Nate Anderson in Ars Technica notes:

> Open source is bad enough, but a "buy Indian" law? That would be an outrage and surely something the US government would not itself engage in as recently as last year. Err, right?

Furthermore, the IIPA submission do not provide any reference for their claim that "domestic origin" software is being thought of being made a mandatory requirement in governmental software procurement.

WCT, WPPT, Camcording, and Statutory Damages

The IIPA submission also wish that India would:

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

Quick counters:

1. Statutory damages (that is, an amount based on statute rather than actual loss) would result in ridiculousness such as the $1.92 million damages that the jury (based on the statutory damages) slapped on Jammie Thomas. The judge in that case called the damage award "monstrous and shocking" and said that veered into "the realm of gross injustice."
2. The reasons against an optical disc law are given above. Quick recap: it is a) unnecessary and b) harmful.
3. India has not signed the WCT and the WPPT. Indian law satisfies all our international obligations. Thus enacting amendments consistent with the WCT and the WPPT is not required.
4. Camcording of a film is in any case a violation of the Copyright Act, 1957, and one would be hard-pressed to find a single theatre that allows for / does not prohibit camcorders. Given this, the reason for an additional law is, quite frankly, puzzling. At any rate, IIPA in its submission does not go into such nuances.

Further conclusions

Shamnad Basheer, an IP professor at NUJS, offer the following as a response:

> "Dear USA,

> India encourages you to mind your own business. We respect your sovereignty to frame IP laws according to your national priorities and suggest that you show us the same courtesy. If your grouse is that we haven't complied with TRIPS, please feel free to take us to the WTO dispute panel. Our guess is that panel members familiar with the English language will ultimately inform you that section 3(d) is perfectly compatible with TRIPS. And that Article 39.3 does not mandate pharmaceutical data exclusivity, as you suggest! More importantly, at that point, we might even think of hauling you up before the very same body for rampant violations, including your refusal to grant TRIPS mandated copyright protection to our record companies, despite a WTO ruling (Irish music case) against you.
>
> Yours sincerely,
>
> India."

Basheer's suggestion seems to be in line with that Michael Geist who believes that other countries should join Canada and Israel in openly refusing to acknowledge the validity of the Special 301 Reports because they lack ['reliable and objective analysis'][geist-reliable]. And that thought serves as a good coda.