

Feature
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The absence of arrest reduces significantly the deterrent effect of police action against counterfeiters



New bill is huge setback to criminal enforcement

Despite fierce criticism from IP rights owners, a new bill, which is set to come into force in the near future, will significantly water down India's criminal enforcement system

On December 23 2008 eight legislative bills were passed by the Lower House of the Indian Parliament in record time and seemingly without much debate. One of these bills (which has already received presidential assent and will become law once it is notified in the *Official Gazette*) will radically amend provisions of the Code of Criminal Procedure 1973 (the code). Among other things, the bill introduces an amendment into Section 41 of the code, which fetters the powers of police officers to make arrests for certain offences. The bill, for various reasons, has already sparked huge controversy and debate within the legal field, and may eventually prompt IP rights owners to review their criminal enforcement options in India.

This article analyzes the possible impact of the Section 41 amendment on brand owners facing problems relating to counterfeiting, and also software manufacturers, publishers and film producers that are trying to combat widespread piracy in India. To address counterfeiting and piracy, these industries have traditionally relied on raids by the police, with a focus on:

- seizure of counterfeit/pirated goods; and
- arrest of the accused.

As Indian courts are heavily burdened with pending cases, slow rates of prosecution seldom result in the pirate/counterfeiter being punished. Thus, the threat of arrest has become an important deterrent against counterfeiting and piracy.

Amendment to Section 41

The code divides offences into two categories:

- 'cognizable offences' (serious crimes) punishable with imprisonment of three or more years; and
- 'non-cognizable offences' (less serious crimes) punishable with imprisonment of less than three years.

Currently, Section 41 of the code empowers police officers to arrest, without a warrant or a magistrate's order, persons accused of cognizable offences merely on the basis of "reasonable suspicion". In stark contrast to the earlier position, the Indian legislature has proposed to insert Section 41(A) into the code, which mandates that in cases concerning offences which carry a maximum prison sentence of up to seven years, police officers may, instead of arresting the accused person, issue a 'notice of appearance' asking him/her to cooperate with police investigations. The officer can make an arrest only if the accused person does not comply with the notice or if, for specific reasons (which must be recorded), the officer

Offences under Indian IP laws: Trademarks Act 1999

Offence	Punishment
Applying false trademarks, trade descriptions, etc (Section 103)	<ul style="list-style-type: none"> Imprisonment: between six months and three years; and
Offering goods/services under false trademarks, trade descriptions (Section 104)	<ul style="list-style-type: none"> Fine: ranging from approximately \$1,000 to \$4,000
Second or subsequent conviction for the above offences (Section 105)	<ul style="list-style-type: none"> Imprisonment: between one year and three years; and Fine: ranging from approximately \$2,000 to \$4,000
Falsely representing a trademark as registered (Section 107)	Imprisonment: up to three years and/or fine (amount not specified)

Offences under Indian IP laws: Copyright Act 1957

Offence	Punishment
Infringement of copyright or other rights conferred by the act (Section 63)	<ul style="list-style-type: none"> Imprisonment: between six months and three years; and Fine: ranging from approximately \$1,000 to \$4,000
Second or subsequent conviction for the above offences (Section 63-A)	<ul style="list-style-type: none"> Imprisonment: between one year and three years; and Fine: ranging from approximately \$2,000 to \$4,000
Knowing use of infringing copy of computer program (Section 63-B)	<ul style="list-style-type: none"> Imprisonment: between seven days and three years; and Fine: ranging from approximately \$1,000 to \$4,000
Possession of plates for purpose of making infringing copies (Section 65)	Imprisonment: up to three years and/or fine (amount not specified)
Making false statements for the purpose of deceiving/influencing any authority or officer (Section 68)	Imprisonment: up to one year and/or fine (amount not specified)

Offences under Indian IP laws: Information Technology Act 2000

Offence	Punishment
Concealing, destroying or altering computer source code (Section 65)	Imprisonment: up to three years and/or fine up to approximately \$4,000
Hacking into a computer system (Section 66)	
Publishing obscene information in electronic form (Section 67)	<ul style="list-style-type: none"> For first conviction: imprisonment up to five years and fine up to approximately \$2,000 Second/subsequent conviction: imprisonment up to 10 years and fine up to \$4,000
Breach of confidentiality or privacy (Section 72)	Imprisonment: up to two years and/or fine up to approximately \$2,000

is of the opinion that the arrest is absolutely necessary.

By imposing stringent conditions under which arrests are actionable, the new law greatly limits the powers of police officers to make arrests in relation to any offences committed under the Trademarks Act 1999 or the Copyright Act 1957 – since, as we explain in more detail below, they attract a maximum prison term of just three years. Under the amendment, even if a person is caught red-handed for counterfeiting activities that pose grave risk to life (as is the case with some counterfeit medicines), the police would be required ordinarily only to seize the counterfeit products and not arrest the counterfeiter. In other words, the counterfeiter would suffer only limited economic loss; the absence of arrest reduces significantly the deterrent effect of police action against counterfeiters, as arrest has an important social stigma attached to it.

The tables in this section, setting out some of the offences under the trademark, copyright and IT laws in India and the corresponding punishments, provide insight into the impact of the newly-inserted law on IP rights owners. The maximum prison term that can be imposed – even for serious offences committed under the Trademarks Act and Copyright Act – is three years. Thus, none of the aforementioned offences meet the threshold of seven years stipulated by the amendment. Even under the Information Technology Act, almost all of the offences carry a maximum term of imprisonment of five years and do not meet the criteria set out by the recent amendment.

The new bill has caused great concern among IP rights owners in India, who were already calling for insertion of deterrent measures and stringent punishments against infringers, and for an increased conviction rate.

Rationale

Meanwhile, in response to the public furore and debate, the relevant authorities have offered a two-fold rationale for introducing the new law.

First, they maintain that the amendment actually strikes a harmonious balance between providing the police with the power to make arrests (on the basis of recorded reasons) and offering protection against cases of unlawful/arbitrary arrests. In other words, the authorities contend that by laying down specific conditions in which arrests can be made, the new law actually prevents misuse/abuse of power by corrupt police officers and other unscrupulous elements within the system – who, instead of using arrest as a tool to ensure a fair investigation, actually use it as an instrument to harass innocent persons. To back up their assertions, the authorities have cited various committee reports, as well as judicial decisions which contain guidelines relating to arrest.

The second rationale offered for the amendment is that it will help to curb prison overcrowding. Numerous sources have extrapolated that only 30% of the prison population in India comprises people who have actually been convicted, while the remaining 70% is mainly composed of people languishing in jail while still awaiting trial. It is thought that those awaiting trial (known as 'under-trials') come from the poorest segments of society and cannot afford to furnish the requisite security for bail. The authorities state that the amendment will prevent frivolous arrests, thereby placing an effective check on the population of under-trials in jail.

Perceived impact on IP rights owners

IP rights owners will surely feel that the Section 41 amendment by the Indian legislature is based on a myopic and narrow-minded diagnosis of the situation. By putting a single blanket provision over all categories of offences, rights holders will rightly feel that the legislature has passed the new law in haste, without fully

deliberating upon or considering all the factors.

It is often said that IP/cyber law-related offences fall into a distinct category, as some of the more serious offences are thought to be committed by intelligent criminals who are extremely difficult to trace. In white-collar crimes of this nature, the main deterrent tool is the huge social stigma associated with being arrested by the police and spending time in jail. This is especially relevant in the Indian context where, for example, offences such as uploading pirated software or trading in pirated DVDs are not generally considered to be serious crimes. Thus, it is likely that such crimes will be viewed as more acceptable given that:

- no arrests are likely to be made for trading in pirated goods, as the maximum term of imprisonment provided is three years; and
- the current economic conditions make it more attractive for consumers to buy pirated goods.

Another factor which merits serious consideration is the limited knowledge and understanding of IP/cyber laws by police officers in India. Even prior to the amendment, critics argued that police officers were slow/reluctant to arrest persons accused of IP/cyber crimes on account of their limited understanding of such matters. Thus, it is possible that the strict new conditions for making arrests will merely offer a convenient excuse for inaction by the police.

Road ahead

While on the one hand it seems acceptable, from a human-rights

USTR Special 301 reports

It is common knowledge that in its much publicized and discussed Special 301 annual reports, the US Trade Representative (USTR) regularly observes that "India's criminal IP right enforcement regime remains weak" and that improvements are needed in the enforcement regime. Particular areas highlighted include "police action against pirates and counterfeiters" and the "imposition of deterrent-level sentences for IP rights infringers". It would therefore come as little surprise if the USTR, based on representation from US copyright and brand owners, takes strong objection to the recent amendment, which is perceived as watering down significantly the provisions relating to the arrest of infringers, thereby nullifying an important weapon for IP rights owners.

perspective, to alter arrest provisions to prevent their misuse, on the other hand, it seems trite and impractical to put a single blanket provision over all categories of offences, regardless of their nature. Considering the reality on the ground and the day-to-day workings of the Indian police systems, it appears that the new law will let even more criminals off the hook.

It remains to be seen whether the new bill will stand the test of time or eventually be modified or repealed. However, having already received presidential assent, it appears the new bill is set to be notified in the *Official Gazette* and obtain full legal force. [WTR](#)

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