Asian Patent Attorneys Association

India

ANTI-COUNTERFEITING COMMITTEE REPORT

59TH COUNCIL MEETING – MANILA, PHILIPPINES

November 12-15, 2011

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REPORT ON ANTI-COUNTERFEITING
IN INDIA 2011

INTRODUCTION

To counterfeit is to sell or market a non-genuine product as a genuine. Generally, such products are sold under the name of a famous manufacturer and an unwary consumer is misled to believe that the product originates from the same manufacturer. It is nothing but cheating a consumer and making him believe that he is buying the original branded product from the same source of manufacture as he imagines. The various statutes governing Intellectual Property Rights recognize such activity as an offence and provide for stringent punishments.

Counterfeiting causes huge losses to the State which loses out on revenue by way of taxes on goods. An FICCI survey estimated the loss of the Indian exchequer by way of taxes to be roughly around Rs. 1,000 Crore every year. Losses of companies to counterfeits is roughly around 4 to 10 per cent of their annual revenue and profits but more importantly companies have more to lose in the sense that they risk losing their credibility in the eyes of the consumer. On the human side, every year many lives are lost to counterfeit drugs and medicines.

COUNTERFEITING & INDIA
It is evident that counterfeiting of products continues to be a bane to the Indian economy as well as the world-wide image of the country. Globalization has brought the positives of increased commerce and opened India up for direct foreign investment, which is excellent for the country’s economy. However, India’s status as a low-cost manufacturing base also opens it up for use by counterfeiters as a prime location for the production of counterfeit goods both for domestic sale and export. Business for the Indian counterfeiters is at an all-time high. India’s counterfeit market for the present year is valued well above $ 5 billion, with auto parts comprising a major part of this. On 22nd February, 2011, the Economic Times reported that counterfeit auto parts cost the Indian Government Rs. 2200 crores per annum.

Various government agencies in cases of counterfeiting have taken action both on their own accord as well as upon receipt of a complaint, either from the private sector, the right owners or the consumers themselves. The owners of rights being more aware of their rights have now become more prudent and are swift in taking action. The Legislative policies have also seen a considerable change and more importantly the Courts in India too have woken up to the need of protecting IPRs in the need of not only protecting the statutory rights of right holders but more in the interest of protecting the unwary and unsuspecting consumer who would be eventual victim.

DRUGS

As per the global counterfeit goods ranking, counterfeited drugs are at the top of the list with a market value of $ 200 billion. World over India is a leading manufacturer and exporter of high-quality generic and patent drugs. However, the TAXUD statistics released by the European Commission a few years back showed us the dark side by stating that 75 percent of fake drugs supplied world over had some origins in India. The figures are bound to have increased considerably. The Indian pharmaceutical industry and government have accused Western multinationals of tarnishing their image in a bid to protect themselves from the dangers of generic competition. A report by Rama Lakshmi in The Washington Post suggests that an estimated 12 to 25 percent of all drugs

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1 http://www.havocscope.com/black-market/counterfeit-goods/counterfeit-goods-market-ranking/
2 http://www.havocscope.com/black-market/counterfeit-goods/counterfeit-goods-ranking/
sold within India are thought to be counterfeited. In order to clamp down on the illegal trade, the health ministry launched a reward program in 2010, offering $55,000 to those who provide information about fake-drug syndicates. In 2011, Sri Lanka blacklisted several drug imports from Indian companies for supplying low quality medicines. Several drug companies have made holograms or embossed logos mandatory on the packaging to protect their brands, but these have also been counterfeited in India.

The Indian government is taking the problem seriously and formulating methods and means to deal with it. Important changes have been proposed to the country’s IP laws like in January 2011 the procedure as stipulated by the Drug Controller General of India requires an amendment to Rule 96 (manner of labeling requirement) of Drugs and Cosmetics Act. The proposed amendment makes it mandatory for every drug manufactured in India to bear on its primary label Unique Identifier Code and 2D bar code by which anyone can verify the drug through an SMS. It is noteworthy that the commerce ministry had earlier passed a rule that medicine packs manufactured in India only for export must carry a bar code (which can be duplicated) whereas the current proposed amendment includes both UID and 2D bar codes.

**MOVIES & MUSIC**

India’s famous ‘Bollywood’ film industry is the largest producer of films in the world. It is under threat with piracy and counterfeiting proving to be such a nuisance that the very existence of the industry is at risk. The flow of counterfeit goods from China, which make their way into the country through the sea ports as well as from Pakistan, Nepal, Bangladesh and Burma make matters worse. Policing the endless boundaries which India shares with its neighboring countries is a next-to-impossible task and, unfortunately, slipshod border controls are encouraging the counterfeiters to extend their operations. Porous borders are threatening the Indian economy as well as its national security.

In India, there is almost no legitimate rental video market, since cottage pirate rental video stores dominate the market. The harm to the motion picture industry due to piracy of films has been well documented, but in Mumbai, DVD piracy at the street vendor level declined due to continual enforcement activities by the Alliance Against Copyright

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Theft (the Bollywood-Hollywood anti-piracy coalition) and law enforcement. In 2010, AACT was involved in 301 hard goods (DVD) raids in Mumbai and 19 hard goods (DVD) raids across Northern India.\textsuperscript{7} In a bid to fight against piracy, producers have begun officially releasing movies online within days of its release\textsuperscript{8}. The producers hope that the low cost for high quality prints would lure people into officially buying such movies online instead of succumbing to pirated versions, most of which are of poor quality prints. Music and movies are some of the industries worst affected by piracy in India. Considering that Bollywood is a national icon for India, making many more films than Hollywood but without nearly the same profit, it seems rather sad that this industry should be made to suffer through the actions of counterfeiters.

**ELECTRONIC & SOFTWARE**

The global counterfeit goods ranking list electronic and software counterfeits as close seconds to drug piracy with market values amounting to $100 billion and $ 58.8 billion respectively\textsuperscript{9}. Software piracy at the retail and wholesale level is prevalent, including hard disk loading and the open sale of pirate software in markets throughout India. Preliminary estimates by research firm IDC indicate that 64\% of PC software deployed in 2010 in India was unlicensed, with the commercial value of such pirated software for U.S. vendors amounting to more than US$1.05 billion\textsuperscript{10}. Pirated PC and console games are widely and openly available in smaller retail establishments throughout the country. In March 2011, the Hindustan Times reported that Nehru Place in New Delhi was a hub for pirated IT products and had been named by the US Trade Representative (USTR) as "among the world's biggest markets for pirated items". Housing over 1,500 shops, company distributors and retailers, dealing with all kinds of computer peripherals, hardware and software.\textsuperscript{11}

**BOOKS**

Piracy of books ranks 23rd in the global counterfeit goods list with a market value of $600 million, including trade books, textbooks, professional books (scientific, technical,
and medical), and scholarly journals continued to harm the publishing industry in India.

Book piracy occurs in a variety of ways in the country: unauthorized photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on sites created and maintained by university students. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues on and around university campuses and in libraries. It is time that the Ministry of Human Resource Development (MHRD) issues a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

**RECENT CASELAW ON ANTI-COUNTERFEITING**

M/S Mahashian Di Hatti Ltd. vs Mr. Raj Niwas, Proprietor of MHS 12 (4th May, 2011): The Delhi High Court awarded punitive damages amounting to rupees one lakh ($ 2500) in the instant case. Citing various case laws, the Court inter alia observed that punitive damages were governed by principles of corrective justice. The Court, further, noted that if punitive damages were not awarded in cases like the instant one, it would encourage unscrupulous individuals / companies to take unfair advantage upon the goodwill and reputation of others.

Sap Aktiengesellschaft & Anr. v. Mr. Sadiq Pasha 13 (3rd May, 2011): The software infringement case was decided in favour of the plaintiffs and the defendant was ordered to pay punitive damages amounting to rupees one lakh ($ 2500) to the plaintiffs. The proceedings were held ex parte and it is interesting to note that the court awarded punitive damages to punish the defendant on the basis that by being absent from the proceedings and not contesting the same the guilty party cannot escape punishment.

Tata Sons Ltd. vs Mr. Md. Jawed & Anr. 14 (28 March, 2011): The defendants who were engaged in the business of manufacturing and selling weighting scales and spring balances under the trade mark A-One TATA were restraining from manufacturing or selling their products under the trade mark TATA and punitive damages amounting to Rs.2 Lacs ($ 5000) were awarded to the Plaintiff.

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12 CS(OS)No. 326/2009 (Delhi HC)
13 CS(OS) No. 255/2005 (Delhi HC)
14 CS(OS) No. 264/2008 (Delhi HC)
Autodesk, Inc. & Another vs Mr. Prashant Deshmukh & Others\(^{15}\): The Delhi High Court voiced concerns about increasing instances of piracy of software of reputed companies such as Microsoft and AutoCAD in the country, which might cause discouragement amongst the investors in the development of such software in the lack of dwindling license fees. Furthermore, the use of pirated software for commercial rather than personal purposes should, according to the court, be more heavily frowned upon, and therefore the court awarded the plaintiffs the permanent injunction sought for as also punitive damages amounting to Rs. 1 lakh ($ 2500) against Defendant No. 2.

Mr. Arun Jaitley vs. Network Solutions Private Ltd.\(^{16}\): Delhi High Court granted punitive damages to the tune of Rs.5 lakhs ($ 12500) to the plaintiff for “causing hardship and harassment and mental torture to the plaintiff in getting back the domain name”

Microsoft Corporation v. Yogesh Papat & Anr.\(^{17}\): The Delhi High Court awarded damages against the Defendants for INR 19.75 lacs (approximately $49,375) for loading the software owned by Microsoft Corporation on the computer of their customers without seeking any permission from Microsoft Corporation for use of the software.

THE LEGISLATURE AND THE CHANGES IN LAW

- The Trademarks Act of 1999 provides for the registration of trademarks and the statutory protection of registered trademarks. Section 29 of the Trademarks Act provides for protection in cases of infringement of Registered Trademarks. In addition, Section 27 (2) clarifies that suits for passing off in respect of both Registered and Unregistered Trademarks can be maintained irrespective of infringement action.

- The Trademarks Act of 1999 provides for a Penalty of 6 months to 3 years of imprisonment in addition to a fine of minimum Rs.50,000/- for selling or applying false trade marks, trade descriptions, etc

- The Central Government under sub-section (1) and (2) of Section 157 of the Trade Marks Act, 1999, by a notification published in the official Gazette dated 20th May,

\(^{15}\) CS(OS) No. 1755/2003 (Delhi HC)
\(^{16}\) CS(OS) 1745/2009 & LA. No. 11945/2009 & 17485/2010 (Delhi HC)
\(^{17}\) 2005 (30) PTC 245
2010 has enforced the Trademarks (Amendment) Rules, 2010 which besides certain other changes has expanded the number of Classes for Registration. Which would only mean a more definite set of classes is created in respect of Trademarks making it easier to obtain orders from the Courts in cases of infringement.


- The Union Legislature on 10th of August, 2010 passed a Bill on to amend the Trademarks Act, 1999 the main aim of the Bill as introduced in 2007 was to incorporate into Indian law the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks. All the major trading jurisdictions are signatories to this Protocol. Surprisingly, India has enacted this legislation before signing the Madrid Protocol. India has also announced that “it will join the World Intellectual Property Organization’s (WIPO's) Madrid System for the International Registration of Marks later this year.18” This will enable trademark owners in general to extend the reach of their trademarks to the Indian territory by simply filing a Trademark application in any member country. This amendment would make it much easier and quicker to protect international Trademarks in India and would prevent misleading registrations in the first place which would go a long way in curbing counterfeiting.

- The Standard of Weight and Measure (Packaged Commodities) Rules 1977 were enacted to enforce the use of correct weighing and measuring instruments in production, trade and commerce and to ensure that exact weight, measure and quantity of any commodity is provided to any customer as contracted for. They are used to protect the consumers by assuring compulsory declarations on packaged commodities.

The Drugs and Cosmetics Act, 1940 provides for the definitions of “adulterated”, “spurious” or “misbranded” drugs and cosmetics. It empowers certain government agencies not only to inspect but also to seize and confiscate any product that is found to be adulterated, spurious or misbranded. The Government of India in 2009 vide Central Government notification no. S.O.2076 (E) notified the Drugs and Cosmetics (Amendment) Act, 2008 in order to amend the Drugs and Cosmetics Act, 1940. The amended Act provided for a flexible procedure, heavier penalties and longer prison terms for those convicted of offences relating to counterfeiting of drugs.

The Prevention of Food Adulteration Act, 1954 empowers government agencies to seize and confiscate “adulterated” or “misbranded” goods and also to suspend manufacturing licenses of manufacturers. The Courts have the power to take cognizance of offences under the Act and enforce fines and prison sentences.

The Maharashtra State Government in 2009 passed an Amendment to the Maharashtra Prevention of Dangerous Activities Act which provided more stringent punishments for offenders. In addition it empowered the police to take into preventive custody a habitual offender on the ground that he was about to repeat an offence relating to the sale of a counterfeit or pirated product. In addition a cell would also be set up to oversee the enforcement activities.

India has made many laws in respect of anti-counterfeiting however; the stand of the Country in respect to the definition of a counterfeit is quite different. According to India, a counterfeit cannot mean a legitimate generic version of a drug and that is why India strongly opposes ACTA.

**THE COURT AND ITS METHOD:**
The Courts in India have become well aware of what counterfeiting is and are now more open minded while looking at matters relating to Intellectual Property Rights in general. The Courts have changed their procedural working and now allow more flexibility with respect to IP litigation.
High Courts have now started giving ad-interim ex-parte injunctions as well as inspection and sealing orders with respect to matters relating to intellectual property. The Courts have also realized that Counterfeit products are a menace and pose a serious danger to the health and safety of consumers.

The Courts have reduced the life-span of IP litigation and in the case of TVS v/s Bajaj Motors the Supreme Court observing the seriousness of the issues involved has observed as thus:

“In our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit.”

**REMEDIES**

- **Injunctions**: Chartered Financial Analysis Institute v. The Institute of Chartered Financial Analysts of India and Ors. Del HC 2010

- **Anton Pillar Orders**

- **Roving orders** – Landmark case: Laxmikant Patel vs. Chetanbhat

- **John Doe orders** – Landmark Cases: Taj Television Limited vs. RajanMondal/Singham Case

- **Damages**-compensatory, punitive and exemplary (High Court of Judicature at Delhi itself has given large amount of damages in almost 65 IP cases in the past year).

- **Costs**.

- **Punitive damages**
Total of compensatory, punitive and exemplary damages of Rs. 4,00,000/- ($10,000) in addition to costs United Biotech (P) Ltd. v. Schon Pharmaceuticals Ltd. Del HC 2009

Lock Breaking Powers

Police Aid for Civil Raids- Microsoft Corporation vs. Mr. Kiran and Anr.

Quia Timet Actions- Orders issued in advance of infringement to prevent and effectively deal with counterfeiting;

Taking a serious note of the proliferation of spurious drugs in Uttar Pradesh, the Allahabad High Court in a Writ Petition while coming down strongly on the state Government directed it to ensure that adequate steps were taken to check the menace. It also directed the State to ensure that necessary funds and facilities were available in addition to staff for the same. The Drug Controller’s Office was also ordered to place before the Court, data in respect of raids and seizures carried out by it. The Government was also directed to set up chemical analysis laboratories.

The High Court of Bombay at Goa in a Criminal Appeal against a lower Courts Order filed by the Food and Drugs Inspector, convicted Samuel and Manuel Athisavem, two small time businessmen and sentenced them to undergo simple imprisonment for three months and a fine in a case involving misbranding of peanuts.

THE ENFORCEMENT AGENCIES

Enforcement Agencies: The various legislations empower many governmental agencies to deal with issues of IP infringement and counterfeiting. Some of these and some prominent cases in which they were involved in the past 1 year are listed below:

(i) The Police Force: The Police force is empowered to deal with counterfeiting matters and acts on complaints filed by individuals. The police also provide assistance in civil raids on counterfeits.

In June 2009 the D B Marg police conducted raids at three places in South Mumbai and seized counterfeit spin oil filters and other products of Kirloskar company worth Rs. 35,000.
In June 2009, large quantities of counterfeit turmeric powder were seized from a spice mill in the Vishakarma area of Jaipur city. The fake spice powder was being produced using grinded waste of turmeric and rice plants mixed with colour. However, the artificial essence used made the powder look and smell similar to the original product.

In November 2009, the Chandigarh police during a raid recovered medicines worth around Rs 2,00,000. They acted upon a complaint of Johnson & Johnson branch inspector.

In May 2010, India's Central Bureau of Investigation arrested the heads of two drug companies Gurbachan Singh of J P Herbal Pharmacy and NavinGadekar of NaliniAyurvedic Co for allegedly manufacturing counterfeit medicines. The raids were conducted to check the supply and manufacturing of counterfeits, the sale of expired medicines and the movement of counterfeits through the Indian supply chain. CBI agents raided facilities from May 12 to 19, 2010, in New Delhi, Nagpur and Chennai. The agents also made 62 surprise visits to facilities. Six cases are moving forward.

In August 2010, South district police of New Delhi arrested a person and recovered 7,500 tablets of Listril 5mg and 60 units of Octride-100 in packets bearing falsified trademark of its producers.

(ii) The Customs: The Customs authorities are empowered to seize all Intellectual Property infringing goods at the point of entry itself.

In June 2009, fake spark plugs of Bosch with "Made in India" tags, but originally manufactured in China, were seized at the Chennai port by the Customs.

In July 2009, Rs 6,00,00,000 ($ 1500000) worth counterfeit cosmetics and mobile phone batteries of popular brands like Garnier and Nokia were seized by customs.

In Oct, 2009 the Chennai Seaport Customs seized a consignment of spurious baby care products and herbal shampoo valued at Rs 20 lakh ($ 50000) (Rs.2 million). The consignment was shipped from China to Chennai via Hong Kong. The seized fake products include Johnson and Johnson's baby shampoo and baby milk bath,
Procter and Gamble's Clairol herbal shampoo and Malaysia-based Gervas' herbal conditioning shampoo named Gervenne, which has no market exposure in India. All the products were packed in look-alike containers.

- In October 2009, Rs.1,50,00,000 ($ 375000) worth of adulterated and misbranded food products sourced from China, Malaysia, Thailand and Vietnam were confiscated by Customs.

(iii) **Health Department/DGCI**: The Health Department and the Drug Controller General of India.

- In December 2009 a raid in Agra yielded drugs worth Rs. 6,00,000 ($ 15000).
- In June, 2009 during a raid in Barra locality of Kanpur fake drugs, cough syrups and antacids in particular, worth over Rs 1,00,000 ($ 2500) were recovered.
- In July,2010 sleuths of the drug control wing of the health department conducted a raid at a house in Maharani Colony, Patna in and seized spurious drugs, wrappers and other materials worth Rs.5,00,000 ($ 1000).
- In July, 2010 the drug department picked up Voveron 100 mg from pharmacies and dealers in Chennai and found them to be spurious.

(iv) **Food and Drugs Administration (FDA)**: The FDA of each State also is empowered to deal with counterfeiting issues and tackle the menace.

- The Maharashtra State Food and Drug Administration (FDA), in late 2008 conducted a survey on cosmetics in Maharashtra State, found that 21 out of 125 samples drawn from the market were spurious/counterfeit.
- In December 2009 Spurious drugs worth Rs 1,04,00,000 ($ 2,60,000) were seized from Muzaffarnagar in Uttar Pradesh.
- In December 2009 drugs worth Rs 13,50,000 ($ 33750) were seized from Varanasi, Uttar Pradesh.
Also in December 2009 raids yielded drugs worth Rs 11.50 lakh ($ 28750) in Lucknow, Uttar Pradesh.

Roger Bate, a leading authority on counterfeit drugs recently in 2010 wrote an article for the Wall Street Journal on raids conducted by the Food and Drugs Administration in India and the prevalence of counterfeit drugs and spoke about how last year alone, counterfeit drugs were seized by authorities in Bangalore, Mumbai, Delhi, Jaipur and many other Indian cities.

**PRIVATE SECTOR & RIGHT OWNERS**

Members of the Private Sector have realized the value of their IP and fight counterfeiters.

In May, 2010 Hewlett Packard filed complaints with the local police in Bangalore, Delhi and Gandhidham and conducted raids and seized over 12,000 counterfeit products that included various ink and toner packages. The raid discovered more than 5,000 additional production items and around 79,000 toner security labels.

In July 2010, 3M won a case against counterfeit stationary items bearing the Trademarks 3M, Post-it and Post-it (logo) in Bombay High Court which ordered that all stationary products from defendants' premises be seized in addition to damages of Rs. 4,00,000 ($ 10000).

Through the initiatives of Dabur India, raids were carried out on premises in West Bengal, Ghaziabad and Rajasthan which led to the seizure of spurious personal care and healthcare products, as well as medicines worth over Rs. 15 million (around $325,000).

On 1st September 2010, the Confederation of Indian Industry organized a Seminar on “Combating Counterfeiting & Piracy” at the Andhra Pradesh Police Academy for the Senior State Police Officers as a part of an initiative to help the officers to be well abreast with the laws regarding Counterfeiting and Piracy.
Hindustan Unilever Limited a leading manufacturer, in the year 2009 carried out about 141 raids on retailers, wholesalers, manufacturers and counterfeit goods worth over Rs. 36,90,000 ($ 92250) were seized. Upto August 2010 HUL had conducted over 120 raids.

Hindustan Unilever Limited, in September 2009 issued “a concise guide on Intellectual property protection” a booklet for educating Customs formations all over the country, in order to help them detect counterfeits that were entering the country through the borders.

GOVERNMENT INITIATIVES

In 2003 India's cabinet approved the death penalty for people who manufacture and sell counterfeit drugs. This is still a bill and will become law if/when parliament approves this bill.- www.medicalnewstoday.com

In late 2008 the upper house of parliament approved measures to create a comprehensive national food and drug authority. Penalties for those manufacturing and trading in fake drugs were increased, and it would be easier to capture and convict counterfeiters. The new law would increase jail time for convicted drug counterfeiters from a minimum of five years to a minimum of ten years and increases the minimum fine for such offenses from 10,000 rupees to a million rupees.- www.theamerican.com

In 2009 in an attempt to tackle the menace of fake life-saving medicines, the health ministry proposed a "whistle blower" policy that would handsomely reward both the public and officers who inform and help seize spurious, adulterated and misbranded drugs, cosmetics and medical devices. - KounteyaSinha, TNN, Jul 23, 2009, 02.40 am IST.

The Uttar Pradesh State Government in February, 2010 decided to invoke the stringent National Security Act against offenders found engaged in dealing/trading in, or manufacturing fake drugs in the state. The extreme measure shall be resorted to in case of grave and extreme cases to rein in the drug mafia. - TNN, Feb 20, 2010, 05.51am IST
In order to facilitate proper co-ordination between the stakeholders and the enforcement agencies in the matter of enforcement of copyright laws, the Government of India requested the State Governments to designate a Nodal Officer in its respective State to deal with enforcement issues. The Nodal Officer so appointed would be Senior Officers of the police at the rank of Superintendent of Police/ Inspector General of Police etc.

On 31st August 2010 the Government organized a Training Seminar on Intellectual Property Rights at the National Police Academy for Police Officers in order to sensitize them towards IP issues in general and dealing with counterfeiting in particular.

CONSUMER INITIATIVE
A social worker on 28th July, 2010 filed a writ petition at the Nagpur Bench of the Bombay High Court against the Union Secretary, Ministry of Health and Family Welfare and others, praying for directions to the Government to take necessary action against food adulterators and counterfeit drug manufactures.19

CONCLUSION
From the above, it can be safely assumed that the procedures and measures currently being proposed and put into practice by the Government of India as also the private sector are sufficient to redress the counterfeiting problem in India.

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19 TNN, Jul 29, 2010, 06:03am IST