

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY

India has a large, significant indigenous copyright industry, across all of the artistic, literary and computer fields. These industries are growing very rapidly despite high levels of piracy. The software industry is expected to grow to a \$90 billion industry by 2008 (with predicted exports of \$50 billion). That industry was also predicted to contribute 7.5% to GDP growth by this period; software exports would account for 30% of all Indian exports by 2008. The music and motion picture industry is predicted to become a \$15 billion industry by 2005. A study done in 1995 concluded that the copyright industries represented over 5% of GDP.¹

With these significant prospects for strong economic growth in the copyright field, it is unfortunate that piracy levels continue to hinder that growth and that the primary obstacles to reducing these rates are police corruption, lack of resources and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal case. Larger pirates are often protected by the police, and it has become commonplace for only smaller pirates to be raided. Even if these problems were to be solved, the Indian court system continues to present an issue that seems almost incapable of a solution. This problem alone, we believe, significantly hampers Indian economic development.

The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense. To IIPA's knowledge there have only been four criminal convictions for video piracy in India since the effective date of the new copyright law in 1995, and a few convictions for music piracy including two in 2000 with prison sentences of three and two years for music piracy. Most music piracy cases have not reached the trial stage and those that have involved only small fines. There have been no convictions for software piracy. Surprisingly, one industry – the motion picture industry -- has had better fortune using the civil route by getting countrywide injunctions against cable pirates, even though civil cases take even longer to get to judgment than criminal cases. Judges have been willing to issue contempt citations for violations of these injunctions which have brought some deterrence, though it is estimated that it will take five years to adjudicate a contempt citation through to actual enforcement. What is crystal clear from all of this is that the enforcement system is inadequate to the task of dealing with piracy and must be substantially reformed.

At the end of 1999 India adopted a number of amendments to bring it into compliance with its new TRIPS obligations. While it generally did so in the copyright area, the Parliament also passed new, unanticipated exceptions to protection for computer programs which do not pass muster under the tripartite test of article 13 of TRIPS. A new Information Technology Law was

¹ However, a study conducted in 1997 for the Indian government by the National Productivity Council set the number at only 1%, which even the authors thought was too low due to the unavailability of adequate information.

adopted in May 2000 and while it deals with some aspects of ISP liability, it is reported that it is not meant to deal with copyright issues.

India's new government has established a core group to study WIPO treaties ratification. It is expected that a report will be issued in spring 2001. It is hoped that the core group will follow the lead established in the DMCA and E-Commerce Directive, but that is uncertain at this time. It is strongly in India's interest to implement these treaties correctly and fully, and to ratify them.

Because of India's continued inability to bring deterrence into its enforcement system, IIPA recommends that it be kept on the Watch List for 2000.²

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	47.0	60%	66.0	80%	66.0	80%	66.0	80%	66.0	85%	58.0	99%
Sound Recordings / Musical Compositions	6.0	40%	8.0	40%	6.0	30%	6.0	40%	7.0	30%	10.0	30%
Business Software Applications ³	195.2	63%	160.2	61%	158.0	65%	148.7	69%	182.4	78%	114.6	78%
Entertainment Software ⁴	NA	80%	42.8	86%	36.8	84%	35.9	82%	31.4	78%	25.8	76%
Books	36.0	NA	35.0	NA	30.0	NA	22.0	NA	25.0	NA	25.0	NA
TOTALS	284.2		312.0		296.8		278.6		311.8		233.4	

COPYRIGHT PIRACY IN INDIA

Piracy pervades all the copyright industries – domestic, U.S. and international. For the film industry, unauthorized cable television transmission remains the predominant form of piracy. As many as 40,000 cable systems exist in India, and these systems continue frequently to transmit U.S. films without authorization, often using pirated videos or video CDs (VCDs) for their transmissions. These cable systems seriously undermine the entire business, including theatrical, home video and legitimate television. Since 1999, MPA has brought civil actions in an attempt to limit cable television piracy. This has been effective in reducing piracy for U.S. films, but Indian films continue to suffer significant losses at the hands of pirate cable operators. The passage of the amendments to the Cable Television Networks (Regulation) Act, 1995, discussed below in the

²For India's long involvement with the Special 301 process, see the history in Appendix E.

³BSA loss numbers for 2000 are preliminary.

⁴ IDSA estimates for 2000 are preliminary.

legislation part of this survey, has reportedly had some effect in deterring piracy, though no actions have yet been brought under it.

Pirate videos and VCDs are available in major cities well before the local theatrical release of the title. Video piracy rates of U.S. films have dropped somewhat, to around 60%, owing to the continuing enforcement activities by MPA. The piracy rates for Indian motion pictures continues to remain very high, from 80% to 90%. There is hardly any Indian film title which is not readily available in pirate video format within a few days of its theatrical release.

VCDs are mostly imported from elsewhere in Asia, many from Malaysia and now Pakistan. This pretheatrical-release piracy has devastated the Indian film industry to such an extent that Indian producers have made simultaneous theatrical and video releases of their titles, unique to almost anywhere else in the world.

In November 2000, MPA undertook its first raid on a CD plant in Rajasthan, where 40,000 VCDs were seized of pornographic and Hindi blockbusters. Fortunately no U.S. product was found, but the size of the seizure indicates the growing threat of optical media piracy in India. Another investigation led to the discovery of one of the largest distribution channels for pirate films in India.

The recording industry reports that piracy rates stayed steady in 2000 at 40% nationwide. Most of the audiocassette piracy is not in the retail shops, but limited to street vendors. A very large percentage of pirate unit sales in India continue to be in the cassette format. CD piracy tends to be limited to international repertoire and pirate copies are generally imported, like VCDs from the rest of Asia and predominantly Malaysia, though the problem of local pirate production is increasing. In addition, other industries have reported the sourcing of some pirate production in the export market from India. Many shops in major cities now use CD burners and are able to make compilations of music at the request of a customer – an increasing problem.

The recording industry also reports increasing instances of Internet piracy in India. The local industry estimated in April 2000 that there were over 30 Indian sites containing infringing MP3 files for download. A complaint was filed by IMI, the local recording industry trade association, against a Web portal and IMI now reports that the site has applied for a license to stream Indian-origin music.

With respect to business software applications, India is still the third largest producer in the world. The incredible growth noted in the summary above may be attributable in part to the strong emphasis on anti-piracy activity spearheaded by NAASCOM. The business software piracy rate in India has dropped consistently, from 78% in 1995 to 63% in 2000, a 2% increase from 1999. It can be reasonably expected that further reductions in piracy would only benefit the burgeoning software industry and the American companies that work and partner with these companies. Piracy is mostly concentrated in the end-user category with major Indian companies not purchasing legitimate software. However, piracy at the retail and wholesale level is also prevalent.

Interactive Digital Software Association (IDSA) members continue to report moderate levels of piracy in India, including the manufacture of pirate games, some pirate exports, and difficulties with enforcement. Losses for 2000 are not yet available and the piracy rate is 80%.

The Association of American Publishers, which had teamed up with the British Publishers Association and the Federation of Publishers and Bookseller Association of India in 2000 to commence a joint enforcement program, estimates that for each genuine book sold in India, four copies are unauthorized, either pirate reprints or commercial photocopies – a piracy rate of 80% for foreign works, up significantly from prior years. Piracy covers all lines, trade, textbooks and professional and scholarly publishing, including journals. Exports of India-only reprints, found in large quantities throughout the Middle East and southern Africa, particularly South Africa, and traditional piracy of books continues. A recent raid in Mumbai, described below, resulted in the seizure of over 19,500 trade books and 800 technical books.

COPYRIGHT ENFORCEMENT

Criminal Enforcement and India's TRIPS Obligations

As noted above, criminal enforcement has been the most frustrating problem for the copyright industries. While all industries have reported occasional good cooperation from the police, this is far from the norm, and the situation has appeared to deteriorate. Police are often responsible for leaked information before raids and are generally slow to act. Raiding has been at a relatively high level, and often arrests are made with defendants spending some time in jail before posting bail – bringing some deterrence into the system beyond mere product seizures. Moreover, criminal enforcement in India is a state matter; there is no national coordination of enforcement, leading to wide variances in capabilities and results throughout India. Many Indian right owners are now calling for an IPR court system and a better trained and broader based IPR police force. Both the courts and the police are considered to lack basic knowledge and sensitivity to IPR issues.

There are many procedural hurdles at the police level which hamper enforcement. For example, even though police can act on their own to seize pirate product under some laws, they invariably require a complaint from the rightholder. The police will then only seize the product of that rightholder, even though the presence of other pirate product is open and obvious. Following a raid, police can take up to a year to prepare the charge sheet on a defendant and then leave out pertinent information. Often investigations are cursory, with no attempt being made to follow the source of supply or find out pertinent details from the shop owner. When the charge sheet is presented in court, cases are routinely dismissed due to the insufficiency of the charge and the evidence supporting it. The police also often insist upon the complainant producing copyright registration certificates for each film found at the time of the seizure. Such a requirement is contrary to Indian law.

Because criminal cases proceed so slowly, the investigative officers have often been transferred to a remote location and the trial is delayed further by the task of securing their presence. With such long delays, the evidence is often missing or unusable. These investigative officers must be present at the trial, which may be many hundreds of miles away. If he does arrive, the defendant can easily postpone the hearing or trial.

As reported in last year's IIPA submission, as a result of these problems, in 1999 the motion picture industry decided that the criminal system no longer was proving useful to the industry in fighting its major problem, cable piracy, and moved to a civil litigation strategy. As described in part above, the problems encountered were manifold, including severe delays in closing criminal cases (up to seven years), corruption and leaks of information, the need for timely raids

with police resources not being available on short notice, the need to have investigators and complainants present at every hearing, in spread out locations for the entire period of the pending case, the need to track multiple hearings in diverse locations, frequent continuances for depositions, etc. (There is no continuous trial in India).

In moving to a civil strategy, the industry was able to obtain broad injunctive relief, backed by contempt powers. Rather than be at the mercy of the police, public prosecutors and defense counsel who regularly continued proceedings, civil cases, because of these injunctions, have proven more effective – a result almost unique in the global enforcement against copyright piracy. Nevertheless, while these procedures have had a deterrent effect, defendants regularly challenge these injunctions and MPA reports that it will take up to five years before a contempt citation is actually enforced. In one of the injunction and contempt proceedings undertaken above, the injunction was issued in August 1999 and the first hearing was not scheduled until August 2000.

The record in criminal cases has been appalling, despite a strong law with penalties of no less than six months imprisonment and minimum fines. In the film field, reported convictions have not exceeded four, all discussed in last year's submission. There were three convictions under the pre-1995 amendments (e.g., before the higher penalties were adopted): the first in January 1997 in a Bangalore court where a video pirate was sentenced to three years hard labor in a case from 1993; the second in May 1997 when a New Delhi Magistrate sentenced a cable operator to six months imprisonment, to be served in hard labor, and ordered a fine of Rupees 5,000 (U.S.\$115); the third in early 1999 (involving a raid conducted in 1986!) where the sentence was one-year imprisonment and a fine of U.S.\$118. The May 1997 conviction was the first conviction against cable piracy. A fourth case was decided in December 1998 against a video pirate – the first case under the new 1995 law. It is reported that some of these cases were then reversed on appeal.

The statistics go downhill from here and there has been little change in 2000. Despite bringing a large number of cases over the years, the recording industry has obtained only a few criminal convictions in the south of India subject to small fines – reportedly at a maximum of Rupees 25,000 (U.S.\$605), far below the minimum required in the law. However, as noted above, there were recently two convictions with jail terms of three and two years, respectively – a positive sign. BSA has undertaken many criminal raids against retail and wholesale pirates between 1995 and 2000, in which 118 people were arrested and considerable pirate product seized. Over 70 criminal cases are pending with none having proceeded past the most preliminary stages, much less to trial or conviction. In 2000, 26 raids were run and 74 criminal cases are pending. MPA ran 104 criminal raids in 2000 with only limited results. Trials in these cases have yet to commence and it is too early to predict whether there will be convictions. MPA currently has 505 cases pending in the courts. Thus, in 2000 there have been no trials and no convictions.

The joint publishing industry enforcement effort bore fruit in November 2000 with one of the largest criminal book piracy raids in Indian history. Over 19,500 trade books were seized in Mumbai, along with 800 scientific, technical and medical books and two photocopiers. Seven persons were arrested and the magistrate gave each six days of pretrial detention. Further investigation, growing out of this one, may turn up an even larger ring. Raids have also been conducted in New Delhi (together with the Federation of Indian Publishers) and in Hyderabad. Seven arrests, two large truckloads of books and five high-speed photocopiers were seized. Additional raids in other cities are planned. All this activity seems to have had a deterrent

effect, but this has not yet been reflected in lowered losses and rates and likely will not be until deterrent convictions are secured.

**CRIMINAL COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	MPA	IFPI	TOTALS
Number of Raids conducted	104	1054	1158
Number of indictments filed	96	600	696
Number of defendants convicted (including guilty pleas)	0	NA	
Ratio of convictions to the number of raids conducted	0%	NA	
Ratio of convictions to the number of indictments	0%	NA	
Total number of cases resulting in jail time		2	2
1 to 12 months	0		
13 to 24 months	0	1	1
25 to 36 months	0	1	1
37 to 60 months	0		
Over 61 months	0		
Number of cases resulting in criminal fines	0	NA	
Total amount of fines levied	0	NA	
U.S.\$0-\$1,000	0		
\$1,001-\$5,000	0		
\$5,001-\$10,000	0		
\$10,000 and above	0		
Total amount of restitution ordered in how many cases	0	NA	

CIVIL ENFORCEMENT

The failure of the criminal system, as noted above, has led one IIPA member – MPA -- to alter its enforcement strategy from criminal cases against cable pirates to bringing civil cases. The association was able to obtain a number of broad injunction orders, backed by the threat of a contempt conviction if the orders are violated, which have been effective in the fight against cable piracy. To date MPA has filed eight civil actions against some of the largest cable networks in the country. The injunctions cover these cable networks in over 45 cities consisting of in excess of eight million cable homes. Three contempt proceedings have also been initiated against these networks for violating court orders, but as noted above, these cases have been substantially delayed. Nevertheless, these contempt orders have had a deterrent effect and MPA's estimates that cable piracy has been brought down by 50%. Encouraged by this initial success, MPA has filed civil actions against other forms of piracy as well. In one of these, against shop owners in Palika Bazaar in New Delhi (these shop owners were part of a larger network supplying pirate product throughout Northern Indian and even Pakistan), an initially successful civil raid turned sour when the shop owners protested and the police returned over 40,000 seized

VCDs back to them. The police openly conspired with the shopkeepers to ensure that the seizures could not take place. However, the court ultimately issued injunctions and the shop owners remain in jeopardy. The court is now conducting hearings for return of the seized property as well as for contempt of court for obstructing the local commissioners. The shopkeepers have been asked to be personally present in court to explain how the goods were allowed to disappear. At least for the time being, the shopkeepers are not engaged in piracy of U.S. videos.

BSA and NASSCOM have also filed nine civil cases against corporate end-users since 1998 and all but two have been settled. There are also 31 active civil cases against counterfeit resellers and hard disk loaders. These cases are costly to maintain and difficult to settle due to the slowness of the system and the lack of jeopardy points during a noncontinuous trial process.

**CIVIL COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	MPA	IFPI	TOTALS
Number of civil raids/searches conducted	5	0	5
Post Search Action			
Cases Dropped			
Cases Settled			
Cases Adjudicated			
Value of loss as determined by Court (U.S.\$)			
Judgment Amount (U.S.\$) in how many cases			
U.S.\$0-\$1,000			
\$1,001-\$5,000			
\$5,001-\$10,000			
\$10,001-\$20,000			
\$20,001-\$50,000			
\$50,001-\$100,000			
\$100,000 and above			
Settlement Amount (U.S.\$) in how many cases			

This overall criminal and civil enforcement record implicates India's TRIPS enforcement obligation in each area. Its enforcement system has the following deficiencies which render it incompatible with the TRIPS Agreement:

1. Maximum statutory fines are too low to deter major infringements and the reported requirement that actual knowledge be proved in criminal cases violates TRIPS articles 41 and 61.
2. There have been negligible criminal convictions for piracy in India since 1995 and after 2000 in violation of TRIPS articles 41 and 61.
3. Court procedures are overly burdensome; courts are severely backlogged and there are massive delays in bringing criminal and civil cases to final judgment in violation of TRIPS articles 41, 41(2), 42 and 61. Civil *ex parte* searches are available and are reported to be more readily available than as reported in last year's submission.

Lack of Customs Enforcement

The import of motion pictures into India is covered by the Restricted List of the Export and Import Policy of India. Subject to certain exceptions, imports even of legitimate films are not permitted without an import license, a market access issue that has been the subject of industry complaint for years.

Import of any pirated films into India is specifically prohibited under the Export and Import Policy 1997-2000. This includes import in any format, including on videotape, VCD, LD or DVD. Import of pirate motion pictures in any form is considered smuggling and the goods are subject to confiscation. The Customs Act establishes a maximum jail term of up to three years makes the person who acquires possession of, or is in any way concerned in, carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other way dealing with any goods he knows or has reason to believe are smuggled, equally liable for punishment.

Despite the strength of this law, the Customs authorities almost never enforce it against importers of pirate motion pictures.

DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

Copyright Law and Enforcement Provisions: India's TRIPS Legislation

The Copyright Act of 1957 was amended in 1994, and was implemented on May 10, 1995, resulting in one of the most modern copyright laws in any country. In 1995, a number of significant changes were made, including to the enforcement provisions. Minimum penalty provisions (sections 63, 63A and 63B) provide for a mandatory six-month minimum jail term for commercial piracy, with a maximum term of three years, and a minimum fine of 50,000 rupees (U.S.\$1,210) and a maximum of two lakh rupees (U.S.\$4,840). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (U.S.\$2,420) for a second and subsequent offense. "Use" of an infringing computer program now carries a minimum jail term of seven days and a minimum fine of 50,000 rupees (U.S.\$1,210). With the exception of the level of fines, which should be increased, these are among the toughest criminal provisions in the world. Unfortunately, they have not been implemented.

Overall, the new law was TRIPS-compatible from the standpoint of substantive rights, except that the term of protection for performers needed to be increased from 25 to 50 years. At the end of 1999, the Indian government drafted and the Parliament adopted a number of further amendments intended to bring its IP laws, including the Copyright Act of 1957, into compliance with TRIPS. These amendments were signed by the President of India on December 30, 1999 and went into force on January 15, 2000.

India Backslides in Protecting Computer Programs

The TRIPS-related copyright amendments fixed the remaining deficiencies in India's statutory law in the area of substantive rights. However, three new amendments, added at the last minute and not related to India's TRIPS obligations, severely compromise the high level of protection that India has always afforded computer programs. The amendments added three new exceptions to the protection for computer programs in sections 52(1)(ab) – (ad). Subsection (ab) grants an overbroad exception permitting the decompilation of computer programs; subsection (ac) provides an exception apparently permitting unauthorized reproductions to observe the functionality of a program without the proper safeguards of TRIPS article 13; and another broad exception in subsection (ad) allows the making of multiple copies and adaptations of programs "for non-commercial personal use," again without article 13 safeguards. Subsection (ad), unless narrowly interpreted by a court, would permit such uses to substitute for the normal licensing of software to home and even business customers, so long as the copies are used for "personal" purposes. IIPA and BSA believe these new and unexpected changes to India's regime for protection of computer programs violate TRIPS article 13 establishing a tripartite test for measuring whether exceptions to protection are legitimate or not.

Cable Law Amendments

In a further effort to reduce film piracy by cable networks in India, the Government has adopted certain far-reaching amendments to the Cable Television Networks (Regulation) Act, 1995 on September 9, 2000.

The new rules prohibit cable operators from carrying or including in their cable service any program that has not been granted a license in writing by the owner(s) of the copyright in respect of such programs. Such transmissions if made, shall constitute a violation of the "Programme Code" [Rule 6(3)]. The District Magistrate/Sub-Divisional Magistrate and the Commissioner of Police have been designated as "Authorized Officers" to enforce the Programme Code. If any of these "Authorized Officers" have reason to believe that the Programme Code has been or is being contravened by any cable operator, they have been empowered to seize the equipment being used by the cable operator for operating the cable television network. These "Authorized Officers" are also empowered to prohibit any cable operator from transmitting or re-transmitting any program or channel which violates the Programme Code. This is clearly a positive development and the law fills a lacuna in the Cable Act wherein previously there was no specific prohibition against exhibiting pirated films on cable networks. As noted above, not a single action has been brought under these new amendments.

A proposed Communications Convergence Bill will replace the Cable Television Networks (Regulation) Act 1995 and its amendments. IIPA has not reviewed this bill but it apparently contains good IPR provisions including (a) granting the Communications Commission of India the same power vested in a civil court under the Code of Civil Procedure 1908 while trying a suit; (b) requiring every service provider to ensure that no program infringes a copyright; and (3) imposing penalties for violation of up to rupees 10 crores (U.S.\$24,000).

The WIPO Treaties and the New Information Technology Bill

With its powerful and growing software and IT industries, the largest and most sophisticated entertainment industries in all of Asia, and a large English language publishing industry, India is a prime candidate for early ratification of both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. India has signed the treaties and the government has appointed a “core group” of academics and private sector representatives to review India’s possible ratification and implementation of the treaties. IIPA has also heard that some drafting may even have been done. IIPA has no current information on what tack the “core group” is taking but a report is expected to be released this spring.

Fortunately, India is a long way down the path of implementing the provisions of the treaties and should take the lead in Asia in the area of ecommerce by adopting this critical element of infrastructure. India’s copyright law already conforms to many of the key provisions of the treaties. For example,

- The Copyright Act’s provisions on the reproduction right can already be read to cover temporary copying in accordance with the treaties’ “agreed statement” on the reproduction right. A simple amendment avoiding any ambiguity on this important point would be advisable, however, and involve merely the addition of the words “whether permanent or temporary” after the words “in material form” in Section 14(a)(l) of the act.
- The act also appears to implement the treaties’ “right of communication to the public,” including the making available right in Section 14. The making available right could also be made a feature of the Act’s distribution right through a simple amendment to that right in Section 14.

However, the Copyright Act cannot be read to implement the treaties’ obligations with regard to technological protection measures (TPMs) nor with respect to protection of electronic rights management information (RMI). We are informed, however, that Section 25 and 107 of the Penal Code may cover some, but not all, of the elements of this obligation.

In 2000, India adopted its “Information Technology Bill.” While IIPA has not reviewed the bill as finally adopted, it reportedly contains provisions to deal with the fast-approaching world of electronic commerce, deals in major part with electronic signatures and authentication, and establishes a certification regime. In addition it sets out new offenses for various types of computer crime. The new law does not fully implement the WIPO treaties’ requirements on TPMs or RMI, though there are apparently provisions touching on part of those obligations. It also reportedly contains provisions on ISP liability, but apparently not with respect to copyright infringements which may be covered in the core group report and dealt with, if at all, in the copyright law amendments implementing the WCT and WPPT.

Generalized System of Preferences

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program which offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provide “adequate and effective

protection of intellectual property rights." In 1999, \$1.02 billion of India's imports to the United States benefited from the GSP program, accounting for 11.2% of its total imports to the U.S. For the first eleven months of 2000, \$1.1 billion of Indian goods entered the U.S. under the duty-free GSP code, representing an 11.9% increase over the same time period last year. At the same time, India caused losses to the U.S. due to piracy of \$284.2 million (not counting entertainment software losses which are not yet available) in piracy losses in 2000.