

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY¹

IIPA recommends that India be retained on the Priority Watch List.

While India has a large, significant indigenous copyright industry, across all of the artistic, literary and computer fields,² these industries are severely stunted due to high levels of piracy. The primary obstacles to reducing piracy rates in India are police corruption (larger pirates are often protected by the police), lack of resources, and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal cases. It has become commonplace for only smaller pirates to be raided.³ While India has made some progress in fighting software piracy, corporate end-user piracy (unauthorized use of software in a business setting), the availability of pirated software at the retail level remains at unacceptably high levels, thereby limiting the market in India for computer software; six out of ten business software programs in use in India are illegal. Meanwhile, the criminal system is slow, cumbersome, and fraught with delays and unnecessary expenses.⁴ Surprisingly, the motion picture industry has had some success in obtaining countrywide civil 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 would take five years to adjudicate a contempt citation through to actual enforcement.

In 2002, IIPA hopes to see several key changes in India that would go a long way toward improving the situation there and bringing down piracy levels:

¹ For India's long involvement with the Special 301 process, see the History appendix.

² A study done in 1995 concluded that the copyright industries represented over 5% of GDP. More recent indicators suggest that the software industry will grow to a \$90 billion industry by 2008 (with predicted exports of \$50 billion, or 30% of all Indian exports), contributing 7.5% to GDP growth by this period. Indicators also suggest that the music and motion picture industries will become \$15 billion industries by 2005. Another study by the National Productivity Council in 1997 set the growth number at a low 1%, but the authors of that study freely admitted their estimate is too low due to the unavailability of adequate information to them.

³ Recently, however, book publishers have, with difficulty, been able to secure the arrest of three "fixers" in Delhi and Mumbai, seizing a printing press and 37 photocopiers, which remain in police custody. A "fixer" is a person who identifies a bestseller, estimates its demand, gets the copies printed and distributes to most State capitals, mostly simultaneously with the genuine publishers, e.g., the Harry Potter Series, Robin Cook "Abduction", John Grisham "The Painted House", Katherine Frank "Indira," Shiv Khera "You Can Win", etc. See Times of India dated July 13 2001 story titled "25,000 pirated books seized, five arrested,"

⁴ 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, respectively, 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.

- **Establish a Centralized Body Dedicated to IPR Enforcement.** There is currently no national coordination body devoted to enforcement in India, but instead, enforcement is left to each individual state. This leads to an inefficient system, with a wide variance in capabilities and results throughout India. Moreover, there is little expertise within the police and the court system for handling IPR cases. Police sometimes 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 made to locate the source of the pirated goods. The heavily burdened legal and judicial systems means that outstanding cases often take years to be resolved.
- **Adopt an Optical Media Law to Deal With Increasing Optical Media Piracy.** This has become a growing problem and like many other countries in Asia, India should also pass an effective law modeled on the ones already in place in Hong Kong, Malaysia and elsewhere. Initial discussions with the Indian government have been positive and IIPA and its members plan to provide assistance in the form of a model law to the Indian government.
- **Improve and Strengthen Existing State Level Intellectual Property Police Cells.** These IP cells, located either in the Office of the Director General of State Police or the Economic Offenses Wing of the State Police, must be given greater resources and more power to enforce the law. Training, sufficient manpower, machinery and office infrastructure must be provided to permit effective investigation, action and specialized prosecution to be done. Expert prosecutors need to be appointed to work closely with these cells in the states.
- **Introduce Court Reform to Decrease Burdens, Costs and Delays.** Examples abound of how the Indian court system fails to work properly. For example, our members report that criminal cases can take 12 years to complete. With such long delays, evidence is often tainted, missing or otherwise unusable. Corruption and leaks of information are also problematic. There is also nothing in the criminal procedure law to allow “compounding” criminal cases (a procedure by which both parties can come to a settlement privately, thereby ending the case in court with the courts permission), leading to overly costly judicial enforcement for right holders.
- **Add Needed Deterrence into the Criminal and Civil System.** While India’s law has a high minimum prison term (but generally low fines), this overall positive system has little opportunity to be tested due to the failure of the Indian enforcement machinery to conclude cases with convictions or deterrent civil damages. Until this changes and India accepts that its enforcement system is not TRIPS-compatible and takes action to fix it, progress against piracy is likely to continue only at the margins.

IIPA understands that the Indian Copyright Act is in the process of being reviewed for needed amendments, and a “core group” of academics and private sector representatives has been appointed by the Indian government to consider modifications that will bring India into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). This group will need to consider issues critical to U.S. and Indian copyright holders, including: protection for temporary reproductions; defining the scope of the “communication to the public” right; presumptions to assist right holders in exercising and enforcing their rights; the protection of technological protection measures from unlawful circumvention and trafficking in circumvention devices; the protection of rights management information; and the application of limitations and exceptions to subject matter, including computer programs, and rights in the digital environment. IIPA urges the USG to engage with the government of India on these critical issues,

and urges the government of India to present a discussion draft early in the process so that it may profit from the experience of industry representatives that have been dealing with these issues for some time in other fora and countries.

INDIA ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	70.0	55%	47.0	60%	66.0	80%	66.0	80%	66.0	80%	66.0	85%
Sound Recordings / Musical Compositions	NA	40%	6.0	40%	8.0	40%	6.0	30%	6.0	40%	7.0	30%
Business Software Applications ⁵	238.4	69%	181.6	63%	160.2	61%	158.0	65%	148.7	69%	182.4	78%
Entertainment Software	NA	NA	NA	80%	42.8	86%	36.8	84%	35.9	82%	31.4	78%
Books	36.0	NA	36.0	NA	35.0	NA	30.0	NA	22.0	NA	25.0	NA
TOTALS⁶	345.4		270.6		312.0		296.8		278.6		311.8	

COPYRIGHT PIRACY IN INDIA

Piracy in India continues to devastate the markets for copyrighted goods, wreaking particular havoc on the business software, publishing, and motion picture industries. The following are among the most serious piracy issues facing the government in India today:

Book Piracy. Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals decimates the legitimate publishers' market in India. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality (complete) photocopies and obviously pirated cheap reprints, to hardbound copies of medical reference volumes and high quality offsets, are readily available. Publishers estimate that any best seller suffers from 50 to 60% piracy. Major best sellers, college texts and reference works suffer even higher levels of piracy – up to 80%. Moreover, as a consequence of a successful anti-piracy campaign in North India, high quality pirated offset printed books are being exported from the south of India to countries like Sri Lanka, Bangladesh and the Maldives. Another recent phenomenon is that published materials in digitized form (including interactive published materials in CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically.⁷

⁵ BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss figure of \$195.2 million was also reported as preliminary. This number was finalized in mid-2001, and is reflected above.

⁶ In IIPA's February 2001 report, total losses to the U.S. copyright industries in India were estimated to be \$284.2 million. Due to BSA's adjustment of its loss estimate in mid-2001, the total estimated losses due to piracy in India in 2000 are adjusted to \$270.6 million.

⁷ In a recent raid in the Mumbai markets, the following titles were seized, which were being sold for US\$ 5 to 8. Bulk transactions of hundreds could be purchased overnight for as little as Rs.75 (US\$ 1.50).

- **Internet Piracy.** Large number of Websites continue to make use of Indian-origin repertoire in 2001, and one recent phenomenon involved the burning of MP3s onto discs for sale over Internet distribution networks in India.⁸
- **Retail Piracy (in Both Analog and Digital Forms).** Both analog and digital forms of pirated movies, music, entertainment software, business software, and published materials crowd out legitimate product in the market place. Increasing problems include production of pirate optical media for domestic consumption, as well as increasing CD-R “burning” in shops.
- **Piracy of Motion Pictures.** Pirate videos, VCDs, and DVDs cause severe damage in the markets in India. Most are available in major cities well before the local theatrical release of the title (so-called “pre-release” piracy), with a significant number of the pirated VCDs being manufactured locally by two factories located just at the border of New Delhi in the State of Harayana (Kundli) and the State of Rajasthan (Bhiwadi). These factories also manufacture a significant amount of the pirate music and computer software product. Effective enforcement efforts appear to be problematic. In a recent MPA raid conducted in conjunction with Delhi police, the Harayana police detained the Delhi police officials and the investigators after they gained entry into one of the factories. The incident resulted in significant press coverage and was even raised briefly in the Indian National Parliament. In addition to the pirate production coming from the above two factories, pirate optical discs are also imported from Malaysia, and now Pakistan.
- **Pirate Entertainment Software.** Pirates sell the most popular games for R175-250 (approximately US\$3.50 to 5.00). Much of the product is now believed to be produced in India with production quantities increasing daily. The piracy level is as high as 90% for all products, with CD-R burning occurring in areas with higher PC penetration.
- **Pirate Business Software.** Corporate end-user piracy (unauthorized use of business software in a business setting) is endemic in major Indian companies, while piracy at the retail and wholesale level is also prevalent.
- **Pirate Music.** The legitimate music business is decimated by counterfeits (in which the inlay cards differ in quality, color of printing, do not contain the name of the company on the leader tape or embossed on the cassette), pirated copies (name and contact of company manufacturing

-
- THE OXFORD BUSINESS SHELF, Instant Access to Oxford Reference
 - OXFORD, Talking Dictionary
 - RANDOM HOUSE, Webster's
 - Eyewitness Encyclopedia of Science, by Dorling Kindersley
 - BBC, English Dictionary
 - Peter Collin, Dictionary of Medicine
 - MOSBY, Medical Encyclopedia
 - CAMPBELLS, Operative Orthopedics
 - MOSBY, Clinical Medicine by Forbes and Jackson
 - MOSBY, Pathology by Steven and Lowe
 - MOSBY, Clinical neurology
 - A.D.A.M Benjamin Cummings, Interactive Physiology Respiratory System
 - A.D.A.M Benjamin Cummings, Interactive Physiology Urinary System

⁸ See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

the cassette is missing, name and contact of the copyright owner and year of publication are missing, inlay card shows poor quality printing and/or unknown brand name, compilations of "hit songs" from different albums under names such as "Top Ten" or "Bollywood Hits" etc.), and pirated CDs (which include the same indicia of illegality as pirated cassettes, but in addition, source identification (SID) code is missing). Most of the audiocassette piracy is not in the retail shops, but limited to street vendors. Many shops in major cities now use CD-R burners and are able to make compilations of music at the request of a customer – an increasing problem.

- **Cable Piracy.** Unauthorized cable television transmission remains the predominant form of piracy of motion pictures in India. As many as 40,000 cable systems exist in India, and these systems continue to frequently transmit MPA member company product without authorization, often using pirated videos or video CDs (VCDs) for their transmissions. These cable systems seriously affect all member company business, including theatrical, home video and legitimate television. Since 1999, MPA has brought civil actions against the major cable television networks in an attempt to limit cable television piracy. The restraining orders passed by the civil court (Delhi High Court) against the entire network (including all franchisees, distributors and cable operators forming part of the network) have been a big deterrent. Under the auspices of the Ministry of Information and Broadcasting, the representatives of the film industry and the cable service providers have signed a joint memorandum whereby the latter have agreed not to make unauthorized cable telecasts on their networks and to cancel licenses of their franchisees should they be found making unauthorized telecasts. A similar memorandum has also been signed by the cable industry with the IMPPA (Indian Motion Pictures and Producer's Association), a local association of the film industry. It is hoped that these memoranda will lead to more restraint being exercised by the cable networks, though for now many such networks are known to be in contravention of the law, as well as of specific orders of the court. Such court actions require constant monitoring and initiation of fresh criminal prosecutions for copyright violation; a contempt of court proceeding is a costly and time-consuming process.

COPYRIGHT ENFORCEMENT IN INDIA

The copyright industries face various hurdles to effective enforcement in India. While it is quite commonplace for small-scale pirates to be raided, and all the industries continue to report cooperation among the police in such endeavors, larger pirates often go untouched, either because of official protection, or because, due to the wily ways of these large-scale pirates, their operations allow them to set up "fall guys," letting them escape punishment every time. Even when a criminal raid is successfully carried out, the system often falters from there, with slow, cumbersome, and costly criminal procedures that are weighted against the legitimate copyright owners at each step. Mainly for this reason, the motion picture industry has resorted to civil procedures which, somewhat surprisingly (since civil cases take even longer to get to judgment than criminal cases), have led to some successes, particularly in terms of obtaining nationwide injunctive relief. Contempt citations for violations of these injunctions have actually brought some deterrence. Nonetheless, better coordination of enforcement resources (e.g., in a national body dedicated to enforcement of IP), more focus on the deterrent aspect of damages, fines and penalties meted out, and greater focus on judicial reform (e.g., moving dockets quickly, dividing cases to speed up trials, training a cadre of specialized IP judges, etc.) would all be welcome steps by the government to assist in the struggle against piracy in India.

Criminal Enforcement: Numerous Raids . . .

The experience of the copyright industries using criminal procedures has been a mixed bag, since much raiding activity occurs, but follow-up from raids is made difficult by cumbersome, costly, and time-consuming procedures that lead to an overall lack of deterrence in the market.

For example, the music industry obtained 1,082 raids in 2001, carried out by the police, with seizures of almost 500,000 pirate audiocassettes, over 125,000 pirate audio CDs, a reported 383 cassette duplicating machines and 86 CD-R burners.⁹ An almost identical number of arrests were made in both 2000 and 2001 (1,175 and 1,193, respectively). While there are certainly positive trends to note in these statistics, the fact that the raids yielded far more CDs in 2001 (compared with 2000) and far more CD-R burners indicates that enforcement efforts are not having a significant deterrent effect on music piracy in India.

The publishing industry has been increasingly active in addressing piracy of published materials (in analog and digital forms) and has had some impressive results in 2001. For example, the arrest of the first fixer in New Delhi yielded 25,000 pirated copies of trade fiction and nonfiction titles on the first day of the raid. Further raids revealed the large-scale nature of the fixers network. In another raid in September 2001, a large-scale printing and distribution operation/network, complete with a printing press and thousands of pirate negatives of U.S. titles were seized in Delhi.¹⁰ In December 2001, the New Delhi police uncovered one of the largest habitual pirates of medical texts, raiding various locations, arresting four, seizing five copiers and 1,000 pirated copies of medical books. These copies were being made from original books in the National Medical Library and the "All Indian Institute of Medical Sciences B.B.Dikshit Library."¹¹ The library books bearing all stamps were seized, but no action has been taken against the libraries or responsible persons. Finally, in January 2002, the police in Mumbai caught one of the largest known piracy rings in India, seizing and sealing over 34,000 book titles. All these raids indicate the increasing organization and sophistication with which the book pirates are operating in India, even though their business has become more risky purely because of increasingly effective anti-piracy activities of international book publishers.¹²

The MPA facilitated 108 police actions resulting in seizure of 126,782 pirate VCDs and 3,719 VHS tapes in 2001. November 2000 marked the first raid on an optical media facility

⁹ By contrast, in 2000, 1,054 raids were conducted, with seizures of over 750,000 pirate audiocassettes, over 75,000 pirate CDs, a reported 361 cassette duplicating machines, and 30 CD-R burners.

¹⁰ *Indian Express*, Delhi dated September 24, 2001 story titled "Racket in printing pirated novels busted, 5 held." *The Hindu*, September 25, 2001 story titled "Printing press raided for piracy."

¹¹ *The Hindustan Times*, Delhi dated December 13, 2001 story titled "Medical Books worth over Rs.25 Lakh seized, 5 held."

¹² In yet a further set of successful raids in November 2001 in Mumbai, Jai Ambe Copiers were caught conducting a large-scale photocopying of textbooks and academic book (mainly medical). Not only were these the same folks who had previously been arrested in Mumbai in January 2001, but their equipment was highly sophisticated, laser color copying, so that the medical texts, including diagrams, would look as clean as possible.

engaging in pirate production as a result of a complaint made by MPA investigators. The successful raid resulted in the seizure of 40,000 VCDs of pornography and “Bollywood” classics. The raid on that plant, located in Rajasthan, resulted in the illegal plant being closed and the replication equipment sealed. This raid reveals the increasingly damaging nature of optical media piracy in India, and suggests a growing domestic production that previously didn’t exist or went undetected. Unfortunately, however, the facilities have now re-opened and are back in operation. In January 2002, these facilities were raided once again.

A positive development in 2001 involved the local police initiating retail raids where pirated business software was sold, on an *ex officio* basis (i.e., without the copyright owner filing a complaint). Six retail operations (against 18 retail software pirates) were raided in 2001 in the cities of New Delhi, Mumbai, Pune, Kolkatta, and Bangalore with 1,647 CD-ROMs being seized in total, many of which contained compilations of software programs from many different U.S. software publishers. It is estimated that the street value from these discs alone was well over US\$1 million.

. . . But Little Deterrence

Again, the music industry had perhaps the strongest showing in 2001, as 55 defendants were convicted (an increase from the 30 convictions obtained in 2000), with nine defendants being sentenced from six to twelve months’ imprisonment. Fines were paltry, however, generally ranging from Rs.5,000 to Rs.50,000 (approximately US\$103 to \$1,030).¹³ In many of the cases decided in 2001, suspects had to remain in judicial custody for several days before they were freed on bail by the courts, a very positive development. Notwithstanding these positive results, piracy levels remained steady at 40% in the overall market, but much higher for international repertoire. Sorely needed are more convictions to provide a higher level of deterrence in the market. The publishing industry also achieved some positive results in the last six months of 2000 and in 2001, conducting 101 raids, seizing more than 110,000 pirated books, 37 copiers, one printing press, two computers containing book scans, and arresting 94 persons, all of whom stayed in pretrial interim detention for from 5 to 17 days. Despite these gains, however, it has been necessary to re-raid repeat offenders who have become more sophisticated and built police informer contacts after the first raid, making it extremely difficult to raid the second time. Two anti-piracy cases brought in 1987 and 1991 against four repeat pirates surprisingly ended in acquittal on the same day in November 2000.

For the motion picture industry, criminal cases brought since the early 1990s have resulted in a paltry four reported convictions (three of them coming pre-1995, before higher penalties for copyright infringement were established).¹⁴ Since then, not a single criminal case reached conclusion. By the end of 2001, the motion picture industry had 608 criminal cases pending in the courts. Meanwhile, for the business software industry, 81 criminal cases against pirate resellers of

¹³ In the other cases, defendants were generally subject to only small fines – reportedly a maximum of Rs. 25,000 (approximately US\$515), far below the minimum required in the law.

¹⁴ The first conviction came in January 1997 in a Bangalore court, in which a video pirate was sentenced to three years’ hard labor (in a case that dated from 1993); the second conviction came in May 1997, when a New Delhi magistrate sentenced a cable operator (the first conviction against cable piracy) to six months’ imprisonment, to be served in hard labor, and ordered a fine of Rs.5,000 (approximately US\$103); the third conviction came in early 1999 (involving a raid conducted in 1986), in which the sentence was one year in prison and a fine of approximately US\$118. 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 have since been reversed on appeal.

software dating back to 1996 are still unresolved. Many of the cases have not even reached court. In addition, there has not been a single conviction of such offenders to date. The potential deterrent effect of the many criminal raids noted above is completely lost by long and expensive court processes and the failure to ensure swift and deterrent punishment as a result.

Procedural Burdens, Hurdles, Costs and Delays

Exacerbating the overall nondeterrent effect of criminal actions taken in India are the many procedural barriers erected in the path of a legitimate right holder the most fundamental of which is the lack of national enforcement coordination (since enforcement in India is a “state” matter). For example, in some cities (such as Delhi, Mumbai and Chennai), specialized police units (IP cells) have been set up to combat piracy. However, these units lack the necessary resources in terms of manpower (making them incapable of raiding larger pirate distribution and production targets), training and funds. The local police do not provide the necessary support to these units, and in some instances have been known to confront and obstruct these raiding teams in an effort to protect pirates.¹⁵

Obstruction of the raiding process is all too common. For example, leaks (to the pirates) before raids occur often in India. Once the raid is run, police often only seize the specific pirate goods in respect of which the complaint has been filed, rather than seizing all suspected pirated goods, as well as tools and materials the predominant use of which is in the act of infringement (a TRIPS requirement). By virtue of this practice the majority of the pirate goods are not seized. Owing to the lack of pre-raid investigation, larger pirates often set up “decoy owners” who are arrested, while the real owners and pirates get away.

Once the raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to larger criminal organizations and pirates, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable. In addition, cases are frequently continued at the request of the accused, and such requests are usually made on days when the prosecution evidence has been assembled.

There are other procedural hurdles at the police level which hamper enforcement. For example, even though police can act on their own to seize pirate product under the copyright laws, and in fact, are obliged to do so, under the Criminal Procedure Code, they invariably require a complaint from the rights holder. The police will then only seize the product of that rights holder, even though the presence of other pirate product is open and obvious, this is despite the specific observation of the Supreme Court of India that it is unnecessary for the prosecution to trace the owner of copyright to come and adduce evidence of infringement of copyright (see *State of Andhra Pradesh v. Nagoti Vekatrman*, 1996(6) Supreme Court Cases 409). It is believed that because

¹⁵ See, e.g., Sonu Jain, “Video ‘Pirates’ in Lead Role, Cops Play Villains,” Indian Express, December 19, 2001, at <http://www.indian-express.com/ie20011220/top6.html>. At least two incidents of pirates causing serious injury to a raiding party have been reported from the Palika Bazar market of Delhi.

the enforcement agencies and courts insist that the copyright owner personally be present to give evidence, many rights owners are hesitant to come forward and make complaints to enforce their rights. Initiating a criminal prosecution on a complaint made by the rights owner often becomes a source of harassment for the rights owner for years to come.

Finally, criminal case proceedings do not lend themselves to satisfactory, mutually agreeable resolutions between the complainant and the defendant. For example, there is nothing in the law of criminal procedure that allows the complainant/aggrieved party to compound the offense (a procedure by which both parties can come to a settlement privately, thereby ending the case in court with the courts permission).

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS					
2001					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	108	9	1082	101	1300
Number of cases commenced	103	3	0	94	197
Number of defendants convicted (including guilty pleas)	0	0	55	0	55
Acquittals and Dismissals	5	0	0	0	5
Number of Cases Pending	608	81	0	0	689
Total number of cases resulting in jail time	0	0	9	0	9
Suspended Prison Terms	0	0	0	0	0
Maximum 6 months	103	0	0	0	103
Over 6 months	0	0	0	0	0
Over 1 year	0	0	0	0	0
Total Suspended Prison Terms	0	0	0	0	0
Prison Terms Served (not suspended)	NA	0	0	0	0
Maximum 6 months	0	0	0	0	0
Over 6 months	0	0	0	0	0
Over 1 year	0	0	0	0	0
Total Prison Terms Served (not suspended)	0	0	0	0	0
Number of cases resulting in criminal fines	0	0	0	0	0
Up to \$1,000	0	0	0	0	0
\$1,000 to \$5,000	0	0	0	0	0
Over \$5,000	0	0	0	0	0
Total amount of fines levied	0	0	0	0	0

**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	30	30
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

In 1999, the motion picture industry moved to a civil litigation strategy, mainly in order to fight cable piracy. In doing so, they were no longer at the mercy of the police, public prosecutors and defense counsel who regularly continued proceedings, and they were able to obtain broad injunctive relief, backed by contempt powers (i.e., the threat of a contempt conviction if the orders are violated). These injunctions have proved to have some deterrent value, effective in limiting cable television piracy in India for U.S. films (while Indian films continue to suffer significant losses at the hands of pirate cable operators), although defendants regularly challenge these injunctions and it can take up to five years before a contempt citation is actually enforced.¹⁶ The passage of the amendments to the Cable Television Networks (Regulation) Act, 1995, discussed below in the legislation part of this survey, has reportedly also had some effect in deterring cable piracy in India, though no actions have yet been brought under it. To date, the motion picture industry has filed eight civil actions, five against some of the largest cable networks in the country and three against specific shops in some of the largest retail markets in the country. The injunctions cover these cable networks in over 45 cities consisting of in excess of 8 million cable homes. Following this example, almost every Hindi film released in India today is preceded by a civil injunction order. Such an order has almost become an industry norm. Three contempt proceedings have also been

¹⁶ In one of the injunction and contempt proceedings undertaken, the injunction was issued in August 1999 and the first hearing was not scheduled until August 2000.

initiated by MPA against these networks for violating court orders, but as noted above, these cases have been substantially delayed. Similar contempt proceedings have also been initiated by the local industry. These contempt petitions appear to have had a deterrent effect, as the motion picture industry's cable/satellite piracy levels have dropped for the third consecutive year, to 35% in 2001 (down from 40% in 2000).

The business software industry has similarly relied on civil enforcement, given the myriad difficulties facing the industry in trying to bring criminal cases. Civil cases have been especially useful against unauthorized use of business software in a business setting, so-called business end-user piracy of software. In 2001, the industry filed four civil actions and conducted civil raids with local commissioners appointed by the Delhi High Court.¹⁷ While it appears that only one of the cases will be contested, from past experience, the industry expects a long, drawn-out legal process due to the under-resourced and bureaucratic judicial system. Moreover, where civil remedies are concerned, there is no yardstick prescribed that would assist a court in quantifying damages, for example, that a defendant would have to pay "X" amount for every infringing copy dealt with by him.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS			
2001			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	Totals
Number of civil raids conducted	0	4	
Post Search Action		-	
Cases Pending	8	10	
Cases Dropped	0	0	
Cases Settled or Adjudicated	0	12	
Value of loss as determined by Rightholder (\$USD)		31250	
Settlement/Judgment Amount (\$USD)	0	3958	

¹⁷ There have been nine civil cases against pirate corporate end-users since 1998, and all but two have been settled. There are also 31 active civil cases against counterfeit resellers and computer resellers who load hard disks with pirated software prior to sale (so-called "hard-disk loaders").

**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 renders 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 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 now reported to be more readily available than as reported in IIPA's 2001 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 and 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, though the MPA has reported limited success with the Mumbai customs authorities.

DEFICIENCIES IN THE STATUTORY AND REGULATORY REGIME

Copyright Law and Enforcement Provisions: India's Copyright Law, TRIPS and WIPO Treaties 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 (US\$1,210) and a maximum of two lakh rupees (US\$4,840). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (US\$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 (US\$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 1994 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 ("the 2000 amendments").

While the term of protection for performers was lengthened as required by TRIPS, the 2000 amendments, as IIPA noted in its 2000 and 2001 submission, added a number of last-minute amendments dealing with the protection of computer programs which severely compromised the high level of protection that India has always afforded computer programs and, in doing so, caused the law to fall out of compliance with the TRIPS Agreement. 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 changes to India's 1994 regime for protection of computer programs violate TRIPS Article 13 establishing a tripartite test for measuring whether exceptions to protection are legitimate or not.

For the last two years, we understand that a "core group" of academics and private sector representatives appointed by the Indian government has been considering amending the law to

bring it into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA urges the government of India to release a discussion draft of such amendments at the earliest possible time so that that the government can have the benefit of the wide experience of U.S. right holders, the U.S. government, as well as other right holders and governments, that have been operating under new laws that have implemented these new treaties.

Cable Law Amendments

In an effort to reduce film piracy by cable networks in India, the government has adopted far-reaching amendments to the Cable Television Networks (Regulation) Act, 1995 which went into effect on September 9, 2000.

The rules now prohibit cable operators from carrying or including in their cable service any program without copyright authorization. Transmissions without authorization, 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 Program Code. If any of these "Authorized Officers" has reason to believe that the Program 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. However, there is a gap in the law in that Section 18 provides that no court can take cognizance of any offense under the act except upon a complaint in writing made by the authorized officer. Since criminal procedure requires the personal presence of the complainant, the authorized officers are reluctant to become complainants. To date there have been no cases of seizure of the equipment by authorized officers under the act, despite it having been in operation for over a year (since September 1, 2000). The amendments are, however, welcomed in that there was previously no specific prohibition from exhibiting pirated films on cable networks.

Generalized System of Preferences

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. Part of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." In the first 11 months of 2001, \$1.2 billion of Indian goods (or 13.4% of India's total imports to the U.S. in that time period) entered the U.S. under the duty-free GSP Program. As India caused losses to the U.S. due to piracy of \$345.4 million in 2001, India should not continue to expect such favorable treatment at this level if it continues to fail to meet the discretionary criteria in this U.S. law.