

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that India be retained on the Priority Watch List. Estimated trade losses in 2002 are \$468.1 million.

Overview of key problems in India: While India has a large, significant indigenous copyright industry,² and a good copyright law, the major issues in India are high piracy rates and debilitating deficiencies in the enforcement system. The primary obstacles to reducing piracy rates in India are police corruption (larger pirates are often protected by the police), reluctance to act *ex officio* in criminal cases, lack of resources and training, and an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases in a timely manner. In addition, effective action is not being taken against imports of pirate OD product from Pakistan, Malaysia and other countries, and only recently against some of the nine indigenous OD factories in India. India must adopt an optical disc law like its neighbors in Asia; many of the factories raided to date produce virtually no legitimate product. The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense. For this reason, the motion picture industry and business software industry have resorted to bringing civil cases, the former against cable pirates (obtaining injunctions in the process) and recently even against pirate retailers, rental libraries and video parlors and the latter against corporate end-user software piracy. However, while injunctions issue fairly promptly, these cases move far too slowly. While the injunctions offer some deterrence, this is not sufficient. India is also in the process of drafting amendments to its copyright law and in doing so must fully and properly implement the WIPO "Internet" Treaties and then ratify them.

Actions to be taken by the Indian government:

- Establish a national centralized body dedicated to, and trained in, IPR enforcement;
- Adopt an optical disc law to deal with increasing optical disc piracy;
- Improve and strengthen existing state level intellectual property police cells and ensure that they act *ex officio* against piracy crimes;
- Adopt meaningful court reform to decrease burdens, costs and delays and ensure that cases are concluded promptly with deterrent penalties and damages;

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.

- Adopt amendments to the copyright law that properly implement critical aspects of the WCT and WPPT, including protection for temporary copies, adequate and effective protection against the circumvention of technical protection measures and ensure that ISP liability rules are clear, with narrow exceptions, and with an effective notice and takedown system.

INDIA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002³

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	75.0	60%	70.0	60%	47.0	60%	66.0	80%	66.0	80%
Records & Music	6.6	40%	NA	40%	6.0	40%	8.0	40%	6.0	30%
Business Software Applications ⁴	350.0	75%	256.0	70%	181.6	63%	160.2	61%	158.0	65%
Entertainment Software	NA	NA	NA	90	NA	80%	42.8	86%	36.8	84%
Books	36.5	NA	37.0	NA	36.0	NA	35.0	NA	30.0	NA
TOTALS	468.1		363.0		270.6		312.0		296.8	

COPYRIGHT PIRACY IN INDIA

Piracy in India continues to be a serious problem, with increased pirate production from at least 3 of a reported 9 OD plants with at least 14 production lines and increasing imports of pirate OD product from Pakistan and Malaysia. Continued book, music, video and cable piracy hamper the development of what should be one of the best copyright markets in Asia.

Book piracy: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals became starkly evident to both domestic and foreign publishers in 2000-2001 when the industry began an impressive program of continuing raids against book pirates at all levels, which continued throughout 2002. 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

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

⁴ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$238.4 million at 69% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

reference volumes and high quality offsets, are readily available.⁵ Publishers estimate that any best seller suffers from 50 to 60% piracy, despite the fact that prices for legitimate titles in India are among the lowest in the world. Percentages may soar even higher for certain individual works.⁶ 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.⁷ Raids undertaken by publishers have had some effect on organized commercial photocopying, but organized copying and distribution continues in some sectors. For instance, copying remains a problem at private educational and research institutions and is on the rise with regard to medical texts.⁸ Another recent phenomenon is that published materials in digitized form (including interactive published materials on CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically. Furthermore, the National Institute of Science Communication and International Resources has digitized a number of textbooks and is planning to offer free access to university students through the Internet. This would decimate the college textbook market. The Ministry of Human Resources, Government of India, must prevent this plan from being enacted, as it is sure to lead to blatant and uncontrollable digital piracy.

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 on CD-ROM) are now widely available in the pirate markets in India, mostly manufactured domestically.

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, video CDs (VCDs) and increasingly DVDs (both parallel imports and pirated copies) for their transmissions. These cable systems seriously affect all member company business, including theatrical, home video and 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 networks (including all franchisees, distributors and cable operators forming part of the network) have been a deterrent and have brought down cable piracy by many percentage

⁵ Publishers estimate that approximately 300 modern offset printing presses are located within blocks of the Delhi Police Commissioner's Office alone, of which at least a third are seasonally engaged in printing and binding of pirated trade books and textbooks.

⁶ For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. Publishers estimate that these seizures reflect only 1/5 of total pirate production of the work. This is startling when compared with legitimate sales of the books—totaling only 75,000 over three years.

⁷ For instance, Sivakasi, in the southern state of Tamilnadu, exported US\$150,000 of pirated textbooks during 2002.

⁸ Recently, a leading publishing company found one of its medical journals copied and bound, with a title embossed in gold, alongside legitimate products in the Cardiology Department of the Apollo Hospital in New Delhi. This is merely one example of the ways pharmaceutical companies are becoming increasingly organized in their illegal reproductions of medical texts and reference books.

points. However, MPA must be constantly vigilant and continue to seek new injunctions and where possible, contempt orders against recidivist cable systems. Recently, MPA has begun joining (in civil suits) the government departments that license the cable systems and sought orders directing these departments to cancel the licenses of the errant systems. This is expected to put added pressure on the cable networks. Courts have recently issued notices to the departments but no orders have yet issued. These court actions require constant monitoring and initiation of fresh criminal prosecutions and civil cases for copyright violation, including contempt of court proceedings, all of which are costly and time-consuming, but, nonetheless, somewhat effective.

Video piracy: 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 and without desperately needed optical disc legislation, it will be difficult to close or force a reduction in piracy. In addition to the pirate production coming from the above two factories, pirate optical discs are also imported from Malaysia, and now Pakistan. Finally, such factories have become easier to set up in India in rural areas due to tax concessions and other benefits.

In 2002, the MPA representative—along with a member of Parliament from the local film industry as well as the president of a local film association—presented a memorandum signed by over 200 film personalities from the local industry as well as Hollywood to the Home Minister. In the memorandum a request was made to initiate action against two errant OD factories. According to information, the government has initiated action against these factories. It is believed that the state governments have been informed of these and appropriate police agencies have been directed to investigate and put an end to these pirate operations.

MPA has also successfully obtained appropriate orders from the Delhi High Court against some of the major pirate markets in Delhi and Chennai. The Delhi High Court has not only passed restraining orders but has also issued directions for discreet investigations on an ongoing basis and directions to the police to assist in conducting raid and seizure operations as and when required. In other cases appropriate orders have been passed against importation of pirate/parallel import product against video libraries and restraining orders against unauthorized rental of MPA member company titles. Directions have also been issued against libraries stocking and renting in an unauthorized manner, to hand over to MPA representatives all pirate copies and parallel import copies of MPA members company title DVDs and VCDs.

Music piracy: In 2002, the Indian and international recording industry suffered its most significant decline in years. In a recent article in *Billboard*, it was reported that the industry is on the brink of collapse.⁹ They report a decline in their last fiscal year from revenues of \$123 million to less than \$90 million. That represents a 20% decline in 2002, following a 23% decline in the year before that. The local music industry is responsible for about 80% of the legitimate music market in India. The industry estimates the piracy rate at 40-50% for cassettes and 60% for CDs. In short, the legitimate music business is decimated by counterfeit cassettes (in which the inlay cards differ in quality, color of printing, do not contain the name of the company on the

⁹http://www.billboard.com/billboard/billboard_members/currenteditorials/article_display.jsp?vnu_content_id=1803209

leader tape or embossed on the cassette), pirated copies (name and contact of company manufacturing 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), many emanating from pirate plants in Pakistan (whose music market also has witnessed a steep decline—by almost 70%). 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. Pirated CD-Rs containing 100 or more songs each in MP3 format retail for about US\$0.83. Legitimate CDs sell for between US\$2 and \$3.

Piracy of business software: Corporate end-user piracy (unauthorized use of business software in a business setting) is endemic in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. The piracy rate continues to rise, from 63% in 2000, to 70% in 2001 and to 75% in 2002.

Internet piracy: A large number of websites continue to make use of Indian-origin repertoire in 2002, and one report in early 2002 involved the burning of MP3s onto discs for sale over Internet distribution networks in India.¹⁰ One U.S. software company took action against the sale of pirated software on the Internet over a popular auction site. BSA has to date brought no actions dealing with Internet piracy, but has issued successful cease and desist letters to ISPs concerning pirated software offered for sale at auction. These sites were promptly taken down and BSA believes that such piracy is subject to both criminal as well as civil action. MPA has also successfully issued warning notices to some pirates offering pirate products for sale through the Internet.

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 disc for domestic consumption, as well as increasing CD-R “burning” in shops.

Piracy of 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.

COPYRIGHT ENFORCEMENT IN INDIA

The challenge posed by the Indian enforcement system is to make the criminal system work, despite corruption, inefficient court procedures, lack of training and massively long delays, followed by woeful fines and virtually no significant jail terms. While there have been a few recent signs of hope in this dreary scenario, many copyright owners (the movie and business software industries) have been forced to resort to an also slow and inefficient civil system, which has the virtue at least of being able to award (somewhat) deterrent injunctions (with the threat of

¹⁰ See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

possible contempt citations and in the case of end-user software piracy result in some settlements.

Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. In the over 15 years that IIPA has been working on Indian issues, there have been no more than 10 convictions¹¹ for copyright piracy, as far as industry is able to ascertain. Until this year, when the police began to run “suo moto” (*ex officio*) raids, the criminal process has been cumbersome, costly, and time-consuming and without deterrent impact on the market for copyrighted products. The Economic Times of India recently reported that the Law Ministry had estimated that only 6% of serious crimes are prosecuted in India; the success of petty crime actions is only 33%. Until this woeful record changes, it simply will not be possible to gain control over piracy in India.

For example, the music industry obtained 1140 raids in 2002, carried out by the police, with seizures of almost 677,213 pirate audiocassettes, over 278,617 pirate audio CDs, a reported 152 cassette duplicating machines and 248 CD-R burners.¹² Arrests increased slightly to 1,250 in 2002 from 1,193 in 2001. There were 126 convictions involving music piracy reported by the music industry in 2002, virtually all for violation of Section 52A (failure to use the required certificate). In only 10 cases, jail terms were awarded plus fines from Rp500 to RP50,000 (US\$10 to \$1,050). In all other cases only fines were awarded and at much lower levels, though some pretrial detention occurred before bail was posted. All in all, however, this record is insufficient to deter piracy effectively and the legitimate music industry in India is slowly shrinking and concerned about its very survival. Historically, the Indian Music Industry (IMI) has had the greatest success of all copyright industries in getting raids and seizures, reporting 196 convictions in the last two years, though, as noted above, virtually all were under Section 52A and resulted in small fines, with only a few jail terms. However, this lack of deterrence in the system is now taking a severe toll. Piracy rates in the cassette market are estimated at 40-50% and in the CD market at 60%, with even higher rates for international repertoire, according to recent reports. The move of police to taking *ex officio* actions may help but only if followed by convictions with significant deterrent penalties. It should also be noted that CD-R seizures continue to rise (over 100% from 2001 to 2002), indicating that this is becoming an increasing problem in India.

Piracy of music on the Internet is taking a toll as well. The local music industry established an Internet Anti-Piracy Group in 2002 and through year's end, 2484 sites were investigated and 633 sites containing local repertoire were identified as infringing. Only about 10% of these offending sites were locally based. Only 30 of these offending sites were taken down in 2002.

The publishing industry has been increasingly active, and with considerable success, in addressing piracy of published materials (in analog and digital forms). Results continued to be impressive in 2002. Significant raids involving large seizures continued in 2002. For example in

¹¹ There have been a number of convictions for failure to use the required certificate on audio and videograms under Section 52A of the Copyright Act but virtually none under the Section 63B, the criminal piracy provision.

¹² By contrast, in 2001, 1,082 raids were conducted, with seizures of over 500,000 pirate audiocassettes, over 125,000 pirate CDs, a reported 383 cassette duplicating machines, and 86 CD-R burners.

January and February 2002, three warehouses of a notorious pirate were raided in Mumbai and 34,000 pirated copies seized. In May, a major pirate was arrested and again three warehouses emptied and printing presses seized. In September 2002, again in Mumbai, a major pirate “fixer” was raided, arrested and 12,500 pirated books seized. All in all, since 2000, the AAP/UK Publishers Association/local publishers anti-piracy program has raided 181 businesses, arrested 167 persons, seized more than 173, 400 pirated books, 1800 CD-ROMs, 3 printing presses, 44 copiers, 3 computers and 2 CD burners. While an excellent record with the result that pirated books have been cleared from many of the traditional markets, publishers have still not obtained a single conviction for book piracy. While 55 criminal cases have been filed (with the publishers’ lawyer undertaking a great deal of the work), no cases have yet been brought to trial, in part due to a failure by police and prosecutors to efficiently process cases. Furthermore, as do the other copyright industries, publishers face significant procedural hurdles to prosecution, including inadequate presumptions to prove subsistence of copyright. It is expected that 11 cases will be heard sometime in 2003. What is clear is that all these raids have revealed 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 and local book publishers. While publishers note that eight *ex officio* actions have now been instituted following on site training by publishers, without direct complaint by the right holder, they request that the government take a more proactive approach to anti-piracy activities in the publishing sector, including more frequent self-initiation of raids and effective post-raid prosecution, including time bound destruction of seized pirate stocks and imposition of deterrent penalties.

The MPA facilitated 206 police actions resulting in the seizure of 222,162 pirate VCDs, 3,687 DVDs and 1,270,190 inlay cards in 2002. As a consequence of some of the Police Cells (In Delhi, Bangalore, Cochin, Trivandrum, Mangalore, Hyderabad and Gurgaon) beginning to commence *ex officio* raids, (following intense lobbying by MPA and others) the criminal enforcement situation has improved somewhat and MPA has gone back to running more criminal raids. Since August 2002, virtually all raids run by MPA have been *ex officio* by police in Delhi and Bangalore. Raids have also been run in Ernakuum, Cochin and Gurgaon and lately in Hyderabad. Prior to this (and to this day in many cities), right holders were required to file a complaint with the complainant having to be ready to travel to a distant court at any time over a potential 10-year period (the average course of a criminal case in India). MPA determined to, in effect, stop its criminal program as a result and resort to civil actions, but recently more criminal cases have been run.

In November 2000, MPA ran the first raid on an optical disc facility engaging in pirate production. 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 revealed the increasingly damaging nature of optical disc piracy in India, and suggests a growing domestic production that previously didn’t exist or went undetected. Unfortunately, the plant has reopened and was raided again in January 2002.

The police training imparted by MPA for conducting *ex officio* raid actions also resulted in the police conducting an *ex officio* raid on another OD plant in Delhi in November 2002. This plant largely indulged in piracy of music, software and local film product.

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).¹³ Since then, not a single criminal case has reached conclusion. By the end of 2002, the motion picture industry had 818 criminal cases pending in the courts.

The business software industry also began a program of criminal actions using the new determination of certain police cells to bring *ex officio* action against retail and wholesale pirates. The Delhi police conducted a number of raids in 2002 at the notorious Nehru Place, a hub for pirate software and also at the infamous Palika Bazaar. Police in Mumbai also conducted retail raids in the city. A total of 25 retail raids were conducted against software pirates in 2002 with large quantities of CD-ROMs being seized, many of which contained compilations of software programs from many different U.S. software publishers. Meanwhile, for the business software industry, 50 criminal cases against pirate resellers of software dating back to 1996 are still unresolved (81 in 2001). Fortunately, as a result of action taken by the Delhi High Court in 2002, some of these cases were compounded and allowed to be settled and removed from the crowded docket. Unfortunately, this does not provide the kind of deterrence needed. There are now five cases active in the criminal courts. Two of these were initiated in 1999 and 2000 and are active in the Hyderabad courts. Such cases, in places far from Delhi, add exponentially to the cost of supporting the case. Despite all this action and some progress in getting *ex officio* raids, there have only been two convictions to date. These cases were filed in 1999 and the convictions were obtained on February 6, 2003 in Hyderabad under Section 63 of the Copyright Act. The accused were sent to six months rigorous imprisonment with the fine of Rp 50,000 (US\$1,050), the minimum fine required under the Copyright Act. It should also be noted that for the first time in Chennai, a special Public Prosecutor was appointed in a BSA criminal action.

Lack of Deterrence, 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 and the government announced in 2002 the setting up of 19 such cells. Unfortunately, not all are even remotely active. The cells 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.¹⁴

¹³ 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 may have since been reversed on appeal.

¹⁴ 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.

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 that 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, the police in many cities simply refuse to act *ex officio* and invariably require a complaint from the right holder. The police will then only seize the product of that right 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 Vekatatraman*, 1996(6) Supreme Court Cases 409]. It is believed that because 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.

Fortunately this seems to be changing somewhat as noted above, with more *ex officio* actions now taking place. But despite this advance, convictions remain rare and deterrent penalties even rarer.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002					
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS	BOOKS	TOTALS
Number of Raids conducted	206	25	1,140	181	1552
Number of cases commenced	206	11	NA	55	272
Number of defendants convicted (including guilty pleas)			126	0	126
Acquittals and Dismissals	4		NA	NA	4
Number of Cases Pending	813	74	NA	NA	887
Total number of cases resulting in jail time	Virtually all cases entail some pre-trial jail time		10	Pre-trial jail time	10+
Suspended Prison Terms	0		NA	0	0
Maximum 6 months	0		NA	0	0
Over 6 months	0		NA	0	0
Over 1 year	0		NA	0	0
Total Suspended Prison Terms	0		NA	0	0
Prison Terms Served (not suspended)	0		10	0	10
Maximum 6 months	0		NA	0	0
Over 6 months	0		NA	0	0
Over 1 year	0		NA	0	0
Total Prison Terms Served (not suspended)	0		10	0	10
Number of cases resulting in criminal fines	0		126	0	126
Up to \$1,000	0		126	0	126
\$1,000 to \$5,000	0		0	0	0
Over \$5,000	0		0	0	0
Total amount of fines levied	0		NA	0	0

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

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, although defendants regularly challenge these injunctions and it can take up to five years before a contempt citation is actually enforced.¹⁵ To date, the motion picture industry has filed 18 actions, 8 against some of the largest cable networks in the country and others against specific shops in the some of the largest retail markets in the country and of late certain video libraries and video parlors. On November 26, 2002, for example, the Delhi High Court granted an injunction order covering any MPA film (past, present or future) against certain shops in the infamous “Palika Bazaar” and appointed a Court Commissioner empowered to conduct further investigations over a three-month period. This Commissioner has broad powers: to conduct surprise visits, to seize pirated goods and documents, and to force the shopkeeper to disclose pirate suppliers. Notices in this case were also issued to the landlord of “Palika Bazaar” ordering New Delhi Municipal Corporation (NDMC) to disclose details about the tenants. It is hoped that this action will eventually lead to NDMC canceling leases of pirate outlets.

The injunctions against cable networks have been as broad as to cover over 45 cities consisting of in excess of 8 million cable homes. Following these examples, almost every Hindi film released in India today is preceded by a civil injunction order. Such an order has almost become an industry norm. Four contempt proceedings have also been 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. In October 2002, an injunction was obtained against one of the Delhi’s larger cable networks—Home Cable Network—and in this case, the government ministries responsible for licensing the cable system was joined in the action and it is hoped that eventually an order will be obtained to cancel the license of cable operators that engage in unauthorized cable transmissions.

The MPA recently obtained an injunction barring unauthorized rental and importation against perhaps the largest video library in India.

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 brought against unauthorized use of business software in a business setting, so-called business end-user piracy of software. In 2002, BSA and an individual software company filed three civil actions (four were filed in 2001) and conducted civil raids with local commissioners appointed by the Delhi High Court.¹⁶ During the period 1999 to 2002, BSA initiated 13 civil actions against corporate end user piracy. In each of these cases, interim injunctions and Anton Pillar orders were granted. Multiple plaintiffs were permitted to file combined actions, which brings a cost

¹⁵ 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.

¹⁶ There have been 13 civil cases against pirate corporate end-users since 1999, and all but 3 have been settled. There are also 6 active civil cases against counterfeit resellers and computer resellers who load hard disks with pirated software prior to sale (so-called “hard-disk loaders”).

savings. Of these 13 cases, 10 have been concluded, with total damages recovered amounting to around US\$54,000. Two others are expected to be settled by May, 2003. The remaining one involves criminal contempt where the Division Bench of Delhi High Court has asked the defendants for full details of their software installations and use. 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. Changes to the Civil Procedure Code effective July 31, 2002 compressed the life of litigation, and a case can reach trial within 12 to 16 months.

While more properly labeled as an administrative action, 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. The first ever raid under that Act was conducted in November 2002. On a complaint made by the MPA, Mr. Chetan Ram, Sub-Divisional Magistrate, New Delhi conducted simultaneous raids on two cable networks, Bindra Communications at Gole Market and RM Video network at Udyan Marg. In addition to exhibiting pirate movies, these operators were also found violating a provision of the Delhi Entertainment and Betting Tax Act, 1996, and had not paid the necessary entertainment tax dues. R.M Cable network was not even registered as a cable operator. The Sub-Divisional Magistrate had sealed the entire equipment used for the broadcast and cable networks were completely shut down and the premises housing the cable networks were also sealed. The cable networks were only allowed to commence operations after almost 10 days with an undertaking from the owners to the effect that the said cable networks shall not violate / infringe the copyrights of any copyright holder. This should have a significant deterrent impact.

After many months of delay, authorized officers have been appointed to enforce the provision of the said Act. These included the District Magistrate, the Sub-Divisional Magistrate, the Commissioner of Police, the Entertainment Tax Commissioner and the Assistant Entertainment Tax Commissioner.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	0	2
Post Search Action		
Cases Pending	18	9
Cases Dropped	0	
Cases Settled or Adjudicated	0	
Value of loss as determined by Right holder (\$USD)	1,875,000	
Settlement/Judgment Amount (\$USD)	0	

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

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

1. Maximum statutory fines are too low to deter major infringements; fines actually imposed are too low; and the reported requirement that actual knowledge be proved in criminal cases all violate TRIPS Articles 41 and 61.
2. There have been negligible criminal convictions for piracy in India since January 1, 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.

What Needs to Be Done?

The Indian enforcement system is in need of very substantial reform. While some recent improvements have been seen such as increased *ex officio* criminal raids, pre-trial detention of criminal arrestees, broad civil injunctions with the appointment of powerful court Commissioners, all these welcome actions are only meaningful if right holders can pursue criminal and civil cases expeditiously and obtain quick and deterrent fines, jail terms, significant civil damages and effective contempt rulings with real teeth in them. The following actions and reforms must be made for India to reduce piracy and bring its enforcement system into compliance with its TRIPS obligations.

- Preferably a National Anti-piracy Task Force should be created to take criminal and civil actions against piracy. If this is not achievable, resources must be provided to the states to equip and train state IP Task Forces. The Home Ministry should take the lead in providing this training and resources and the Home Minister should issue a strong and widely publicized condemnation of piracy and the damage it is doing to India and urge all police forces to take immediate action to root it out;
- Specialized IP courts should be set up to get around the massive backlog of civil and criminal cases pending in the Indian court system. Failing that, chiefs of all the high courts should appoint special judges to try copyright piracy crimes and civil cases imposing deadlines for resolving them finally. These courts or special judges should at

least be responsible for completing a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy which has never been delivered;

- Significantly increase the number of *ex officio* raids against piracy at all levels. This will require a significant increase in the resources and manpower in the IPR cells and the local police forces;
- Reform the judicial system to prevent unjustified continuances; adopt case management techniques; eliminate court backlogs and focus on new cases and their speedy conclusion;
- Treat piracy as a serious economic crime which is undermining one of the strongest, fastest growing industries in India; impose deterrent penalties on pirates and establish clear standards for damages in civil cases, including implementing a statutory damage system which results in real deterrence;
- Adopt a modern OD law;
- Further modernize the copyright law and particular its enforcement procedures and penalty levels; bring the law fully into compliance with the WIPO treaties to prepare for the new era of e-commerce.

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\$1,050) and a maximum of two lakh rupees (US\$4,200). The minimum jail term was doubled to one year and the minimum fine increased to one lakh rupee (US\$2,100) 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\$1,050). 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 *never* 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. BSA has proposed the deletion of Section 52(1)(ad) to the Core Group now engaged in drafting amendments to the Copyright Act.

For the last three years, this Core Group of academics, government officials and local, Indian private sector representatives appointed by the Indian government has been considering amendments to the law to bring it into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The work of this Core Group, despite its importance to the entire international community of right holders, has been conducted in secret with foreign organizations not being permitted officially to view the draft as it is being completed or to comment on it. IIPA urges the Government of India to open up this process fully to all interested parties, to release immediately the text of the draft of such amendments now being discussed. We believe the government can benefit from the wide experience of U.S. right holders, as well as other right holders and governments, that have been operating under new laws that have implemented these new treaties.

The Core Group is now considering some of the most important issues that will face all governments in modernizing its copyright infrastructure as e-commerce develops. These issues are equally 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; providing for the full and Treaties-compatible protection for technological protection measures that right holders use to protect their digital, and easily copied and transmitted works from unauthorized access and from copyright infringement; 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; and the establishment of clear secondary liability of Internet Service Providers and an effective notice and takedown system. IIPA urges the USG to engage immediately with the Government of India on these critical issues before a draft is introduced into the Indian Parliament.

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 that 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 Programme Code. If any of these "Authorized Officers" has 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 that 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 only 2 (and very recent) cases of seizure of the equipment by authorized officers under the act, despite it having been in operation for over two years (since September 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 2002, \$1.8 billion worth of Indian goods (or 16.9% of India's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 52% increase over the same period in 2001. As India caused losses to the U.S. due to piracy of \$468.1 million in 2002, 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.