

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

INDIA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that India be retained on the Priority Watch List.

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. 2003 saw very little progress in combating piracy. 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 outside the largest cities; lack of resources and training; and an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases. CD-R burning is assuming a larger percentage of the pirate market (replacing VCDs and manufactured CDs) but imports of pirate OD product, from Pakistan, Malaysia and other countries, continue unchecked by Customs and other enforcement authorities. The nine local OD factories continue to produce pirate product and a first successful raid was made at the end of 2001. India has been pressed for at least 2 years to adopt an optical disc law like its neighbors in Asia, and recent reports indicate that a drafting process has been completed and the draft law rests with the Ministry of Information & Broadcasting. IIPA has not been able to review this draft. End-user software piracy and hard disk loading continue virtually unchecked, with almost no court cases decided. Book piracy continues as a huge problem and major seizures continue, with some deterrent effect, but no court decisions. The criminal system is slow, cumbersome, and fraught with delays and unnecessary expense, but *ex officio* actions by police cells in some major cities like New Delhi, Bangalore, Hyderabad and Chennai, with some pretrial detention of infringers, has brought some deterrence. While injunctions are issued fairly promptly in some jurisdictions in civil cases, these cases move far too slowly and infringers are known to violate court orders with impunity. While the injunctions offer some deterrence against cable piracy, in particular, this is not sufficient for other forms of piracy. The Civil Procedure Code was amended in 2003 to speed up decisions but it is too early to judge success. India has also engaged in a three-year, almost totally nontransparent, process of drafting amendments to its copyright law. We understand that this process has recently been concluded but IIPA has not seen a draft. It is

¹ For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>

² A study done in 1995 concluded that the copyright industries represented over 5% of GDP. IIPA understands an update of this study, based on WIPO's new template, is being planned for India. Software exports alone reached \$9.5 billion in 2003 and are expected to grow by 26-28% in 2004. Another study suggested 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.

hoped that these proposed amendments will correct some of the deficiencies in the current law and also fully and properly implement the WIPO “Internet” treaties. India should then promptly ratify them.

Actions to be taken by the Indian government

IIPA recommendations are virtually the same as in its 2003 submission, few advances in dealing with piracy having occurred:

- Establish a national centralized body dedicated to, and trained in, IPR enforcement, with powers to enforce across state borders;
- Adopt a world-class optical disc law to deal with increasing optical disc piracy;
- Improve and strengthen existing state level intellectual property police cells and ensure that they conduct more *ex officio (suo moto)* actions against piracy crimes;
- Work with Customs (a) to reduce significant imports of pirate product, particularly from Pakistan and (b) investigate and prevent illegal exports of low-cost India editions of textbooks, including to the U.S.;
- Adopt meaningful court reform to decrease burdens, costs and delays and ensure that cases are concluded promptly with deterrent penalties and damages;
- Adopt quickly amendments to the copyright law that correct deficiencies and properly implement critical aspects of the WCT and WPPT, including protection for temporary copies, and 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: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	77.0	60%	75.0	60%	70.0	60%	47.0	60%	66.0	80%
Records & Music	6.0	40%	6.6	40%	NA	40%	6.0	40%	8.0	40%
Business Software Applications ⁴	NA	NA	257.7	70%	256.0	70%	181.6	63%	160.2	61%
Entertainment Software ⁵	113.3	84%	NA	NA	NA	90	NA	80%	42.8	86%
Books	36.5	NA	36.5	NA	37.0	NA	36.0	NA	35.0	NA
TOTALS	NA		375.8		363.0		270.6		312.0	

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ BSA’s 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA’s statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. 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 reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT PIRACY IN INDIA

The fight against high levels of piracy progressed little in India in 2003. CD-R burning and increased Internet piracy have affected all industries in India. Continued book, music, video, business software 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 and 2003. 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, remain readily available, though continued seizures have helped to contain the problem, particularly in New Delhi and Mumbai. However, publishers' enforcement operations have encountered great difficulty in other cities. Publishers estimate that any bestseller 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, high quality pirated offset printed books are being exported from the south of India to surrounding countries.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. Continuing in 2003 is the unauthorized publication of books in digitized form (including interactive published materials on CD-ROM), all now widely available in the pirate markets in India, mostly manufactured domestically. Publishers report, for example, cases where 200-250 best selling medical and technical textbooks were being loaded onto CD-ROMS and being sold for US\$5. Reports are unconfirmed, but the source of these digitized pirate copies could have been digital copies made by the government in its announced effort to digitize textbooks and offer free access to them over the Internet. It is suspected that many of these digital copies are unauthorized. The government must ensure that permission is obtained from publishers for the making of all such copies and work with publishers to ensure that they are not diverted to the pirate marketplace.

In 2003, unauthorized copies of trade and textbooks began showing up on the Internet. While the penetration of Internet users in India remains small, this is a disturbing new development and calls, again, for India updating its copyright law and building a much stronger Internet enforcement infrastructure.

IIPA and AAP have urged for years that actions be taken with respect to exports of low cost "India-only" editions of U.S. books, particularly to the Middle East. 2003 saw these being

⁶ For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. The newest Harry Potter book, "Harry Potter and the Order of the Phoenix," was heavily pirated when it was released in 2003, and many Harry Potter knock-offs also flooded the market. 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.

exported to the U.S. both in hard copy form and via the Internet. Immediate action should be taken to halt this illegal activity.

Cable piracy: Through 2002, unauthorized cable television transmission was the predominant form of piracy of motion pictures in India. As many as 40,000 cable systems exist in India, and these systems 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 affected 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 and has achieved substantial success in reducing cable piracy of U.S. motion picture product. 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 points. However, these actions demand constant vigilance and MPA will continue to seek new injunctions and, where possible, contempt orders against recidivist cable systems. Because some cable systems violate these court ordered injunctions (and because of the positive impact of *suo moto* actions), MPA is bringing criminal cases in addition to civil cases for contempt of court. These actions are difficult but have some deterrent effect.

Video piracy: Pirate videos, VCDs, DVDs, and increasingly this year, CD-Rs, 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). A significant number of the VCDs are being manufactured locally by at least one factory located just at the border of New Delhi in the State of Rajasthan (Bhiwadi). The other factory in Kundli, Haryana, however, has largely shifted its operations to legitimate product, after the MPA initiated a raid on it in 2001. Its activities need continuous monitoring, however. The Indian OD factories are also suspected of manufacturing a significant amount of 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. Pirate optical discs are also being imported from Malaysia and Pakistan, but, as noted, CD-R burning in labs located throughout India is also taking over the pirate market.

While losses to the U.S. film industry are large, the popularity of, and high levels of piracy of, Indian films have contributed to reported balance sheet losses to the local industry of \$66 million (not piracy losses). The domestic industry generated close to \$900 million in total revenue in 2002.⁸ Given the importance of this industry to Indian economic development, it is critical that Indian authorities respond with adequate enforcement.

Music piracy: In 2003, the Indian and international recording industry reported significant losses due in large part to rampant piracy, particularly for Indian repertoire. The Indian Music Industry (IMI) reported in April 2003 that its members are losing close to \$30 million annually. In last year’s submission, IIPA reported that the industry declined 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. The legitimate music business is decimated by three types of pirate product. In counterfeit cassettes, the inlay cards differ in quality and color of printing, and do not contain the name of the company on the leader tape or embossed on the cassette. In pirated copies, the name and contact of the company manufacturing the cassette is missing,

⁸ *Deccan Herald*, “Film Industry Posted Rs300 Crore Loss in 2002,” March 15, 2003.

the name and contact of the copyright owner and year of publication are missing, the inlay card shows poor quality printing and/or unknown brand name, and compilations of “hit songs” from different albums are collected under names such as “Top Ten” or “Bollywood Hits,” etc. Pirated CDs containing MP3 files and include the same indicia of illegality as pirated cassettes, but in addition, source identification (SID) code is missing. Many pirate CDs emanate from pirate plants in Pakistan (whose music market is also in a precipitous decline due to massive optical media piracy there). Increasingly CD and CD-R piracy is replacing audiocassette piracy in the marketplace with audiocassette piracy focused on street vendors. Retail shops in major cities increasingly use CD-R burners to make compilations of music at the request of a customer. 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) continues unabated 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. Little positive change has been observed, with weak enforcement continuing. BSA, in a study released in 2003, stated that if India reduced its piracy levels from 70% to just 60%, it could add US\$2.1 billion to its GDP by 2006, add US\$92 million in tax revenues, and add 50,000 new software jobs. This is a big incentive for India to begin addressing this problem in a serious way.

Internet piracy: Internet piracy continues to grow as a problem affecting every copyright industry. 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.⁹ In 2002, one U.S. software company took action against the sale of pirated software on the Internet over a popular auction site. In September 2003, BSA obtained its first *suo moto* Internet raid conducted by the Mumbai police against a pirate selling illicit software through a list (www.list1.150m.com). Prior to that it had issued successful cease and desist letters to ISPs involving pirated software offered for sale at auction. These sites were promptly taken down and BSA believes that such piracy is subject to both criminal and civil action. MPA has also successfully issued warning notices to some pirates offering pirate products for sale through the Internet.

Piracy of entertainment software: Pirates sell the most popular games for Rs.175-250 (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 remains high 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 low fines and virtually no significant jail terms. While there have been a few recent small signs of progress, detailed below, the situation remains dire for U.S. industry generally.

⁹ See Manohar Sharma, “Music Industry Battles MP3 Piracy,” *Times of India*, January 31, 2002.

Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. Last year IIPA reported that in the over 15 years that IIPA has been working on Indian issues, there have been no more than 15 convictions¹⁰ for copyright piracy, as far as industry is able to ascertain. This included BSA's first ever conviction, in 2002, for retail piracy of software, which decision was ultimately reversed on appeal in 2003! The one bright spot, however, in an otherwise grim picture is the continuing cooperation, particularly by the New Delhi police (and by police in some other parts of the country), in running *suo moto* criminal raids. While the pretrial detention of suspected pirates is a deterrent, there have been only a few case decisions this year.

For example, the music industry obtained 1400 raids in 2003 carried out by the police, with seizures of almost 341,462 pirate audiocassettes (about one-half of the seizures in 2002) and over 460,903 CDs and CD-Rs (a 60% increase over seizures in 2002). Of this number 155,972 CD-Rs were seized, indicating clearly that CD-R burning is taking over the marketplace, as it is in other Asian countries. All in all, however, this record is insufficient to deter piracy effectively and the legitimate music industry in India is slowly shrinking, even 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, 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. Overall piracy rates (including local repertoire) in the cassette market are estimated at 40-50% and in the CD market at 60%. The move of police to taking *ex officio* actions is helping but only if followed by convictions with significant deterrent penalties. Piracy of music on the Internet is taking a toll as well. The local music industry established an Internet Anti-Piracy Group in 2002.

The publishing industry has been very active in addressing piracy of published materials. Slightly fewer raids were taken in 2003, due primarily to book piracy becoming more costly to pirates and moving even further underground. The 2003 raids were largely focused on the source of pirate production rather than distribution outlets. Noteworthy in 2003 was a raid against a pirate operating from a medical college campus in New Delhi, netting 1,100 copies of photocopied and hard bound pirate books and four photocopy machines. This was the third raid conducted within the medical college premises in the past three years. Unfortunately, this college seems to be taking no action to ensure that this does not happen again. In other medical college raids, one pirate had been found to have been arrested three times. In another raid in March 2003 at a pirate's printing establishment in New Delhi, 70,000 pirated copies of trade bestsellers were recovered. This was estimated to be one month's stock of pirate books being fed by this pirate alone into an even larger pirate distribution channel. While over 79 businesses/pirates were raided in 2003,¹¹ and while pirated books are regularly removed from many of the traditional markets, publishers have still not obtained a single conviction for book piracy. While 62 criminal cases have been commenced (with the publishers' lawyer undertaking a great deal of the work), progression of cases has been excruciatingly slow. In 2003, the prosecutors have filed charge sheets in 21 criminal cases but none of these cases has yet progressed beyond the preliminary stage. What is clear is that all these raids have revealed the

¹⁰ There have been a number of convictions, in cases brought by the recording industry, for failure to use the required certificate on audio and videograms under Section 52A of the Copyright Act, but virtually none under Section 63B, the criminal piracy provision. As noted in the text below, MPA recently obtained 3 additional convictions under 63B—a welcome development

¹¹ From September 2002 through November 2003.

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 despite training by the publishers, not many *suo moto* actions have been instituted (a direct complaint by the right holder was necessary), it is critical that more such actions, particularly in cities outside New Delhi, be conducted.¹² Beyond this stage, there is an urgent need for effective post-raid prosecution, including time-bound destruction of seized pirate stocks, and actual convictions with deterrent penalties.

With respect to video piracy, between July 1, 2002 and August 6, 2003, police conducted 119 *suo moto* actions across India. Police seized 30,539 VCDs, 15,113 DVDs and 190,610 CD-Rs, the majority of which infringed U.S. motion pictures. This is a marked and welcome increase in such raids and has led to MPA returning to use the criminal system more than in the last two years, when civil actions looked like the only viable enforcement tool. Most important, however, three convictions under the copyright law's criminal provisions, S. 63B, were obtained by MPA, not just under S. 52A, with imprisonment of 9 months in each case plus fines. This is a significant step forward.

To obtain even more *suo moto* raids on CD-R labs, MPA, in May 2003, announced a reward scheme designed to obtain information on CD burning operations. With a concerted program to train more police, MPA hopes to increase deterrence through raiding and more convictions with deterrent penalties.

The business software industry also began a program of criminal actions using the new determination of certain police cells to bring *suo moto* actions against retail and wholesale pirates. A total of 48 *suo moto* raids were conducted in 2003, mainly in New Delhi. The value of software seized in each raid varied from US\$250,000 up to US\$2.2 million, indicating the seriousness of the problem. However, none of these cases has yet reached the court—an all too typical situation in India. In addition, there are now 48 pending criminal cases, some of them filed in the mid 1990s, which have yet to reach court. The difficulty in concluding criminal cases satisfactorily can be seen in a case prominently reported in last year's submission as a major advance. In February 2003 a court in Hyderabad convicted dealers (hard disk loading and selling of pirate software) in two cases initiated in 1999 under S. 63 of the Copyright Act and S. 78 & 79 of the Trademarks Act. In one case there were three accused and in the other case there were four accused; each received a conviction for six months and a fine of Rs. 50,000 (US\$ 1,100), the minimum in the Copyright Act. This marked the first case in which BSA had received a conviction for distribution channel piracy in India. However, the defendants thereafter successfully appealed and the conviction was overturned. BSA has now had to file a further appeal in the High Court. This means, again, that the software industry still has never had a conviction for software piracy in India—even though India is one of the largest software producers in the world!

One major positive development was the first criminal end-user raid ever conducted by BSA in India, which occurred in March 2003 and involved a computer training institute located in Delhi. The software seized in that raid was valued at Rs. 1 Crore (US\$22,000) and the owner was arrested.

¹² The publishing industry reports that its anti-piracy lawyers had a particularly difficult time getting the police in Mumbai to cooperate. Near the end of 2003, for no apparent reason, 30 criminal cases were simply dropped without notice by the Delhi police.

There were 17 software cases active in the criminal courts at the end of 2003. The long, drawn-out nature of these prosecutions and the need to make appearances whenever the cases are heard adds exponentially to the cost of supporting the case.

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. The government announced in 2002 the setting up of 19 such cells. Unfortunately, not all are even remotely active. With the exception of the cell in New Delhi¹³ and a few other cities, these cells lack the necessary resources in terms of manpower (making them incapable of raiding larger pirate distribution and production targets), training and funds. In many locations, 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

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 to 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 most 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. Moreover, 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. This is another key reason why *suo moto* actions have become so important.

Another source of harassment for right holders has occurred recently in the form of counter-cases being filed by pirate syndicates. Pirates who are raided have started forming organized groups. Members of these syndicates have hired professionals whose sole job is to disrupt raid and seizure operations conducted at the behest of rights holders. These professionals use the slow court system to initiate false cases against those representing right

¹³ Publishers report that the Delhi cell now has the capability of running simultaneous actions against six targets.

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. AAP reports particular problems with the Mumbai police in persuading them to run *suo moto* raids.

holders in anti-piracy actions. Once initiated, the syndicates then create adverse publicity as an obvious tactic to defame these anti-piracy operations. The MPA has specifically targeted these larger organized pirates and is therefore particularly vulnerable to these tactics.

INDIA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING [#]	TOTALS
Number of raids conducted	170	48*	1,400	129	1,747
Number of VCDs seized	54,995				54,995
Number of DVDs seized	19,117				19,117
Number of CDs/CD-Rs seized	114,520		460,903		575,423
Numbers of audiocassettes seized			341,462		341,462
Number of books seized				141,716	141,716
Number of persons arrested				87	87
Number of investigations	379				379
Number of VCD lab/factory raids	0				0
Number of cases commenced	170	0 (17) [^]			170
Number of Indictments	170				170
Number of defendants convicted (including guilty pleas)	3	2**			5
Acquittals and dismissals	1	2**			3
Number of cases Pending	980	48 [^] + 48*			1,028
Number of factory cases pending	2				2
Total number of cases resulting in jail time	3	0			3
Suspended prison terms		0			0
Maximum 6 months		0			0
Over 6 months		0			0
Over 1 year		0			0
Total suspended prison terms		0			0
Prison terms served (not suspended)		0			0
Maximum 6 months		0			0
Over 6 months		0			0
Over 1 year		0			0
Total prison terms served (not suspended)		0			0
Number of cases resulting in criminal fines		2**			2
Up to \$1,000		0			0
\$1,000 to \$5,000		2**			2
Over \$5,000		0			0
Total amount of fines levied (in US\$)		\$2,200**			\$2,200

*These cases are criminal retail cases conducted independently by the police (as against the older cases in which BSA was the complainant). We have cross-checked our information with various police jurisdictions who inform us that though charge sheets have been framed in most of the cases, the courts have yet to frame charges in any of them and hence yet to take cognizance of the same. Hence the number of cases commenced is 48, *i.e.*, the number of *suo moto* raids in 2003. Due to this, the number of cases pending would also be zero.

[^] These cases are all pre-2003 cases in which BSA was the complainant.

**These two cases relate to the first ever conviction achieved by BSA, however, the defendant successfully appealed. An appeal is being filed against the acquittal of the two accused.

[#]Statistics for September 2003-November 2003

CIVIL ENFORCEMENT

MPA is still taking civil cases against cable operators, but fewer than in prior years. Recently it has settled one case against a large cable operator in Gurgaon, near New Delhi. In another series of cases involving unauthorized cable transmission of the movie *Monsoon Wedding*, the system owner has appealed to the Supreme Court on the grounds that it should not be liable for the acts of their franchisees or distributors. This case is being watched carefully by industry, since it may set new standards for future enforcement against cable networks.

In addition to its efforts to use civil litigation against cable piracy, MPA has now expanded its operations against rental libraries and video parlors. Last year it obtained an injunction barring unauthorized rental and importation against perhaps the largest video library in India. The pirate involved in that case is the person particularly responsible for organizing one of the syndicates seeking to disrupt MPA's anti-piracy operations, as described above. This tactic is being used to thwart the existing injunction barring the pirate from renting and importing U.S. videos by trying to force the association to settle with him.

While the business software industry also seeks to rely more heavily on *suo moto* actions, historically, BSA has been compelled to focus more on civil redress in end-user cases, as being a complainant in a criminal case can tie up a copyright holder for years pending resolution of the criminal case. Yet, even this course of action has many hurdles. On the practical side of taking civil action, it has been found that it is extremely difficult to obtain statements or affidavits in relation to business/corporate piracy, as people are often fearful of the implications and consequences. The copyright owners often struggle to obtain conclusive evidence of the infringing use. This, coupled with the ease with which this evidence can be removed and destroyed, make effective and expedient criminal enforcement an important component in the drive to reduce piracy in all forms. Unfortunately, this is presently elusive.

In 2003, BSA brought three civil actions against corporate end users. In 2002, BSA filed three civil actions (four were filed in 2001) and conducted civil raids with local commissioners appointed by the Delhi High Court.¹⁵ During 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 savings. Of these 13 cases, 10 have been concluded, with total damages recovered amounting to around US\$54,000. 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.

On July 1, 2003, amendments to the Code of Civil Procedure went into force providing that civil cases must be completed within one year of being brought and that no more than three adjournments would be granted per party. This will hopefully lead to a new docket management culture within the judiciary. For example, the court now accepts an affidavit rather than requiring evidence in chief. Issues that could take two years as a result now can be dealt with in a week. It is too early to say how effective these new regulations will be in expediting civil cases; IIPA members will be monitoring these developments in the meantime.

¹⁵ 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").

INDIA CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	TOTALS
Number of civil raids conducted	2	3	5
Post-search action		-	
Cases pending	19	13	32
Cases dropped		-	
Cases settled or adjudicated	1	0	1
Value of loss as determined by right holder (\$USD)		-	
Settlement/judgment amount (\$USD)	1100	1*	1100+

*This case refers to an out-of-court settlement amount paid to BSA in a criminal matter. Two settlements in end-user cases filed in 2003 are likely to be concluded in 2004.

This overall criminal and civil enforcement record implicates India's TRIPS enforcement obligation in each area. In sum, the 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 *suo moto* criminal raids, pre-trial detention of criminal arrestees, and broad civil injunctions with the appointment of 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 contempt rulings with real teeth. 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 fast track 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 optical disc 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.

COPYRIGHT LAW AND ENFORCEMENT PROVISIONS: INDIA'S COPYRIGHT LAW, TRIPS AND WIPO TREATIES LEGISLATION

The positive and negative provisions in India's copyright law were discussed in some detail in IIPA's 2003 submission and that analysis will not be repeated here.¹⁶

For the last three years, a "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 again urges the Government of India to open up this process fully to all interested parties, and 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 treaties.

The Core Group has now reportedly concluded its consideration of 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;

¹⁶ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

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; 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.

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. One of the discretionary criteria of this program is that the country provides “adequate and effective” copyright protection. In 2002, \$2 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 17.3% of its total exports to the U.S. During the first 11 months of 2003, \$2.4 billion worth of Indian goods (or 20% 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 30.1% increase over the same period in 2002.

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