

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 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: Both the domestic copyright-based industry² (one of the largest and most significant in the developing world), and the U.S. and international industry, suffer from high piracy rates and a continuing, debilitating enforcement system. As in 2003, there was only minor progress in combating piracy, though there seems to be a growing recognition, particularly at the state level, that piracy is sapping the creative industries in those states. The hurdles to reducing piracy rates in India have not changed significantly over the years; they 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; an overburdened and slow court system that prevents conclusion of even the simplest criminal or civil cases, and finally, a lack of real deterrence in the overall enforcement system. CD-R burning (including multi-album compilations of MP3 format music) is assuming a larger percentage of the pirate market, and pirate VCD sales are increasing in Southern India. Unauthorized rental of pre-release pirate or parallel imported DVDs and pirate VCDs has grown into a major problem for the film industry. Imports of pirate CDs, DVDs, entertainment software and other pirate OD product, from Pakistan, Malaysia and other countries, continue substantially unchecked by customs and other enforcement authorities.

There are now 12 OD factories in India, and it is known that at least one, located just outside New Delhi, continues to produce pirate product. India has been pressed for at least three years to adopt an optical disc law like its neighbors in Asia, and, while we reported in 2003 that a drafting process had been completed and the draft law rested with the Ministry of Information & Broadcasting, no action to move it to Parliament has yet been taken. IIPA still has not been able to review this draft and there are recent reports that the government may also be

¹ For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.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. India is also being encouraged by WIPO to do an update of this study, following the new WIPO template for such studies. Software exports alone reached \$12.8 billion in 2003-4 (March ended). http://news.ncmonline.com/news/view_article.html?article_id=167d1c86c1d28e7607c942fd9891938e. 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. Recently the Indian IT Minister commented that he thought the \$50 billion export target by 2008 could be achieved given the extraordinary growth in 2004. <http://www.newkerala.com/news-daily/news/features.php?action=fullnews&id=64856>. 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.

considering just adopting amendments in its copyright law, rather than a strict licensing regime, a route that IIPA and its members would oppose.

End-user piracy of business software 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 increased interest by state governments in fighting piracy has resulted in more *ex officio* actions by police cells in some major cities like New Delhi, Bangalore, Hyderabad and Chennai, and now even in some smaller towns. Pretrial detention of infringers has brought some deterrence, but convictions and deterrent penalties remain rare. While injunctions are issued fairly promptly in some jurisdictions in civil cases, these cases move far too slowly and damages are rarely granted. While the injunctions have offered some deterrence against cable piracy, in particular, this has not been sufficient for other forms of piracy. The Civil Procedure Code was amended in 2003 to speed up decisions but IIPA members report that it is still too early to judge success. India has also engaged in a now four-year, almost totally nontransparent, process of drafting amendments to its copyright law to implement the WIPO "Internet" treaties. We reported in last year's submission that this process had been concluded but neither IIPA nor the U.S. government has been able to review and comment on a draft. Rumors continue to circulate that action may be taken this year, including the ratification of the WIPO treaties. IIPA is concerned, however, that the draft law will not be compatible with the WIPO treaties obligations.

Actions to be Taken by the Indian Government

IIPA recommendations have changed little over the years since few advances in dealing with piracy have 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, modeled on the IIPA "model" provided to India in 2003, 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 in all copyright sectors;
- Work with customs (a) to reduce significant imports of pirate product, particularly from Pakistan and Malaysia, (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film's Indian theatrical run; and (c) investigate and prevent 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, including, in particular, setting up IP courts with both civil and criminal jurisdiction;
- Adopt in 2005 amendments to the copyright law that correct deficiencies and properly implement all obligations 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 Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004³

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	80.0	60%	77.0	60%	75.0	60%	70.0	60%	47.0	60%
Records & Music	67.3	50%	6.0	40%	6.6	40%	NA	40%	6.0	40%
Business Software⁴	220.0	74%	187.0	73%	257.7	70%	256.0	70%	181.6	63%
Entertainment Software⁵	59.5	86%	113.3	84%	NA	NA	NA	90%	NA	80%
Books	38.0	NA	36.5	NA	36.5	NA	37.0	NA	36.0	NA
TOTALS	464.8		419.8		375.8		363.0		270.6	

COPYRIGHT PIRACY

The fight against high levels of piracy progressed only marginally in India in 2004. CD-R burning has affected all copyright industries. Internet piracy has already hit the music industry, and is now progressing to all other sectors. Continued book, music, video, business software and cable piracy hamper the development of what should be one of the best copyright markets in Asia. Factory piracy remains a problem with the increase in production lines to 35 (from 14 in 2003) and total capacity up from 49 million units annually to over 122 million. This tripling of capacity makes an effective OD law even more urgent. OD imports also continue.

Book piracy: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry, despite significant efforts at enforcement by affected companies and trade associations. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality cover-to-cover 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 somewhat, particularly in New Delhi, where industry reports good cooperation from the authorities. Cooperation has been severely lacking in other cities and regions, however, especially in Mumbai, where previous efforts by authorities have dissipated, leaving right holders with nothing but a corrupt enforcement system that turns a blind eye to blatant piracy. The Mumbai police crime branch has been totally unwilling to help publishers enforce their rights, instead directing right holders to local police, who have neither the training nor the expertise to be effective in this area. The result is that piracy abounds with little deterrence. For instance, about 50 retailers in and around Churchgate continue to deal openly in pirate goods, with no resistance from law enforcement. Such instances of flagrant violation of the law must be stopped.

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/2005spec301methodology.pdf>.

⁴ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in India, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$367 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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.

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 books continue to be exported from India to surrounding countries and all over the world, increasingly using the Internet as a means for distribution and/or order management. Sites operated by Indian companies now offer shipment of pirated books in hard copy to users worldwide, including in the United States. Many operators of these websites are highly organized companies with sophisticated acquisition and distribution systems.

Raids undertaken by publishers have had some effect on organized commercial photocopying, but this activity continues despite enforcement efforts. For instance, copying remains a problem at private educational and research institutions and is on the rise with regard to medical texts.⁷ The government should take an active role in combating this problem, starting with a directive to all educational and research institutions that they are to stop use of photocopied versions of books and take appropriate action against on-campus copy shops engaging in illegal activity.

Continuing in 2004 is the unauthorized publication of books in digitized form (including interactive published materials on CD-ROM), all now widely available in the pirate markets. Publishers report, for example, cases where 200-250 best selling medical and technical textbooks are being loaded onto CD-ROMS and being sold for US\$5 or less. Furthermore, the government announced an initiative to digitize textbooks and offer free access to them over the Internet. The government must ensure that appropriate permission is obtained from publishers for the making of all such copies and work with publishers to ensure that copies made as part of this initiative are not diverted to the pirate marketplace.

Unauthorized copies of trade and textbooks began showing up on the Internet in 2003, and this phenomenon took on new proportions in 2004. While the penetration of Internet users in India remains small, the borderless nature of Internet commerce makes this a disturbing 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. Export of these to Asia, the Middle East, Europe and the U.S., both in hard copy form and via the Internet, continued in 2004. Immediate action should be taken to halt this activity.

Video piracy: Pirate VCDs, DVDs, and CD-Rs containing U.S. motion pictures 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). There are still reports that a significant number of 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, while it shifted its operations to legitimate product after an MPA initiated a raid on it in

⁶ For instance, 18,000 pirate copies of the Harry Potter books were seized in 2002 and early 2003. The then 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 enforcement action 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 However, industry reports some government-led effort to crack down on this activity. In December of 2004, a librarian of a government run medical college was arrested for illegal photocopying and dismissed from his job. An inquiry is ongoing.

2001, then resumed pirate operations. There have been no recent reports of piracy by this factory. 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 them or to 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, and has increasingly been moving into southern India.

In 2004, piracy via unauthorized rental has become rampant. Pirate rental libraries now exist all over India and there is virtually no legitimate rental business.

A hopeful sign has been the renewed attentiveness of the Indian film industry to video piracy. Many press stories emanating from Bangalore, Chennai and the States of Karnataka and Tamil Nadu expressed, for example, the Tamil film industry's concern over increasing piracy and included key statements from State government leaders offering to assist in the fight against piracy. Similar reports were coming from Hyderabad in the state of Andhra Pradesh in southern India. Since the state governments are ultimately responsible for enforcing the copyright law, this is a welcome development.⁸ MPA is now working closely with local film companies and has entered into an alliance in the State of Kerala for conducting jointly funded anti piracy operations. If this venture is successful, it is hoped that many more local film bodies will join in this fight.

Also in 2004, the Ministry of Information and Broadcasting (MIB) which, we understand, has taken charge of the OD law, has asked all the states to report to it on state anti-piracy actions. IIPA members will be monitoring this welcome move toward better coordination at the national level

Cable piracy: Through consistent enforcement pressure the cable piracy problem has been relatively contained through 2004. 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 were frequently transmitting 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, at least 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 significantly. While cable networks continue to blatantly make unauthorized cablecasts of Indian titles, piracy of MPA member company titles has now been substantially contained through these actions.

⁸ <http://www.newindpress.com/NewsItems.asp?ID=IET20040912132927&Title=Southern+News+%2D+Tamil+Nadu&rLink=0;>
<http://www.newindpress.com/NewsItems.asp?ID=IEA20040912002141&Title=Southern+News+%2D+Andhra+Pradesh&rLink=0;>
[http://www.ndtv.com/morenews/showmorestory.asp?slug=Video+piracy+robs+TN+film+industry&id=60865.](http://www.ndtv.com/morenews/showmorestory.asp?slug=Video+piracy+robs+TN+film+industry&id=60865)

Music piracy: In 2004, the Indian and international recording industry reported increasing difficulties due to high levels of piracy. The head of the Indian Music Industry (IMI), Mr. V.J. Lazarus, reported in August 2004 that the cassette industry had been virtually “wiped out” by piracy and that the widespread sale of pirated MP3s and the availability of pirate VCDs was causing significant losses to the industry. He reported that the CD business was down 50% in the last one and a half months.⁹ A July 2004 press story reported that the Punjabi recording industry was in a deep crisis due to piracy and that sales have gone into a steep decline, by about 60 to 70 % over the last two years. Increasingly, VCD piracy had become the culprit.¹⁰ In last year’s submission, IIPA reported that the recording industry had declined significantly. For India as a whole, however, this decline has been arrested for 2004, but this may only be temporary. The local music industry is responsible for about 80% of the legitimate music market in India. Pirated CDs containing MP3 files 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). Retail shops in major cities increasingly use CD-R burners to make compilations of music at the request of a customer. Pirated CD-Rs now containing over 200 songs, each in MP3 format, continue to 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. Even though there were a number of *suo moto* raids at the retail level, to IIPA’s and BSA’s knowledge, there have been no convictions. Furthermore, around 46 retail cases that have been pending for a few years without reaching court are now time barred.

Internet piracy: Internet piracy continues to grow as a problem, and broadband connections are increasing resulting in piracy extending beyond just the music industry. For example, there are new reports of some downloading of entertainment software and sales off auction sites. There is a growing number of pirate sites available in India; many of the servers reside in the U.S. P2P downloads are increasing as broadband penetration grows. A large number of websites continue to make use of Indian-origin repertoire. For the software industry, the growing threat posed by P2P filesharing of computer programs (and other works) remains ominous, with 1,099 P2P infringements of business software being noted between January and September 2004. This number will increase with the growth of broadband penetration. India has adopted a new broadband policy under which it is expected that both government and private sector ISPs will increase the availability of broadband, making the Internet piracy issues more complex.

Piracy of entertainment software: The piracy level is estimated at 86% of the market, with retail outlets and flea markets saturated with pirated products. In addition to continued imports of pirate product from elsewhere in Asia, and particularly Malaysia, it has also been reported that there is now domestic optical disc production of pirated entertainment software products, including “demo games.” Demo games are shortened (sample) versions (i.e., two of ten levels of the full game, ten minutes of play time, one of five playable characters made

⁹ <http://www.thehindubusinessline.com/2004/10/16/stories/2004101602670300.htm>.

¹⁰ <http://www.tribuneindia.com/2004/20040713/punjab1.htm#24>.

available, etc.) of legitimate soon-to-be-released or already released full versions of a video game that can be downloaded for free from legitimate sites on the Internet. However, pirates are also now downloading these “demo games” and bundling them into compilation discs, thereby putting “demo games” from various entertainment software publishers onto a single disc. These compilations of “demo games” are then sold to the public as “multi-games,” deceiving the consumer and creating confusion as well as creating conflicts for the publishers. A pack of 14 of these compilation discs sells for US\$10. When legitimate publishers attempt to market the finished video game product (i.e., the final version of the game, complete with packaging and user manuals, etc.) in India, it is difficult to explain to consumers that they must pay more money for this single game (which may have already been included among the games on the “demo” compilation disc). The consumer is unaware or does not know that the compilation disc merely includes a copy of a demo and is not the real game. Other pirated entertainment software products on optical discs sell for US\$2.

COPYRIGHT ENFORCEMENT

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.

Criminal Enforcement

Criminal enforcement against piracy in India has been rife with frustrations for both the Indian and U.S. copyright industries. In 2003 and 2004, IIPA reported that in the over 15 years that IIPA has been working on Indian issues, there have been no more than 15 convictions¹¹ for copyright piracy, as far as industry is able to ascertain. This does not yet include BSA’s first ever conviction, in 2002, for retail piracy of software, which decision was ultimately reversed on appeal in 2003, and is on further appeal! Noteworthy in 2004, and included in the above figure, was a rare conviction for video and music piracy (1,500 videos plus CDs) in March 2004 in Mumbai, in a case commenced in 1999. The defendant was a retailer who was sentenced to a total of 8 months in jail and a total fine of Rs. 6000 (US\$138) under Articles 63 and 68A of the Copyright Act. This is encouraging and has caused MPA to continue its criminal enforcement program though running more *suo moto* criminal raids, now not only in the metro cities of Delhi, Chennai, Bangalore and Hyderabad, but also in smaller towns in the States of Kerala, Karnataka, Tamil Nadu, Andhra Pradesh, Punjab, Haryana and West Bengal. Because of increased pressure from the local film industries, the police have been more cooperative, and have asked for training, which MPA has provided. Also encouraging are longer pretrial detentions (given the length of time it takes to complete a criminal case) in Tamil Nadu, using the Goondas Act, which allows such detentions for up to one year.

The music industry obtained 1600 raids in 2004 carried out by the police, with seizures of almost 241,000 pirate audiocassettes (a drop of about 35% from 2003) and over 1,475,903 CDs and CD-Rs (a 100% increase over 2003; the increase was 60% increase between 2003 and 2003), demonstrating that OD piracy is taking over the market in India. Historically, the Indian Music Industry (IMI) has had the greatest success of all copyright industries in getting

¹¹ 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 three additional convictions under 63B—a welcome development.

raids and seizures, though 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 taking a severe toll. Overall piracy rates (including local repertoire) in the market has increased to 50% and losses have increased as well. The IMI reports that in total 670 convictions were obtained through November 2004 out of 8000 cases initiated since 1997. Of these convictions, 57 resulted in more than minimal jail terms.

Notice and takedown actions against Internet pirates were also conducted by the music industry. The recording industry identified 875 pirate sites during 2004. 211 of these were download sites, 262 do streaming, 32 do music "clips," and 370 link to other sites. The industry took action against 291 of the download and streaming sites through notice and takedown letters to ISPs. 126 of the download and streaming sites remained active in January 2005.

The publishing industry continues to be active in addressing book piracy. Industry-initiated raids continued in 2004 with large seizures in some cases of both pirated print editions and photocopies of medical books, popular fiction and nonfiction and texts of all sorts. However, enforcement becomes non-deterrent after the raids. While over 250 businesses/pirates have been raided since 2000, 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 77 criminal cases have been commenced, progression of cases has been excruciatingly slow. Prosecutors have filed charge sheets in 53 criminal cases but few of these cases have yet progressed beyond the preliminary stage. What is clear is that all these raids have revealed the increasing organization and sophistication with which the book pirates are operating in India. Publishers note that, despite industry training efforts, few *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. 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, out of the total 284 raids conducted in 2004, 249 were *suo moto* (88% of the total). In these raids police seized 185,167 VCDs, 40,336 DVDs, 83,418 CD-Rs, 258 CD-R burners, 21 DVD-R burners and 1,834,157 inlay cards and cover boxes, the majority of which infringed U.S. motion pictures. These increased *suo moto* raids contributed to the seizure of almost 60 percent more pirate optical discs than in 2003.

Central to MPA's criminal program is reducing piracy in Delhi's famed pirate hotspot, Palika Bazaar. Continuing leaks from the police about upcoming raids prompted MPA to go directly to the criminal court where it obtained, in August 2004, a general search and seizure warrant and an order to the police to investigate piracy. This warrant and order resulted in the Delhi police conducting raids in Palika Bazaar and elsewhere, 35 in all, with many arrests. It is hoped that this kind of general court order can be used in other cities.

Owing to a marked and welcome increase in such raids and better co-operation from the police, MPA has now better balanced its use of both the criminal and civil system to combat piracy. For example, MPA reports that in Chennai, in southern India, the police, in the month of July alone, conducted over 35 *suo moto* raids at MPA's request.

In attacking the increase pirate rental business, MPA initiated criminal (and civil) actions in Delhi against one of the largest rental outlets in the country. Repeated pressure by MPA resulted in the bail of the owner being cancelled. A settlement was finally negotiated with the

owner agreeing not to rent any MPA member films and paying a settlement sum of Rs. 500,000 (US\$11,000). This had a deterrent effect on this problem.

MPA has also launched a very successful rewards scheme for identification of CD-R and DVD-R burning facilities. Over Rs. 249,000 (US\$5,711) have been distributed as prize money to the informers for information which resulted in successful raids on CD-R and DVD-R burning labs.

The business software industry reports that there were around 20 known *suo moto* raids conducted by police in 2004 across India targeting the illegal sale of pirate software. Around 16,000 discs containing software with an estimated street value of US\$5.6 million were seized. Given that the cases are prosecuted by the police themselves, it is difficult to keep track of the position of these cases. However, to the best of BSA's knowledge, no cases have resulted in a conviction. The 2003 Hyderabad retail piracy case (filed in 1999), cited in IIPA's 2003 and 2004 submissions in which BSA initially won its first conviction ever for software piracy and then lost on appeal, has now been appealed again. To date there has been no decision on the appeal.

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 each case.

In September 2003, BSA obtained its first *suo moto* Internet raid. It was conducted by the Mumbai police against a pirate selling illicit software through a list (www.list1.150m.com). In this case the charge sheets have now been filed but a court decision is still pending.

Lack of Deterrence, Procedural Burdens, Hurdles, Costs and Delays

Exacerbating the overall non-deterrent 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 Delhi and a few other cities, like Chennai, Mumbai, Bangalore and Hyderabad, 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.¹² The Mumbai police have traditionally refused to emulate the success of *suo moto* actions, and only after concerted MPA efforts did the police conduct two *suo moto* actions in December 2004. Hopefully, these actions are the start of a trend of more police-initiated actions. In 2004, the Ministry of Human Resource Development (HRD) asked each state to set up a Nodal office on IPR to coordinate enforcement. The ministry has been conducting training of these Nodal officers.

¹² 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 Bazaar market of Delhi. AAP reports particular problems with the Mumbai police in persuading them to run *suo moto* raids.

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 pirated 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 pirated 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. Even in the case of *suo moto* raids, trial dates are set based upon when the charge sheets are filed and this results in delays of more than two years or more between the date of the raid and the initial trial date, due to huge backlogs in the court system. Thereafter, 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 in the form of counter-cases being filed by pirate syndicates. Pirates who are raided have formed 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 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. Fortunately, these tactics have not proved a major impediment; MPA has successfully defended itself, and initiated counter actions, which has recently caused a reduction in these complaints.

It is critical that India set up specialized IP courts with both criminal and civil jurisdiction as the only practical way to reduce the huge backlog of court cases and to bring real deterrence to the Indian enforcement system.

**CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS IN 2004
INDIA**

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS	BOOK PUBLISHING	TOTALS
NUMBER OF RAIDS CONDUCTED	284	20*		45	349
NUMBER OF VCDs SEIZED	185,167			0	185,167
NUMBER OF DVDs SEIZED	40,336			0	40,336
NUMBER OF CDs/CD-Rs SEIZED	85,580	6000		0	91,580
NUMBERS OF AUDIOCASSETTES SEIZED				0	0
NUMBER OF BOOKS SEIZED				109,525	109,525
NUMBER OF PERSONS ARRESTED	284			44	328
NUMBER OF INVESTIGATIONS	616			212	828
NUMBER OF VCD LAB/FACILITY RAIDS				0	0
NUMBER OF CASES COMMENCED	284	17**		****	301
NUMBER OF INDICTMENTS	1				1
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	1			0	1
ACQUITTALS AND DISMISSALS	2				2
NUMBER OF CASES PENDING	772	45***		44	861
NUMBER OF FACTORY CASES PENDING					
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	1			0	1
SUSPENDED PRISON TERMS					
MAXIMUM 6 MONTHS	1				1
OVER 6 MONTHS					
OVER 1 YEAR					
TOTAL SUSPENDED PRISON TERMS					
PRISON TERMS SERVED (NOT SUSPENDED)					
MAXIMUM 6 MONTHS					
OVER 6 MONTHS					
OVER 1 YEAR					
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)					
NUMBER OF CASES RESULTING IN CRIMINAL FINES				0	0
UP TO \$1,000	1				1
\$1,000 TO \$5,000					
OVER \$5,000					
TOTAL AMOUNT OF FINES LEVIED (IN US\$)				0	0

* "Suo moto" actions in 2004.

** These cases are all pre-2004 cases.

*** These are very old cases which have not reached the court and are now time barred.

**** Charge sheets have not been filed in any of these cases but bail hearings were held in 44 cases and arrested defendants spent a total of 90 man-days in custody.

CIVIL ENFORCEMENT

MPA is still taking civil cases against cable operators, but improvements here have necessitated fewer cases. In IIPA's 2004 report, MPA reported on a series of cases involving unauthorized cable transmission of the movie *Monsoon Wedding*. The system owner appealed the cases to the Supreme Court on the ground that it should not be liable for the acts of its franchisees or distributors. The injunction was upheld by the Supreme Court in a most welcome development and has deterred many large cable networks from transmitting MPA films without a license.

In addition to the continuing efforts to use civil litigation against cable piracy, MPA has also continued its operations against rental libraries and video parlors. In 2003 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. Due to the constant pressure put on this pirate by the MPA (including efforts resulting in cancellation of his bail), the pirate eventually settled the cases and also paid damages in the sum of Rs. 500,000 (US\$11,468).

The BSA has many civil cases still pending in the courts. The process is grindingly slow and as such the problems of yesteryear are still very much the flavor of today. In 2004, BSA filed two civil end user cases. In 2003, it had brought three such actions. 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. During 1999 to 2002, BSA initiated 13 civil actions against corporate end-user pirates. 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. It remains unclear whether the civil damage route will ever create any deterrence to further end user or retail piracy.

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, theoretically at least, be dealt with in a week. A few developments have been observed which are worth noting:

- If the defendant fails to file his Written Statement to the Plaintiff within 30 days of the summons, they have to seek permission which the Plaintiff gets to oppose. If successfully opposed, it leads to expedited proceedings.
- If the defendant fails to file his Written Statement after the maximum 90 day period, then the courts will limit the right to defend the case, thus expediting the proceedings.
- A few courts have started to run back-to-back proceedings for both completion of pleadings and filing of documents along with arguments on interim applications, etc. This will result also in expediting proceedings.
- The judges have appointed commissioners to record evidence and undertake other administrative tasks, allowing the judge to preside at more hearings and attend more oral arguments.

BSA believes that these new amendments should show results in a few years. Meanwhile, IIPA members will be monitoring these developments.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS IN 2004 INDIA	
ACTIONS	BUSINESS SOFTWARE
NUMBER OF CIVIL RAIDS CONDUCTED	2
POST-SEARCH ACTION	
CASES PENDING	14*
CASES DROPPED	
CASES SETTLED OR ADJUDICATED	
VALUE OF LOSS AS DETERMINED BY RIGHTHOLDER (\$USD)	
SETTLEMENT/JUDGMENT AMOUNT (\$USD)	
*INCLUDES 6 RETAIL CASES AND 8 END-USER CASES, 2 FROM 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 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.

- Create a National Anti-Piracy Task Force to take criminal and civil actions against piracy. If this is not achievable, provide resources 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;
- Set up specialized fast track IP courts 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 *suo moto* 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;
- Empower customs to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPS-inconsistent practice must stop. Additionally, the customs process continues to be cumbersome;
- Adopt a modern optical disc law;
- Further modernize the copyright law and, in 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.¹³

For the last four 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 and governments 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

¹³ See IIPA’s 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

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.

In our 2004 submission IIPA reported that the Core Group had 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; 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 U.S. government to engage immediately with the Government of India on these critical issues before a draft is introduced into the Indian Parliament.

IIPA has recently heard rumors that the Core Group may be considering an amendment to Section 52(1) of the copyright law to make private use an act of fair dealing and not therefore an infringement. This would have potential devastating consequences for Internet enforcement and might extend to camcording a film, for example, in a theater on the grounds that it is a private use. While commercial dealing in the resulting copies would undoubtedly fall outside any such proposed exemption, it would make proving infringement much more difficult.

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 2003, \$2.6 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 20.3% of its total exports to the U.S. During the first 11 months of 2004, \$2.9 billion worth of Indian goods (or 20.6% 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 22% increase over the same period in 2003.

MARKET ACCESS BARRIERS

The government has postponed the Communications Convergence Bill and is now considering revisiting a 1997 draft Broadcast Regulatory Authority Bill that includes the establishment of a Broadcast Regulatory Authority. Local broadcasters are positioning for regulation of foreign broadcasters operations (including content restrictions), and for the provision of a level playing field to allow domestic broadcasters to compete with the alleged unrestricted activities of foreign broadcasters. Both the Broadcast Regulatory Authority Bill and the proposed Broadcast Regulatory Authority will need to be carefully monitored to ensure that provisions from the Convergence Bill of the power to regulate and impose quotas are not included in any Broadcast Regulatory Authority Bill.

The Telecom Regulatory Authority (TRAI) has been given interim responsibility over broadcast and has been extremely active in 2004. While the CAS implementation has been postponed indefinitely due to problems encountered in the implementation process and consumer backlash, a number of other controversial regulations have been issued. In November 2004, TRAI issued a Telecommunication (Broadcasting and Cable Services) Interconnection Regulation. Extensive industry submissions were made on this regulation but despite protest, TRAI maintained the inclusion of the “must provide” and non-exclusivity provisions. These provisions remove the ability of private parties to negotiate standard free market transactions and may undermine the purpose of general anti-competition laws. More recently, TRAI issued a Consultation Paper on the Digitisation of Cable TV. While only a consultation paper, the paper did raise issues of incentives to promote digitization, licensing, competition and a must carry clause. This paper must be monitored closely to ensure that it doesn't also include the controversial provisions of the Interconnectivity Regulation.

Under the Cable TV Networks (Regulation) Act, foreign ownership is limited to 49% of cable systems. For satellite services, the guidelines issued in 2000 place a 20% sectoral cap on platform ownership by foreign companies which limits broadcasters' collective ownership of a satellite platform to not more than 20%. Total direct and indirect foreign ownership (not including non-resident Indian and overseas corporate bodies) also cannot exceed 49%. Such restrictions ignore the fact that significant capital infusions, which may be accessed from international markets, are necessary to further develop the television industry in India.

Entertainment taxes vary widely among Indian states, but the average rate computed on a country wide basis is estimated to be approximately 50%. This constitutes a significant disincentive to much needed cinema construction in India. There is no conformity of entertainment taxes in India. In Tamil Nadu taxes were lowered but remained in place for dubbed films. In the state of Karnataka, in mid 2004, the local industry moved for a 12 week ban on non-Kannada (the local language) films. While having no legal basis, this ban was put in place by the power of the local industry. Despite court rulings against the legality of the ban, fear of repercussions led to compliance. Nevertheless, the term of the ban was gradually reduced from twelve, to seven then to three weeks. Additionally, the local industry was demanding an increase from 40% to 70% of the tax on non-Kannada films, though this was not agreed to by the state government. Furthermore, as a result of sustained pressure, the Karnataka State government waived entertainment taxes on multiplexes and there is now a 100% tax exemption for the first three years followed by a 75% exemption; however, there is a rider of reservation of two screens in the multiplexes for Kannada films.

While taxes relating to production of CDs have been removed, the Revenue and Excise Department maintains an excise tax of 16% on all DVDs and VCDs produced by local legal replicators. Previously the tax had only been applied to masters. This tax puts a heavy burden on replicators, and as a result some have ceased production. The requirement for video certifications to be put on discs also needs to be reviewed as it is not practical for masters and allowance needs to be made, as many masters are used for more than one country. The duty on imported internegatives is also too high and needs to be brought down to prevailing rates.

The censorship requirement of a minimum of three weeks notice for dubbed films is not practical for day and date release films and exemptions should be made for same.