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An ICC initiative

BASCAP
Business Action to Stop
Counterfeiting and Piracy



INDIA

Counterfeiting, Piracy &
Smuggling in India –
Effects and Potential
Solutions



About ICC
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About BASCAP
Business Action to Stop Counterfeiting and Piracy

Counterfeiting and piracy have become a global epidemic, leading to a significant drain on businesses and the global economy, jeopardizing investments in creativity and innovation, undermining recognized brands and creating consumer health and safety risks. In response, the ICC launched BASCAP to connect and mobilize businesses across industries, sectors and national borders in the fight against counterfeiting and piracy; to amplify the voice and views of business to governments, public and media; and to increase both awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm. Visit BASCAP on the web at: www.iccwbo.org/bascap

About FICCI
Federation of Indian Chambers of Commerce and Industry

Established in 1927, FICCI is the largest and oldest apex business organization in India. Its history is closely interwoven with India's struggle for independence and industrialization, and its emergence as one of the most rapidly growing global economies. FICCI has contributed to this historical process by encouraging debate, articulating the private sector's views and influencing policy.

A non-government, not-for-profit organization, FICCI is the voice of India's business and industry. Visit FICCI at www.ficci.com

About FICCI CASCADE
FICCI Committee Against Smuggling and Counterfeiting Activities Destroying Economy (CASCADE)

India's economic growth story has attracted the world's attention bringing new challenges for the domestic economy. One of the challenges is the growing illicit trade in counterfeits, pass offs and smuggled goods. Contraband and counterfeit products hurt the integrity of the brand, further diluting the brand owner's reputation. This not only results in erosion of sales and revenue for the legitimate producer but further [CASACADE]s onto affect for the consumer in the form of health and safety hazards. With the above insight, the Federation of Indian Chambers of Commerce and Industry (FICCI) took the initiative to dedicate a forum to deal with these issues by establishing the **Committee Against Smuggling and Counterfeiting Activities Destroying the Economy - CASCADE**. Visit CASCADE at www-ficci-cascade.com



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Abbreviations

ACA	Anti-Counterfeit Agency
BASCAP	Business Action to Stop Counterfeiting and Piracy
BSA	Business Software Alliance
CASCADE	Committee Against Smuggling and Counterfeiting Activities Destroying the Economy
EU	European Union
FDI	Foreign Direct Investment
FICCI	Federation of Indian Chambers of Commerce and Industry
GDP	Gross Domestic Product
GOI	Government of India
ICC	International Chamber of Commerce
ICT	Information and Communications Technology
IP	Intellectual Property
IPM	Interface Public Members
IPR	Intellectual Property Rights
MOU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
Rs	Indian Rupees and Crores; a numerical unit of the Indian currency that is equal to ten million (10,000,000), which is written as 1,00,00,000, equal to a hundred <i>lakh</i> (<i>lakh</i> is written as 1,00,000).
SMEs	Small and Medium Sized Enterprises
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCO	World Customs Organization
WIPO	World Intellectual Property Organization

Counterfeiting and piracy is a global problem of enormous scale, impacting virtually every industry sector around the world. India is no exception, suffering significant economic and health and safety consequences as a result of widespread counterfeiting piracy & smuggling in the country. Small businesses, knowingly or unknowingly buy counterfeit technology or equipment, and suffer unanticipated costs in breakage, business downtime, and unenforceable warranties. Foreign investors are reluctant to invest when the return on investment of a new product is made more uncertain by unenforced intellectual property rights. Of even greater concern, individual consumers risk health and safety as they are duped into buying faulty automobile parts or unsafe medicines. Governments themselves have been victims of counterfeiters as fake repair components find their way into military aircraft and equipment.

In India, the Government has initiated steps to address counterfeiting piracy & smuggling. Two major efforts stand out. First, the legal framework is fairly well developed in India. Second, the government has taken steps to protect consumers' health and safety from dangerous counterfeits through significant education efforts. Despite these actions, a study by FICCI shows that counterfeit piracy & smuggling rates remain high. For example, across seven industry sectors reviewed in the FICCI report, unauthorized or counterfeit /smuggled goods sales caused average sales losses to rights holders of 21.7% in 2012.¹

There are multiple reasons why counterfeiting & smuggling continues to increase in India. Conflicting government priorities, lack of adequate resources to deal with a multitude of critical issue, a lack of political will to deal with the problem and even a sense among some that counterfeiting & smuggling is a "victimless crime".

In a study conducted by BASCAP in partnership with FICCI CASCADE, including direct interviews with industry representatives in India, all segments of industry called for greater enforcement of trademark and copyright laws and regulations. Enforcement was consistently cited as the key element missing in developing a stronger national intellectual property strategy for India.

There is a clear consensus, however, that the key action needed to stop the trade in counterfeits pirated and smuggled goods is stronger enforcement of the existing laws and regulations.

FICCI CASCADE and BASCAP have prepared this report to raise awareness of the serious consequences of the increase in counterfeiting, piracy & smuggling in India, and the need for more Government attention to the issues, at the Central, Regional and State levels. This paper briefly reviews the economic and consumer consequences of trademark and copyright infringement; provides specific sector evidence of the scope of the problem in India; and finally, based on interviews with Indian rights holders and multinationals, provides specific recommendations to improve enforcement of IP protection laws and regulations in India.

FICCI CASCADE and BASCAP stand ready to work with the Government, NGOs and industry to initiate the critical discussions needed to address the concerns highlighted here, and to implement the report's recommendations.



1. Intellectual property is important to India's economic growth and development

"...the future prosperity of India in the new knowledge economy will increasingly depend on its ability to generate new ideas, processes and solutions. The process of innovation shall convert knowledge into social good and economic wealth. In a globally competitive world, India has to unleash its innovation potential to increase capacity, productivity, efficiency and inclusive growth."²...Indian President Pranab Mukherjee

India's prominence in the global economy has been growing steadily over the past two decades. The movement of hundreds of millions of workers into global labour markets has had a tremendous impact not only on wage growth and interest rates but also on innovation and related investment.³ While emerging markets will continue to expand, they will not accelerate at the same rate; these slowing growth rates are evident in India. As President Mukherjee's comment demonstrates, India's ability to continue to grow and develop its economy will depend in large measure on its ability to promote innovation.

Creativity and innovation are proven drivers for economic growth and competitiveness. Research has shown that economic growth is closely related to how well the economy encourages, stimulates and fosters creativity and innovation. A critical factor in maximizing the value of this creativity and innovation is a clear legal and regulatory system that recognises the importance of the underlying intellectual property and establishes and protects the property rights of the creators, inventors and innovators.

The effectiveness of a country's intellectual property rights (IPR) regime is, therefore, a critical element for unlocking a nation's full innovative capacity and associated economic growth and employment potential. An effective IPR regime releases the potential of inventors and creators, and empowers them to transform ideas into high-quality products and services that create jobs and stimulate economic growth. The protection of these intellectual assets is increasingly important in enabling countries to reach their economic development goals.

Consequently, India's goals for innovation and economic development will be closely tied to its ability to intensify its focus and prioritization on the protection of the intellectual property created by innovators and inventors.

IP benefits the economy – calculating tax and employment losses due to piracy, counterfeits & smuggled goods

Strengthening IPR is increasingly being recognized as a significant contributor to a country's economic development, technology transfer, and increased rates of innovation. IPR helps attract foreign direct investment (FDI) and promotes Research and Development (R&D) and technology transfer in developing countries. IPR is also an important component of many industries, ensuring growth in value-added jobs and foreign trade.⁴ A wide range of economic studies, from NGOs, government, and industry, have confirmed that sectors that rely on IPR protection are substantial contributors to the economy.

Conversely, counterfeiting, piracy & smuggling rob the innovators in an economy of their intellectual property rights, and this creates significant harm, not only to the innovators, but to consumers and the economy in general. These costs of counterfeiting, piracy & smuggling are real and they are huge.

Since counterfeiting operates outside the law, estimating the exact level of this activity and evaluating its harmful consequences is considerably challenging. For obvious reasons, illegal businesses do not report information on their activities to government authorities, and therefore any measures of the scale of illegal sales or profit generated by these businesses must be estimated by indirect methods.⁵

However, in a study commissioned by the FICCI Committee Against Smuggling and Counterfeiting Activities Destroying the Economy (CASCADE), researchers identified seven key sectors which have been most vulnerable to counterfeiting & smuggling in the country.⁶ According to the study, the seven sectors most vulnerable to Smuggling to counterfeiting are automotive parts, alcohol, computer hardware, personal goods, packaged foods, mobile phones, and tobacco products. The research investigated the impact of the economic losses to the Indian economy as a result of counterfeit, piracy & smuggling activity in these sectors, including loss of jobs and tax revenue. The loss of revenue to the government has a direct impact on welfare spending such as health care, education, and public transport. Police and other enforcement infrastructure are also hit by this resource crunch, which exacerbates the problem of insufficient enforcement relative to pirate, counterfeit & smuggling operations.⁷

Estimated Tax Loss** to the Government

Industry Sector	Direct Loss (Rs Crores)	Indirect Tax Loss (Rs Crores)	Tax Loss to the Exchequer (Rs Crores)
Auto Components	421	2,305	2,726
Alcohol	260	2,250	2,510
Computer Hardware	47	1,187	1,234
FMCG (Personal Goods)	867	3,779	4,646
FMCG (Packaged Food)	552	5,108	5,660
Mobile Phones	496	2,678	3,174
Tobacco	861	5,379	6,240
Estimated Annual Loss	3,504	22,686	26,190

Source: FICCI Study 2012⁸

**The loss has been calculated for the year 2012

Additionally, the market for fakes has adverse effects on the labour market by shrinking profitability of legitimate businesses and increasing lay-offs. Moreover, workers employed through piracy and counterfeits live with poor working conditions and lack of benefits.

There are three main negative effects of counterfeiting & smuggling on employment in the official market:⁹

- Reduction in employment as a direct result of fall in sales and profits.
- Reduction in employment due to decrease in demand for services.
- Fall of induced demand due to reduction in expenditure by employees directly employed by the sector.

IP attracts Foreign Direct Investment (FDI)

Research shows that a country attracts more FDI when investors have a reasonable level of certainty of a return on investment. In an environment where potential investors find high levels of piracy, counterfeiting, and theft of intellectual property, they have no incentive to invest when other markets offer stronger protection of their IP assets. Widespread counterfeiting and piracy, and a lack of enforcement to stop it, therefore, increase the risk of investments in India.

This assessment is clearly documented by an Organization for Economic Cooperation and Development (OECD) study on Intellectual Property Rights in Developing Countries, which found that a 1% increase in a country's trademark protection correlates to a 3.8% increase in FDI. A 1% improvement in patent and copyright protection increases FDI by 2.8% and 6.8%, respectively.¹⁰ Of note, India ranks last in FDI among the BRIC countries (Brazil, Russia, India and China) and South Africa that are competing for investment and growth.¹¹ With slowing growth rates, India can little afford to ignore the opportunity that improved intellectual property investment could provide.

IP promotes innovation and R&D

India already is one of the world's largest and fastest-growing performers in terms of R&D due in large part to its cost-competitive, highly educated, labour force. Still, public sector R&D spending far exceeds private investment with a 70% share of total R&D.¹² A stronger IPR regime might encourage greater private sector expenditure on R&D.

Fundamentally, innovation is a key ingredient of sustained economic growth. Inventors and artists want to see their inventions and creativity rewarded; that reward is ensured in trademarks, copyrights, and patents. India's ability to drive and sustain innovation – or, more fundamentally, to reward its best and brightest – is hampered by poor IP enforcement. Similarly, companies seeing a diminished rate of return decrease R&D investments. For example, one study shows that a 10% increase in the patent premium leads to a 6% increase in business and R&D expenditure.¹³ Similarly, effective IPR protection also attracts venture-capital investment for the commercialization of innovative products and services.¹⁴

Benefits of IP protection extend to SMEs

Small and medium enterprises (SMEs) have been recognised by development experts as a critical engine of economic growth and a major factor in promoting private sector development. This is true in India, where SMEs play a critical role in the economy, accounting for 40% of total exports, 45% of its manufacturing output, and employing nearly 40% of the domestic workforce. However, SMEs only contribute 17% to Indian GDP due to low productivity.¹⁵ Interestingly, an increasing body of evidence shows that SMEs, especially young firms, contribute greatly and increasingly to the innovation system by introducing new products and adapting existing products to the needs of customers.¹⁶

Those SMEs that do leverage IP growth strategies report faster growth, and higher income and employment than those that do not.¹⁷ One study on the European Union showed that SMEs in the ICT sector that rely on IPR reported 10% more growth in turnover, market share, and employment, respectively, than those that had not used IPRs.¹⁸ Ironically, this important segment of the economy is the segment least able to afford to defend their intellectual property rights. In this environment, only an effective system of legal enforcement of rights can benefit and stimulate the IPR rights of SMEs.

IP benefits consumers and society

IPR supports the development of a continuous stream of innovative, competitive products and services that benefit consumers. IPR promotes consumer trust and more effective protection against counterfeit and pirated goods.

Copyrights, for example, provide the basis for the continuous stream of new music and films, ever-improving business, games, software, books, magazines, newspapers, and other published material, photography, and many other related activities. However, high piracy rates, inadequate legal provisions for addressing Internet piracy, poor enforcement procedures and ineffective management of IP rights inhibit creative industries from realizing their full potential and lead to underinvestment in production of professional Indian creative content.

Trademarks support the development of products and services that consumers want and depend on, from clothing and computers to foods and footwear, educational and entertainment products, services, scientific products and even sporting activities.

Indian consumers benefit from IP not only through the stream of innovative products and inventions and creativity that would otherwise not be created by firms, but also through the rights that protect the identity of well-known goods and services. Trademarks act as signposts of quality and prevent other firms to pass off one brand of good as being the same as another – especially counterfeits, which tend to be inferior in quality.¹⁹

Establishing and promoting an adequate IPR system can also have a significant impact on consumer health and safety, and on consumer protection. Counterfeit goods, including medicines, auto and airplane parts, electrical components, toys, food and beverages and many others, can be dangerous and can potentially harm or even kill unsuspecting consumers. These products may contain ineffective or hazardous and untested ingredients, and provide no assurance of safety or efficacy.

Effective IPR rules and strong enforcement of laws and regulations are therefore crucial to protect the health of customers while ensuring that the products are genuine and comply with the required safety standards.

Counterfeits provide serious health and safety risks for consumers. Fake medicines, foods, toys, auto parts and health products can be dangerous and can potentially harm or even kill unsuspecting consumers. These products may contain ineffective or hazardous and untested ingredients. Effective IPR rules and strong enforcement of laws and regulations are crucial in ensuring that the products are genuine and comply with the required safety standards.



2. Documenting the consequences of counterfeiting, piracy and smuggling in India

The economic and consumer consequences of counterfeiting, piracy & smuggling are numerous and significant. They are felt not just by brand owners and business, but by the government, consumers and society at large. While the economic impacts are difficult to quantify, a recent market study by FICCI looked at seven industry sectors most impacted by counterfeiting, piracy & smuggling, and found almost Rs 73,000 Crores in lost sales in 2012 across just these seven sectors. The FICCI study showed that nearly 30% of the automobile components market in India is counterfeit.

Estimated Sales Loss* to Industry (seven sectors)

Industry Sector	Grey Market (percentage)	Sales Loss to Industry (Rs Crores)
Auto Components	29.6	9,198
Alcohol	10.2	5,626
Computer Hardware	26.4	4,725
FMCG (Personal Goods)	25.9	15,035
FMCG (Packaged Food)	23.4	20,378
Mobile Phones	20.8	9,042
Tobacco	15.7	8,965
Total Sales Loss		72,969

Source: FICCI Study 2012²⁰

*The loss has been calculated for the year 2012

In addition to the seven sectors studied in depth in the FICCI report, the paper also examined pharmaceuticals and entertainment industries. In each case, it is clear that counterfeiting, piracy & smuggling cause losses to original rights holders in terms of reduced sales, lower profits, brand value, reputation impairment, consumer distrust and many more.

Auto components

The Indian automotive industry is an integral part of the economy and has witnessed unprecedented growth in recent years. This growth is owed to the increasing wealth of the average customer in India, overall gross domestic product (GDP) growth, the arrival of ultra-low cost cars, and the increasing maturity of Indian original equipment manufacturers (OEMs).²¹

While the original manufacturer segment remains safe from counterfeiters, the automotive aftermarket is often the target of illicit activity. This market segment entails the manufacture, distribution and retailing of components, parts and accessories that are used in the repair and modification of motor vehicles.²² Duplicates are often used in the after-sale market because of their low costs and visual similarity. In cases where manufacturers outsource production of components, certain production overruns of legitimate parts find their way to the grey market, being sold alongside counterfeit, recycled, or stolen goods.²³ The mixed sale of unauthorized "legitimate" goods and counterfeits makes it difficult to control the market and differentiate legal from illegal items.²⁴

The use of counterfeit automotive parts has a severe human cost. Counterfeit items adversely impact the functioning of vehicle safety devices; indeed, around 20% of total road accidents in India is estimated to be directly or indirectly attributed to the use of counterfeit automotive parts.²⁵ In 2009, the use of fake parts caused 25,400 deaths and more than 93,000 injuries. Moreover, there are economic costs to consumers: studies show that the use of counterfeit parts costs domestic end-users an additional 109 million litres of petrol and 8 million litres of diesel every year.²⁶

Alcohol

The alcohol industry in India faces a double challenge: production of alcohol under non-standard conditions with harmful health effects, and the smuggling of cheaper products that are not subject to import/excise duties. According to a report on the current patterns and trends of alcohol use, consumption of illicit alcohol from 2003 to 2005 caused more than 328 deaths in India.²⁷

Local alcohol produced illegally accounts for 50% of consumption in India. Consumers are susceptible to buying counterfeit & smuggled alcohol products because this substandard alcohol convincingly resembles mainstream brands, or in some cases are more concerned with social status or public image than the authenticity of the available product.²⁸

Computer hardware

In India, accessibility to computing resources is increasingly essential to the business and individuals. Concurrently, due to problems of affordability and low awareness of the risks of using counterfeit products, demand for and availability of low-cost fake computer parts is increasing.

The Alliance for Grey Market and Counterfeit Abatement (AGMA) has found that about 10% of IT products in the market are counterfeit.³⁰ Globally, the annual size of this market is estimated to be USD 100 billion, including the rebranding and refurbishing end of life products as originals. In India, desktop computers, laptops and their components are all prone to grey market operations.

Fast moving consumer goods (personal goods and packaged foods)

Fast moving consumer goods (FMCG) refer to essential and non-essential items purchased by the consumer at frequent intervals such as soap, detergents, cosmetics, and other toiletries which have swift turnover and relatively low cost.³¹ The FMCG sector is the fourth largest sector in the Indian economy and has consistently shown high growth rates in the last ten years. In India, the FMCG marketplace also is characterized as fragmented and unorganized, with significant levels of unbranded and unpackaged products.³²

Counterfeiters of FMCG take advantage of this unorganized market and use advanced packaging technology in order to imitate the original products and replace them with inferior substitutes; alternatively, the culprits sometimes pass off brands with similar-sounding names as originals. Based on a study conducted by AC Nielsen, 30% of FMCG business is lost to fake products, and 80% of the consumers who purchased these products believed that they had bought originals.³³

Part of the FMCG industry that is vulnerable to counterfeiting is the packaged food sector. Counterfeiting in this area is particularly dangerous because consumption of non-standard or low quality edible food items may cause serious health ailments or be life-threatening. Moreover, counterfeiting is prevalent in this sector because it is relatively easy to do and requires small investments on the part of the counterfeiters.

Mobile phones

Mobile phone sales contribute sizeably to the Indian economy, benefitting from a total of 68 million mobile GSM users as of June 2012, according to the Cellular Operations Association of India.³⁴ In India, counterfeiting of mobile phones occurs often; and while many consumers are unaware that they are buying fakes, there is also a large base of customers who knowingly buy low-priced, counterfeit mobile phones. The spread of counterfeit mobile phones does not only mean reduced technical quality but also occasionally poses dangers to health and personal safety. There have been cases of phone explosions due to the short circuiting or overheating of counterfeit batteries, and fake phones are reported to emit higher levels of radiation.



Since December 2009, the Government of India has implemented a policy wherein all cellular operators are to block mobile phones with fake or invalid International Mobile Equipment Identity (IMEI) numbers from their networks, preventing people with unbranded mobile phones from using these on any of the GSM networks in India. Nonetheless, according to the recent FICCI study, some 21% of mobile phone sales in India are unauthorized or counterfeit.³⁵

Tobacco

India is the second largest consumer of tobacco products and the third largest producer of tobacco in the world. Taxes constitute the major component of the final retail price of tobacco products which makes the industry a profitable enterprise for smugglers and counterfeiters.

Based on data collected by the Tobacco Institute of India (TII), illegitimate trade in tobacco is at 16%. Cigarettes, which constitute 15% of the tobacco market in the country, are the target of smugglers and counterfeiters because of the ease in tax evasion. Large quantities of illegitimately traded cigarettes can be easily disposed of in a relatively short period of time with very minimal traces.

Smuggling and a Abuse of trademarks can be the most common form of intellectual property infringement in the tobacco sector. Smuggled and Counterfeit tobacco products has far-reaching economic effects including the loss of tax revenue to government, undermining public health strategies, posing unfair competition to original manufacturers and threatening public safety in the case that illegal profits support organized crime networks.

Movie piracy

India's Bollywood film industry, the largest producer of films in the world, is severely threatened by physical and online piracy. According to a 2008 report by the US India Business Council and Ernst & Young, the Indian film industry lost US \$959 million in revenue and around 570,000 jobs due to piracy. Another report by the US-India Business Council and the US Chamber of Commerce's Global Intellectual Property Centre reveals that losses to the industry from trade in illegal CDs, DVDs, music downloads and cable television account for 38% of potential sales or approximately US \$4 billion. Furthermore, the annual International Data Corporation (IDC) and Business Software Alliance global software piracy study puts the rate of pirated software at 64%, representing a gross annual loss to the software industry of US \$27 billion.³⁹

According to studies commissioned by the Motion Picture Distributors' Association (MPDA), the local office of the Hollywood Motion Picture Association (MPA), India is the fourth largest downloader of films after the US, the UK and Canada. In a report by internet company Envisional, it was found that online piracy of film and television content in India is carried out primarily through file-sharing networks like BitTorrent and cyberlockers, or web-based file hosts such as RapidShare or HotFile; video streaming websites were less popular.⁴⁰ Illegal camcording on the day of film release in multiplexes/theatres further adds to the existing problem. Industry is now eagerly looking forward to effective amendments in the existing Cinematograph bill that could potentially address this issue.

Producers have taken steps to prevent piracy including officially releasing movies online within days of their DVD release, reducing the gap between the official release of the films in cinemas and their subsequent release on legitimate DVDs, upgrading conventional theatres with digital screens, and introducing Movie on Demand channels which offers consumers an option to view movie at home at much lesser cost. All these strategies are intended to reduce the opportunity for criminals to flood the market with pirated products, and reduce the consumer incentive to indulge in piracy. Numerous raids are being conducted, particularly targeting the sources of the pirated films and not just the small retail stores where fake DVDs are typically sold.

Producers are also trying to raise awareness of the ill effects of piracy among their consumers in the hope that if people realize the connection between pirated films and organized crime, they will stop purchasing fake DVDs or downloading films illegally.

Pharmaceuticals

India's pharmaceutical industry is fourth in the world in terms of production volume, and over 66% of its products are exported to highly regulated markets. Exports are heavily regulated by the importing countries and there is likewise a requirement for continuous monitoring of quality-related aspects within India, including complaints of sub-standard or counterfeit drugs.⁴¹ According to some studies, fake drugs make up 20% of the pharmaceutical market in India. These products are no longer limited to lifestyle drugs (i.e. Viagra), but now also include vital medication like cough syrups, painkillers, and even vitamin supplements. Most cases of fake and spurious drugs in the local market were found in Bihar, West Bengal, Uttar Pradesh and Gujarat.⁴² The health ministry estimates that 5% of drugs in India are counterfeit, while 0.3% are spurious.

Further, distribution and sale of counterfeit medicines often happen beyond jurisdictional borders, creating greater obstacles to successful anti-counterfeiting enforcement. And though guidelines have been produced by international bodies such as the WHO to help mitigate the flow of illicit medicines, most developing countries in Asia do not have adequate infrastructure or financial resources to implement them. Therefore, combating fake medicines requires increased collaboration at national, regional, and international levels.⁴³

Impact of counterfeiting, piracy and smuggling on government and other sectors

Counterfeiting, piracy & smuggling cause losses to original right holders in terms of reduced sales, lower profits, brand value, reputation impairment, and consumer distrust. Furthermore, in an interlocked economy, losses to industry and consumers have a spill-over effect on the government. The government faces severe problems such as reduced tax collections, increased expenditure on public welfare, insurance and health services cost, and loss of jobs as legitimate companies lose business.

The loss of revenue to the government also has a direct impact on welfare spending such as health care, education, and public transport. Police and other enforcement infrastructure are also hit by this resource crunch which exacerbates the problem of grey market operations.⁴⁴

Estimated Tax Loss** to the Government

Industry Sector	Direct Loss (Rs Crores)	Indirect Tax Loss (Rs Crores)	Tax Loss to the Exchequer (Rs Crores)
Auto Components	421	2,305	2,726
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Mobile Phones	496	2,678	3,174
To bacco	861	5,379	6,240
Estimated Annual Loss	3,504	22,686	26,190

Source: FICCI Study 2012⁴⁵

**The loss has been calculated for the year 2012

Counterfeiting, piracy & smuggling damage legitimate businesses and they suffer reduced sales and profits, loss of consumer trust in their products, and ultimately, fewer jobs.

Government also incurs additional costs for implementing anti-counterfeiting, anti-smuggling measures and crime prevention, detection, regulation and deterrence measures. Police raids, custom seizures, execution of mass public awareness campaigns and other measures put a strain on limited government resources. However, these efforts to strengthen IP enforcement regimes must be viewed as investments that pay tangible dividends to economic development and society.⁴⁶

Another victim of the rise in counterfeiting is the environment. Counterfeiters rarely follow safety standards or guidelines for drawing natural resources, quality of materials used or in disposing waste. There are few global facilities for safe containment or destruction of seized goods or a mechanism to hold the counterfeiter liable for costs of destruction.



3. A Roadmap for Moving Forward

India has made important efforts to improve its IP legal framework and enforcement system and has taken several initiatives to modernize its IP administration. Some major achievements include an increase in the level of computerization, providing Internet connectivity among the various offices, creating an online facility for filing and processing patent and trademark applications, and computerizing intellectual property records to create databases.⁴⁷

From a trademark perspective, India recently acceded to the International Registration of Trademarks, known as Madrid Protocol.⁴⁸ And, the recent development of a National IP Strategy Plan is a step toward acknowledgement of the importance of enforcement. It includes provisions: (1) stating that “strengthening of IP protection regime will involve improvement in the institutions that grant IPRs and in those that are responsible for its enforcement...”⁴⁹; (2) plans to increase the efficiency of the Controller General of Patents Design and Trademarks; and (3) a proposal to create a National Intellectual Property Enforcement Taskforce. However, the National IP Strategy Plan spends little time on anti-counterfeiting mechanisms or practical suggestions to address the need for greater enforcement.

Further, the Ministry of Human Resource and Development recently issues an official notification designating FICCI to Chair the Subcommittee under the Copyright Enforcement Advisory Council (CEAC) responsible for coordinating relevant stakeholders to address the menace of piracy. This is a significant step in establishing a centralized coordinating organization.

Despite the efforts to create a strong legal framework, adequate enforcement of existing IP law remains a serious challenge. Moreover, there has been little effect in terms of practical actions. Further, organized government follow-up and focus on enforcement has been minimal.

The following section provides a practical assessment of the barriers to effective anti-counterfeit and anti-piracy enforcement in India, and recommendations for removing these barriers. These recommendations are based on a review of the current situation in Indian and public documents and reports from and to the Indian government, and best practices in place in other countries to deal with counterfeiting, piracy and enforcement. They are also based on a recent study conducted by BASCAP with rights holders in India. While many issues were raised in those interviews, these recommendations represent the consolidated concerns of that group. As noted earlier in this report, the recommendations are overwhelmingly focused on the expressed need for improved enforcement of existing IP laws in India.

Barriers and recommendations

National policy and infrastructure issues

- 1. Lack of central coordination.** As noted previously, the National IP Strategy does not adequately address counterfeiting and piracy, and pays little attention to enforcement of existing IP laws and regulations. This further exacerbates the lack of any central coordination of India’s strategies and actions to stop the growth of counterfeiting and piracy.

We strongly urge the government to add language to the National IP Strategy Plan to strengthen the recognition of the serious impacts of counterfeiting and piracy, and the need for stronger enforcement to stop the trade in fake goods. Specifically, we recommend an approach that (1) provides more improvements in critical intellectual property infrastructure including the police and courts; (2) bolsters mechanisms for dealing with supply of counterfeit product both from imports, as well as domestic production of counterfeits; and (3) enhances legal mechanisms for enforcement.

We urge the government to move forward with the establishment of a National Intellectual Property Enforcement Task Force with the responsibilities outlined in the National IP Strategy Plan. Among its responsibilities, the Task Force should:

- maintain database on criminal enforcement measures instituted for trademark infringement and copyright piracy. Besides this information on civil cases filed should also be collated.
- be mandated to deliberate upon operational issues of enforcement with the concerned Central and State agencies
- to conduct periodic industry wise infringement surveys
- coordinate capacity building programmes for the Central and State enforcing agencies.”⁵⁰

2. Lack of prioritization by police authorities of commercial crimes. There are many important challenges on law enforcement’s time and resources. Burdened with high crime levels and little financial resource with which to manage existing challenges, police understandably focus limited resources on serious violent crimes. Counterfeiting crimes are generally perceived as causing little harm to the public as opposed to body crimes and a “business problem,” so they receive lower or no priority. In these circumstances, even when rights holders provide evidence and good information to police officials, police may not have the resource to follow through.

3. Quality of enforcement varies greatly from region to region. The efficacy of good, strong laws varies greatly with location. It would be useful to see a national level effort to create consistency in enforcement across the country. In particular, leading that effort with the nation’s capital of Delhi and the National Capital Region (NCR) would be invaluable.

4. Underfunded resources for existing specialized IPR units within state police forces and a lack of dedicated IPR enforcement units at the national level. While the system of state nodal officers and specialized IP cells within state police to tackle piracy have been important in the IPR enforcement effort, many of these lack the resources to effectively combat the problem. The absence of a single nodal agency or initiative at the national level to organize and prioritize these resources would be invaluable.

5. Effective IPR police enforcement units should be undertaking operations independently of industry. The police “should be encouraged to take more *suo moto* raids to deter physical piracy.”⁵¹ In order to better address counterfeit issues, police should be self-initiating investigations of trademark violations and conducting trademark actions independently instead of waiting for rights holders to prepare and request for all actions.

6. The High Court system is overburdened. The backlog of existing and new cases results in lengthy delays between the time a case enters the court system and the time it reaches a sentence. According to our survey of rights holders, it takes 2-3 years to issue a summons and 6-8 years to conclude a case. Other sources offer that tribunal level cases may be pending for 7-10 years without resolution.

7. Reluctance to apply strong penalties and deterrent-level sentencing. The Trademark Act (1999) provides companies both civil and criminal remedies to infringement, though a number of factors play into which avenue makes the most sense in each case.⁵² Regardless of which remedy pursued, sources indicate that while seeing some progress on levels of injunction, the courts need to implement stronger penalties.⁵³

Recommendations:

In the short term

- Give political priority to IPR crimes through a national declaration of their importance at the highest levels of government.
- Provide additional funding to existing IP cells at the state level.
- Expand the number of individual dedicated IPR cells in police jurisdictions around the country.
- Work with provinces to help prioritize enforcement related concerns among enforcement infrastructure in individual jurisdictions.
- Increase existing funding, bonus, and pay rewards systems to include an incentive rewarding police officers for focus on economic crimes.

In the long term

- Ensure the joint agency proposed in the National IPR plan includes a clear federal-level single window system or agency for IPR that will be responsible for helping to address resource mobilization, as well as coordination with state police forces and IPR cells within municipalities.
- Establish a national and regularized system of education for police officials on the negative impact of IPR crimes. Focus education resources on key municipalities such as Delhi and NCR.
- Increase the number of independent investigations by police and *suo-moto* raids.
- Ensure ease of access to Registrar of Trademarks data (this may happen in the proposed automation process of the Draft Strategy), as well as updated records.
- Establish specialized IPR courts in every state in India and increase resources to enhance IPR expertise of judicial benches and prosecutors to deal with these cases more expeditiously.
- Consider establishment of mediation centers or alternative dispute resolution to at least deal with the backlog of trademark cases.
- Enhance automation of IPR related judicial processes.
- Adopt statutory damages in civil cases.
- Develop a national level database to track IP criminal cases



Stopping the supply of counterfeit products

In order to stop the flow of counterfeits, it is important to look at all aspects of the supply chain where counterfeit goods, from components and ingredients to fully finished products, are introduced. A complete strategy for addressing enforcement will necessarily look at raw material sourcing, production and manufacturing and distribution channels in India, and consider imports, domestic production and use and exports of counterfeits. Some of the issues to be addressed in protecting the supply chain for legitimate products and cutting off the supply of fakes include:

- 1. Resource constraints limit the number of seizures to be conducted.** Customs officials already are well trained to identify counterfeit goods. Unfortunately, India's extensive land border presents a practical challenge to managing all forms of cross-border trade, not just trade in counterfeit goods. Customs officials indicate that budget challenges limit their ability to organize and execute raids. Document forgery, non-mention of brand name and misrepresentation or description of goods constitute major issues as these also lower detection rates.
- 2. The indemnity bond for Customs actions is bureaucratic and ineffective.** Under the 2007 IPR (Imported Goods) Enforcement Rules, the brand owner can give notice to Customs requesting suspension of clearance of goods suspected to be infringing by putting up an indemnity bond to indemnify customs against all liability and expenses.⁵⁴ The rule requires owners to first file a bank guarantee within 3 days of each notification. This is an impractical procedure given that the designated party may not be available to execute the process on a three day time table. Further, in February 2011 Customs requested on open bank guarantee. This represents a significant long term risk to trademark owners in that cases can go on for years and block cash limits with bankers. Industry has suggested that a practical solution to this problem might be a standing guarantee with finite dates.
- 3. Seized trademark goods sometimes find their way back into the supply chain.** According to Section 111 (d) of the Customs Act, "Confiscated goods will be either destroyed or disposed of outside the normal channel of commerce with the consent of the brand owner. The brand owner is also required to bear the costs towards destruction, demurrage and detention charges incurred till the time of destruction or disposal as the case may be."⁵⁵ Brand owners may provide this service, but delay and manner of destruction of detained goods harms right holders in terms of costs and stress on compliance.
- 4. Authorized packaging materials find their way into counterfeit distribution channels.** In certain counterfeit areas, such as cosmetics, India maintains a thriving indigenous manufacturing base. The challenge is complicated further by unsavory packaging facilities that sell off genuine packaging materials to the counterfeiters who package their fake goods in genuine packaging. Historically for example, fake cosmetics were identified from the packaging material errors. But when the packaging materials are genuine, it becomes increasingly difficult to identify the fakes on packaging material alone. Such cases have to be referred to labs for final verifications.
- 5. Organized operations reuse rubbished materials** Recycling laws may exacerbate the challenges. Some companies identify very sophisticated approaches to repackaging, whereby organized entities are paying rubbish pickers for brand name packaging which are then refilled and shrink wrapped. Well intentioned Indian laws around recycling may exacerbate and facilitate this problem if counterfeiting issues are not considered in the recycling discussion.
- 6. Lack of well-known mark protection against trade names.** While India's Trademark Act protects well-known marks against use as a trademark by another entity, it does not prohibit use of a well-known mark as a trade name – such as BASCAP Land Developers or BASCAP Telecom. A recent court decision interpreted the relevant section of the Act [Section 29(5)] to mean that well-known trademark is not infringed or diluted by use of a trade name in connection with goods different from those covered by the well-known mark, suggesting infringement occurs only when the goods are similar.⁵⁶ While this decision is currently under appeal, a recent filing suggests that this ruling ignores marketplace realities of dilution.

Rather than leaving it to court discretion, the statute should hold liable any entity using a well-known mark, regardless of whether the mark is used as a trademark or trade name, in order to protect the mark owner's enforcement rights.⁵⁷

- 7. Laws providing for the destruction of equipment or for penalties used in various situations to infringe copyright should all be strengthened. This includes relevant sections of the Trademark Act, the Law on Control of Printing Presses and the Press & Registration News Act.** The Copyright Act of India takes great measures to allow for destruction of equipment. "Under Section 66 of the Copyright Act, 1957, the court trying an offence may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be delivered up to the owner of the copyright. Here "*plate*" includes any stereotype or other plate, stone, block, mould, matrix, transfer, negative, duplicating equipment or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which sound recording for the acoustic presentation of the work are or are intended to be made."⁵⁸

Other laws provide for similar destruction of equipment. For example, under Section 111 of the Trade Marks Act, 1999, the court is empowered to direct forfeiture of goods with which an offence has been committed to the Government. The Court could direct such forfeited goods either be destroyed or otherwise be disposed of. This may include *equipments* like dies, blocks, machine, plate or other instrument through which counterfeit, i. e., falsification of goods is carried out. Similarly, the Law on Control of printing press could be enhanced so that production of fake wrappers be declared a cognizable offence. Similarly, we recommend the Press & Registration News Paper Act be strengthened Law to give Police the powers to search and seize objectionable wrappers if there is no proper documentation with Press.

Given the important role manufacturing and equipment distribution could play in counterfeiting and given the importance of removing the means of counterfeiting from the counterfeiters, it would be useful to give further consideration to whether strengthening these provisions could assist in anti-piracy efforts.

- 8. Continue Madrid Protocol Implementation.** Under Section 115(4) of the Trademark Act, infringement of trademarks is a cognizable offence, and a police officer not below the rank of DSP may search or seize without warrant, after seeking the opinion of the Registrar of Trademarks on the facts. At present, police refer this matter to the Trademark Register before taking action. So, in reality, the action is only partly cognizable. We believe further guidance is required in the form of regulations to encourage full cognizability. However, it should be noted that there is some disagreement among rightholders as to whether or not the cognizability of the offense was a significant hurdle. One mechanism for doing so may be through implementing regulations arising around the Madrid Protocol.



Recommendations:

- Prioritize trademark investigations and seizures amongst customs other border enforcement functions.
- Allocate resources to continue the high level of training of Indian customs officials on IPR border enforcement, including ways to appropriately identify, seize, and dispose of counterfeit products.
- Allocate budget resources to Customs officials and facilities to conduct raids.
- Modify the customs registration process to accept a standing bank guarantee as opposed to an open guarantee.
- Link prioritization of resources to key border states for counterfeit & smuggled goods such as Uttar Pradesh, West Bengal, Bihar, and Maharashtra.
- Provide funding for joint training efforts between Indian customs and key bordering countries customs officials where appropriate. Similarly, considering joint actions key bordering countries.
- Customs to focus resources on additional review of parallel imports as a source of counterfeit imports.

With respect to domestic production of counterfeit goods

- Provide for cancellation of trade license given to retailers by local administration if they are found guilty of selling fake products
- Empower government tax inspectors, including external and internal auditors, to check and account for genuine product licenses inside organizations, whether public or private.
- Prioritize counterfeit goods in health and safety inspections under such laws as the Drugs and Cosmetics Act, and the Prevention of Food Adulteration Act.
- Amend India's Trademark Act to strengthen protection of well-known mark for both trademarks and trade names.
- Considering strengthening existing provisions that allow for the destruction of equipment used in production of infringing counterfeit material.
- Continue Madrid Protocol implementation.

India's economy – and public safety – continues to suffer from the effects of widespread counterfeiting, piracy & smuggling. This report shows that further improvement in IPR enforcement is crucial to deterring counterfeiting, piracy & smuggling, and spurring India's economic development. The recurring call by India's international trading partners for continued progress to improve its IPR regime validates the recommendations in this report.

First and foremost, the government of India must make anti-counterfeiting, anti-piracy & anti-smuggling efforts a public policy priority. Tangible actions to strengthen IP laws, increase enforcement, and implement increased punishments will help reassure legitimate business owners and consumers that the government is serious about protecting IP rights, and will, in turn, encourage greater support for government policies. Moreover, strengthening India's IPR enforcement regime will send a message to criminal networks that this activity will no longer be tolerated.

Public officials, international governmental organizations, industry and consumers need to work more collaboratively to build awareness of the significant impacts of counterfeiting, piracy & smuggling, and to develop creative and effective methods to fight this serious economic and societal problem. The benefits of a more advanced IP regime to India's economy are undeniable. As summarized throughout this paper, there is a close correlation between the effectiveness of IP protection and a country's economic performance. IP systems significantly affect every country's growth, FDI, employment capacities, innovation and overall competitiveness, as well as enabling productivity and efficiency gains.

Implementing effective solutions to the complex problems of counterfeiting, piracy & smuggling will require cooperation and innovation from the government and industry working closely together. In order to facilitate needed reforms, FICCI CASCADE and BASCAP have put forward a set of specific legislative and policy recommendations, which could serve as a roadmap for the path forward.

Putting in place a solid IP protection and enforcement regime is thus critically important for India to reach its economic potential. FICCI CASCADE and BASCAP stand ready to do its part to help the Government of India achieve these important goals.

Notes

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The International Chamber of Commerce

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the 20th century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice. ICC also offers specialized training and seminars and is an industry-leading publisher of practical and educational reference tools for international business, banking and arbitration.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include anti-corruption, banking, the digital economy, marketing ethics, environment and energy, competition policy and intellectual property, among others.

ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.



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