INTELLECTUAL PROPERTY RIGHTS IN INDIA

I. Overview

II. Background

A. Patents
1. Issues
a. Adequacy of Legal Protection
b. Adequacy of Enforcement and Legal Sanctions
c. Fairness and Complexity of Registration Procedures
d. Participation in International Agreements
e. Local Private Sector Programs
2. Suggested Solutions
3. Assessment for Progress

B. Trademarks
1. Issues
a. Adequacy of Legal Protection
b. Adequacy of Enforcement and Legal Sanctions
c. Fairness and Complexity of Registration Procedures
d. Participation in International Agreements
e. Local Private Sector Programs
2. Suggested Solutions
3. Assessment for Progress

C. Copyrights
1. Issues
a. Adequacy of Legal Protection
b. Adequacy of Enforcement and Legal Sanctions
c. Fairness and Complexity or Registration Procedures
d. Participation in International Agreements
e. Local Private Sector Programs
2. Suggested Solutions
3. Assessment for Progress

D. Unfair Competition
1. Issues
a. Adequacy of Legal Protection
b. Adequacy of Enforcement and Legal Sanctions
c. Fairness and Complexity of Registration Procedures
d. Participation in International Agreements
e. Local Private Sector Programs
2. Suggested Solutions
3. Assessment for Progress

III. ITA Actions to Date

I. Overview

The Indian environment for intellectual property protection continues to evoke considerable debate. There are two distinct schools of thought in India on the extent of protection afforded by Indian law. One school holds that Indian legislation is not substantially different from that available in most developing countries around the world and provides fairly reasonable protection. The other believes that there are certain provisions in the existing laws which impact adversely on plans to increase the flow of foreign investments or technology transfers into India.

On balance, the latter view appears to have considerable substance and finds greater support among many Indian intellectual property attorneys and foreign business executives. Their perception of the Indian legal environment is that it is weighted against foreign owners of industrial and intellectual property and that it is very difficult for such owners to seek early and effective legal protection. The general view among Indian attorneys specializing in such law is that Indian judicial procedures make infringement very difficult to prove and that penalties are insufficient to deter infringement.

In all areas of intellectual property, India has tended to approach the subject in terms of compatibility with national economic development policies and has often subordinated commercial rationality to short-term economic and political considerations.

India is reputed to be one of the world's major copiers of trademarks, particularly in the consumer goods area. Although many U.S. firms are aware of Indian piracy of their trademarks, most U.S. companies do not appear to pursue the matter in India's courts. In the case of consumer goods, Indian import licensing policy bans their import. As a consequence, many foreign companies most likely do not feel that the Indian market is of great enough importance to engage in a protracted, costly legal battle so long as the products being produced under their pirated marks do not find their way into third-country export markets. So far, that does not appear to be the case on a wide scale.

The most controversial aspect of intellectual property protection in India relates to patents. In the area of pharmaceuticals and chemicals, the Indian Patents Act appears to be one of the most oppressive in the world. Considerable attention has been focused on this area by various Indian and foreign business associations, most notably by the U.S. section of the India-U.S. Joint Business Council. At its

recent meeting in New Delhi on November 28-29, 1984, the subject of inadequate Indian patent protection was raised at length.

While India's attitude toward protection of trademarks is seriously out of step with U.S. philosophy, the Indian Government has tended to be somewhat less restrictive recently in approving the use of foreign brand names for domestic marketing. This has been especially evident in the automotive sector, where the Indian Government has permitted certain foreign brand names to be used in conjunction with the names of domestic Indian companies. Another recent notable exception is reported in the area of fast-food franchising, where the Indian Government has approved the use of a foreign brand name for a chain of fast-food outlets being established in India by a non-resident Indian in cooperation with a foreign company.

The infringement of copyrighted works by Indian nationals has become an increasing problem over the past decade, with British estimates suggesting that some 1500 to 2000 foreign titles are pirated each year. For years, copyright owners have been relatively lax in vigorously asserting their rights in India, particularly against commercial infringement of copyright. To a large extent, this is understandable: India has long been dependent upon the United Kingdom for its book imports, with U.S. works a distant second. Within the last decade, however, U.S. publishers have made dramatic inroads into the Indian market. Today, according to recent UNESCO book trade statistics, slightly over 50 percent of India's book imports are from the United States. Several of our largest and most highly internationalized publishers have large and active subsidiaries in India, publishing local works as well as reprinting their own for the local market.

Recent amendments to the Indian Copyright Act have been positive. The 1983 Amendment, which came into force in August, 1984, had the specific purposes of (a) incorporating the provisions of the Paris Text of 1971 concerning the grant of compulsory licenses for translation and reproduction of foreign works required for educational purposes, (b) providing adequate protection of authors' rights, and (c) removing administrative drawbacks and other lacunae experienced in the administration of the Copyright Act of 1957.

The Copyright (Amendment) Act of 1984, which came into force in October, 1984, was enacted in order to check the problem of piracy in India, specifically in the audio and visual areas. It makes infringement of copyright a cognizable act and provides for stronger punishment for the infringement of copyright, namely, imprisonment of three years with a minimum punishment of imprisonment of six months, as well as a fine

of up to Rs. 200,000 (approx. $16,000), with a minimum of Rs. 50,000 (approx. $4,000). The Act also provides for increased punishment in the case of recidivism, and allows copyright infringement to be classified as an economic offense so that the period of limitation provided for in the Indian Code of Criminal Procedure, 1973, will not be applicable to this offense. This amendment also provides copyright protection for computer software.

These amendments have not been in force long enough to determine the extent of their ability to improve the protection of copyrighted works. Their effectiveness may also be delayed by the reported lack of Indian copyright law experts.

An Indian Government inter-agency committee is reportedly examining the disadvantages perceived in the present Indian legislation governing protection of intellectual property. As a result of the considerable attention that this legislative area continues to receive, there are grounds for optimism that the Indian Government will be moved to seek appropriate amendments in some of the existing laws, although it is unclear how quickly the new government will be able to focus seriously on this area. Prime Minister Rajiv Gandhi's interest in creating conditions which would encourage the inflow of foreign technology could augur well for a serious appraisal by the Indian Government of the deficiencies in some areas of its intellectual property protection, and the subject should continue to be raised on every appropriate occasion.

II. Background

A. Patents

1. Issues

a. Adequacy of Legal Protection

(1.) Term of Patents:

Particularly onerous provisions exist in the case of foods, pharmaceuticals (including intermediates), veterinary products, pesticides and agrochemicals, where the term of patents is only five years from the date of sealing of the patent, or seven years from the date of filing of the complete specification, whichever period is shorter. This period for effective patent protection is considered inadequate by almost all foreign, and many Indian, patent owners. Normally, pharmaceutical patents are applied for at the stage of laboratory discovery.

Subsequently, further research is required for medical and commercial aspects of the drug, and it would normally take 6 to 8 years for a product to appear on the market from the

date of application for the grant of a patent. Hence, effective patent protection of pharmaceuticals is in most instances nil. (Sections 53-1 and 45-1 of the Indian Patents Act). By way of contrast, a new U.S. law, the Drug Price Competition and Patent Term Restoration Act of 1984 extends the patent term for pharmaceuticals and other products subject to FDA regulatory review up to 5 years to compensate at least partially for delays due to federal premarketing clearance procedures.

For products other than those cited above, the term of patents was reduced by the present patent legislation to 14 years from the date of filing of the complete specification. This term of patent compares poorly to terms provided by most developing and developed countries. (Sections 53-1 and 45-1)

Patents of addition are granted for the unexpired term of the original patent. (Section 55-1)

(2.) Scope of Patent Coverage:

Product patent coverage, the strongest protection, is specifically excluded in the major fields of chemicals, pharmaceuticals, veterinary products, pesticides, and agrochemical products, as well as alloys, optical glass, semi-conductors and intermetallic compounds, although the process may be patented. (Sections 5 & 2-1-L)

Although there is some degree of uncertainty in view of a lack of clarity in certain provisions of the Indian Patents Act, it appears that "product-by-process protection" is excluded, (Section 48-1) leaving the patent owner with only "process patents", which generally are more difficult to enforce.

India does not allow patents in the field of biotechnology or environmental pollution control.

(3.) Grant of Compulsory Licenses:

Provisions in the Indian Patents Act relating to the grant of compulsory licenses are so extreme that they leave the door open for potential abuse. Under the Indian Patents Act, the Controller of Patents may issue a compulsory license if he considers that "the reasonable requirements of the public" with respect to the patented invention are not satisfied or the patented invention is not available to the public at a reasonable price. The definition of "reasonable requirements of the public" in the Act is very broad in scope (Sections 84 & 90). In actual practice there have been hardly any such grants, probably for the simple reason that the patent owner cannot be compelled to part with the valuable know-how required to work the patent, even if he can be compelled to part with the patent itself under compulsory license. Compulsory licensing is usually non-exclusive.

Under the Act, the Central Government is entitled, if it considers it necessary in the public interest, to authorize the licensee, under a compulsory license, to even import from abroad an article made by the patented process on such terms as to royalty, etc., as is decided by the Central Government (Section 95-3). Although not many compulsory licenses are granted, this provision could encourage parties who have no intention of engaging in local manufacture, and who only intend to import a product, to apply initially for a compulsory license to manufacture and to apply subsequently for authority to import a patented article.

A further provision, even more extreme in nature, allows a party which has already secured a license from and in agreement with the patent owner, to apply for a compulsory license for the same patent, on terms which would be determined by the Controller of Patents and which could be totally unacceptable under voluntary conditions. (Section 84-2)

There is a provision in the Act entitling a compulsory licensee to obtain an order barring anyone, even the patent owner himself and existing licensees, from using the patent. The Act does not define specific grounds for obtaining such an order and the discretion is left with the Controller of Patents--which clearly leaves the door open for expropriation of patent rights. (Section 93-3)

(4.) Licenses of Right:

In the case of products and processes in certain major fields such as chemicals, foods, pharmaceuticals, veterinary products, pesticides and agrochemicals, patents are automatically deemed to be subject to "licenses of right" on the expiration of three years from the date of sealing of the patent (Section 87-1). Once a patent is subject to licenses of right, any party can, by submitting an application, almost automatically secure a right to use the patented invention and only the terms of such license remain to be determined. (Section 88-1)

In the case of drug patents, however, this issue has been more a psychological than legal deterrent. The Controller General has stated that there has never been an application for grant of license filed with respect to a drug patent. The reason for this is that it takes 2-3 years for the sealing of a patent, and since a patent would be deemed to be endorsed with the words "license of right" 3 years after sealing of the patent, the patent protection would nearly have terminated.

Patents for other inventions are subject to "licenses of right" endorsement three years after sealing if the Controller determines that the patentee is not meeting the reasonable requirements of the public or is not available at a reasonable price.

(5.) Royalty Cap and Taxation of Royalties:

In the case of all the products mentioned in item 4 above (except chemicals), the royalty or other remuneration receivable by the patent owner from a license of right endorsement is subject to a maximum of 4 percent of the net ex-factory price (Section 88-5) and such royalty income would be taxable at a rate of 40 percent without deduction of expenses incurred to earn it.

In the case of products and processes in other fields, the Indian Government can, after the expiry of three years from the date of sealing of a patent, apply to have such patent subject to "licenses of right." On receipt of such application, the Controller of Patents may issue licenses of right if he considers that "the reasonable requirements of the public" with respect to the patented invention are not satisfied, or that the patented invention is not available to the public at a reasonable price. (Sections 86 & 90)

(6.) Revocation:

Two years after grant of a compulsory license or endorsement of licenses of right, the Central Government or any interested person may request revocation. If the controller believes that reasonable requirements of the public with respect to the patented invention have not been satisfied or it is not available to the public at a reasonable price, he may revoke the patent.

(7.) Rights Granted to the Government to Use or Acquire a Patent:

The Indian Patents Act entitles the Government, including a "Government undertaking", to use a patented invention for its own purposes. The term "Government undertaking" is broadly defined to include any industrial undertaking operated by government departments, government corporations or companies (Sections 2-h & 99). Since in India there are a significant number of government corporations engaged in large-scale industrial and business activities, there is considerable scope for manufacture or import by such corporations of patented inventions of others. Furthermore, under the Act, the Government can authorize "any person" to use a patented invention for the purposes of the Government.

Under the Act, the term "for the purposes of Government" is broadly defined and includes not only local manufacture, but

also imports of products covered by a patented invention (Section 99-2). Furthermore, in the case of pharmaceuticals, veterinary products, and agrochemicals, the term "for the purposes of the Government" includes the sale and distribution of these products and the royalty payable by the Government to the patent owner for such use is subject to a maximum of four percent of the net ex-factory price. (Sections 99-2 & 100-3)

The Indian Patents Act also entitles the Government to acquire (even against the wishes of the patent owner) a patented invention for "a public purpose". (Section 102)

(8.) Working:

Under Section 90, the "reasonable requirements of the public" (for purposes of compulsory licensing, endorsement of licenses of right, or revocation of the patent) are considered not to be met if the demand is not met through local manufacture or the establishment or development of commercial activity in India is prejudiced. This places an unfair burden on foreign business and decreases the incentive to introduce new technology.

(9.) Limitations on Patent Coverage:

India does not allow patents in the fields of biotechnology or environmental pollution control.

b. Adequacy of Enforcement and Legal Sanctions

(1.) Legal Procedures:

The major problem relating to protection is a lengthy, protracted and expensive legal procedure. Legal remedy is very slow and time consuming and long delays in enforcing legal protection virtually deny the benefits of patents in many cases.

(2.) Proof of Infringement of Process Patents:

There is no provision for easing the burden on patent owners of proving infringement. At times it can be very difficult for the patent owner to prove that his patented process is being infringed, particularly when the product in question is being imported from abroad.

c. Fairness and Complexity of Registration Procedures:

India's weak registration procedures permit "me-too" registrations. A local firm can use the registration data from the original applicant thereby avoiding demonstrating the safety and efficacy of its product.

d. Participation in International Agreements:

India has not joined the Paris Convention, although it is reportedly considering membership.

e. Local Private Sector Programs:

We have no information available to substantiate the existence of any ongoing programs devoted to problems in the patent protection area. Certain industry associations, such as the Indian Drug Manufacturers Association, on a periodic basis make representations to the Indian Government regarding problem areas of particular concern to them.

2. Suggested Solutions

a. Amendment of Patents Act to:

(1) increase term of patent to at least 16 years (the previous term of patent) for all products
(2) bring the provisions for grant of compulsory licenses into conformity with Article 5A(2) through (4) of the Paris Convention
(3) remove royalty cap in cases where it is in force, to conform to standard Indian practice (the norm is 5%, the ceiling is 8%)
(4) bring provisions for the Government's right to revoke patents into line with the provisions of the Paris Convention (Art.5 (1) and (3))
(5) restrict Government's right to use or acquire a patent without adequate compensation
(6) permit chemical and pharmaceutical (etc.) substances to be patented on the basis of product
(7) create provisions for "reversal of proof" so that the party which is importing and/or marketing a product has the burden of proving in court that the product imported and/or sold was not manufactured by the patented process
(8) expand patent coverage to include inventions in the fields of biotechnology and environmental pollution control.

3. Assessment for Progress:

While the Indian Government has indicated its interest in addressing specific concerns of foreign patent owners and investors, it appears to regard its present patent protection as being in line with most developing, and some developed, countries.

Reportedly, a working committee at the ministerial level has been formed to review perceived controversial passages of the Act. There appears to be some optimism that there are

chances for changes in the Act, if it can be clearly demonstrated that changes would be in India's national interest, i.e., that local R&D efforts and inflow of foreign technology had diminished because of the present act, and would increase with stronger protection. In this respect, a new report countering the assertions made in the Report on the Revision of the Patents Law (September 1959) by Sri Justice N. Rajagopala Ayyanagar would no doubt be useful. (The above report formed the rationale for the present Indian patent legislation.)

There are some preliminary indications that India might prefer to address this issue in the context of an international organization, such as WIPO. It might be useful to look further into the possibility of such an organization producing such a study in cooperation with the Indian Government. Such a study would need to be as thorough as the former report, and would not only be difficult to prepare (for lack of readily available data), but costly and time consuming as well. If such a study could in principle be produced under the auspices of WIPO, the USG might want to look into the possibility of contributing funds toward this end in cooperation with other countries.

While India would perhaps be inclined to view our representations in this matter in the context of developed vs. developing country interests, we believe that our concerns should nevertheless continue to be voiced on appropriate occasions.

B. Trademarks

1. Issues

a. Adequacy of Legal Protection

(1.) Trademark Royalties:

For reasons of foreign exchange constraints, the licensing of foreign trademarks to Indian users is severely restricted. The Indian Government believes that trademarks, unlike patents, offer no technology for the purposes of economic development. It further believes that local companies are placed at a disadvantage when forced to compete with manufacturers of the same product using the imported trademarks of long-standing reputation.

The Indian Government therefore believes that the allocation of foreign exchange for the licensing of foreign trademarks is an unsound and unjustifiable expenditure which the country cannot afford. Although foreign trademark holders can

license their trademarks to an Indian company for use with goods made to their specifications or quality criteria, in practice the foreign company is reluctant to do so since Indian policy generally denies it a trademark royalty.

There is one notable exception. Where the use of the trademark by the Indian manufacturer promises to promote exports of the product, the license, appropriately conditioned, may be approved.

Recent reports indicate that the Government of India is reviewing its policy regarding the use of foreign trademarks. One news item asserted that the government had decided to liberalize the use of foreign brand names for products manufactured in India under foreign collaborations and marketed domestically. This report has not yet been confirmed.

(2.) Trademarks for Pharmaceuticals:

No trademark can be registered in respect of a certain class of single ingredient drugs. In 1979, the Drug Controller promulgated Rule 96, pursuant to the Drug and Cosmetics Act of 1940, providing that all single dosage forms of certain drugs (analgin, aspirin, chloropromazine, ferrous sulfate, piperazine and its salts such as adipate, citrate and phosphate), or any new single ingredient drug first introduced into India, could be marketed only under their generic names. The Registrar of Trademarks directed that the trademarks should not be registered for such drugs.

In 1982, the registrar served notice that any trademark used for these drugs would not be renewed unless the proprietor of the mark filed a statement that the trademark would only be used in connection with drugs for export. A challenge to these rules resulted in a decision by the Delhi High Court (13 August 1982) that the prohibition against marketing certain drugs under brand names is unconstitutional, but the Government appealed this decision. We do not have information regarding the results of this appeal.

(3.) Service Marks:

Service marks are not protectable under Indian law. This leaves the entire service segment of industry without access to the protections afforded by a trademark system. Service companies such as hotels, restaurants, etc., would benefit from these protections against imitators who use their names on products just dissimilar enough to avoid charges of "passing off."

(4.) Use requirements:

A reason for lack of enforcement is that the foreign trademark holder must not only have its trademark registered

in India, but it must also have sold goods using that mark in India within five (5) years. India's import licensing policy precludes many items from import. While Indian courts have held that if non-use of a trademark is occasioned due to import restrictions, then such non-use is not grounds for cancellation of the trademark registration provided the registered proprietor does not give up his/her intention to use the mark in India. Such intentions can be inferred by sales to diplomatic missions and bonded warehouses. However, proving intention can be difficult.

b. Adequacy of Enforcement and Legal Sanctions

(1.) Legal Procedures:

Bringing a suit for trademark infringement to conclusion can be extraordinarily lengthy. In one instance of which we are aware, a case involving a U.S. firm has never come to trial, although it was filed in a Calcutta court over a decade ago.

c. Fairness and Complexity of Registration Procedures

(1.) Broad Government Powers to Reject Applications:

Section 49(3) of the Trade and Merchandise Act, 1958, places no restrictions on the Government's right to reject the application. Also, it authorizes the Government to subject the proposed licensee to "any conditions, restrictions or limitations it may think proper to impose." In addition, it affords the applicant an opportunitiy "of being heard" before the application is refused or conditioned. In other words, the matter is open for discussion and negotiation.

In 1979, the Registrar of Trademarks declared that he had the authority to reject any registered users agreement (a trademark license) submitted for recordation if the agreement is not in the interest of the general public and the development of indigenous industry. A registered users agreement must be recorded to be valid. A 1980 decision of the High Court of Delhi upheld the right of the Government to reject a registered users agreement on such grounds, stating that the decision is a matter of government policy with which the courts cannot interfere.

(2.) Access to Records:

Industry sources report that the trademark files in the Delhi and Calcutta offices are a problem in terms of access to current information. Only in Bombay are trademark files even remotely up-to-date.

(3.) Duration of registration process:

One industry source has reported that it takes a minimum of 3-4 years to complete the Indian registration process.

d. Participation in International Agreements:

India has not joined the Paris Convention (see A.1.d.).

e. Local Private Sector Programs:

No information available.

2. Suggested Solutions

a. Eliminate the Government's right to reject applications.
b. Authorize the payment of trademark royalties up to a reasonable and internationally accepted norm, such as approximately 2-3 percent of net sales.
c. Bring the trademark records up to date in Delhi and Calcutta.
d. Abolish Drug Rule 96 and allow registration of trademarks for single ingredient drugs.
e. Prosecute trademark violators up to the limit of the law and in a timely fashion.
f. Introduce protection for service marks as an additional trade mark class.
g. Provide a facilitated means of proving intention to use a trademark in cases where import of the trademarked item is banned.

3. Assessment for Progress

While we should continue to voice our concerns in appropriate fora, we are not optimistic that the Indian Government would be able to rationalize any significant increase in its protection of foreign trademarks.

C. Copyrights

1. Issues

a. Adequacy of Legal Protection

(1.) Compulsory Licensing

India's 1983 Amendment to its copyright law, which provides for the compulsory licensing of reprint and translation rights, is in conformity with exceptions to copyright provided for in the Berne and Universal Copyright Conventions. While the amendment relating to compulsory licensing may be a matter of routine, it could be more

serious, evincing a will to resort to these regimes with frequency. The first notification of an application for a compulsory license has been received by a U.S. publisher. The Copyright Office has stated that this case should be followed with care.

(2.) Definition of Public Use

Practitioners have also complained about the unauthorized public use of copyrighted works, such as the showing of pirated movies and videos in hotels. The copyright law does not clearly indicate what public uses constitute infringement.

b. Adequacy of Enforcement and Legal Sanctions

(1.) Legal Sanctions:

Until recently, book piracy in India has been endemic, and video, record and tape piracy have been reported to exist at significant levels. Penalties for infringement were insufficient to deter violators. The Copyright (Amendment) Act of 1984 provides for stronger punishment (see page 3). The Amendment has not been in force long enough to determine if the changes it introduced will have a positive effect on stemming the proliferation of piracy.

(2.) Adequacy of Enforcement:

The legal process for civil suits has been inordinately lengthy--up to 5 or 6 years or even longer. Practitioners have complained about the difficulty of obtaining prompt injunctive relief and seizures of allegedly infringing works in the course of civil litigation, although recent reports indicate that this delay may be diminishing. The Amendment to the copyright law also allows for interim injunctions, making the process more effective than before. Publishers have therefore been reluctant to assume the considerable expenses of undertaking a speculative litigation in India's courts.

c. Fairness and Complexity of Registration Procedures:

India has a registration procedure for films, but it is not open to foreign works. Only 18 films have been registered to date.

e. Participation in International Agreements:

India is a member of the Universal Copyright Convention (UCC), the Berne Convention and the Geneva Phonograms Convention.

2. Suggested Solutions

India's political influence, its huge English-language market, its nationalism and its fundamental suspicion of

foreign rights holders call for great tact and caution by the United States Government. It is too early to develop a detailed "problem" agenda for U.S. copyright problems in India, but it is not too early to open lines of communication with the Indian Government on mutual copyright problems. India's copyright importance makes it highly desirable that our governments develop non-confrontational, open channels of communication on copyright matters. The U.S. Government should not let India simply drift into a copyright confrontation with Western countries. It would be desirable to begin to develop a framework for bilateral copyright consultations in the near future. The U.S. could also cooperate with other countries experiencing similar copyright problems in India.

3. Assessment for Progress

In many areas of copyright protection, India should have vital interests: India is the world's largest film producer, it is the world's seventh largest book publisher (the third largest in the English language), and it is rapidly developing a computer software industry for local consumption as well as for export. Nevertheless, India has basically been silent or hostile to international anti-piracy initiatives in the past and it appears that progress in this area will be slow in coming.

D. Unfair Competition

1. Issues

a. Adequacy of Legal Protection

(1.) Import Restrictions prohibiting Use of Foreign Trademarks

See B.1.a.(4)

b. Adequacy of Enforcement and Legal Sanctions

No information available

c. Fairness and Complexity of Registration Procedures

No information available

d. Participation in International Agreements

India is not a member of the Paris Convention (see A.1.d).

e. Local Private Sector Programs

No information available

2. Suggested Solutions

a. See B.2.g.
b. Adherence to the Paris Convention might help solve unfair competition problems, assuming that such problems do indeed exist.

3. Assessment for Progress

Insufficient information available upon which to base an assessment.

III. ITA Actions to Date

The subject of inadequate Indian intellectual property protection was raised at length at the December 1983 meeting of the Indo-U.S. Economic/Commercial Subcommission in New Delhi, by Joseph Dennin, at that time Deputy Assistant Secretary for Africa, the Near East and South Asia.

Subsequently, the issue was raised by James R. Johnston, Director, Office of South Asia, at a meeting of Indian economic and trade officials based in the United States, which was held at the Indian Embassy on December 7, 1984.

During his visit to India in mid-May 1985, U.S. Commerce Secretary Malcolm Baldrige raised the issue in his meeting with the Minister for Industry and Company Affairs, Veenendra Patil.

The U.S. side raised the issue at the May 28-29, 1985 meeting in Washington of the Indo-U.S. Economic/Commercial Subcommission Working Group, in which James R. Johnston, Director, Office of South Asia, and Jeffrey B. Johnson, India Desk Officer, participated.

Staffers in the Office of South Asia have also raised the issue on various occasions in the course of informal discussions with Indian Embassy officials.

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